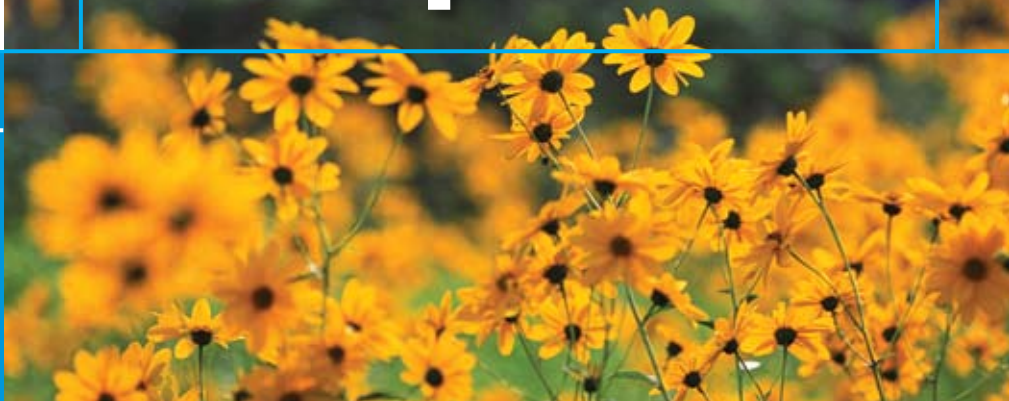


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New Agreements for Sale & Purchase

ADLS OR REINZ FORMS?

Buying a property is the biggest investment most New Zealanders will make. Over the past 30 years, the contract recording a purchase has been based almost exclusively on a standard form agreement jointly drafted by the Real Estate Institute of New Zealand (REINZ) and the Auckland District Law Society (ADLS).

The situation has now changed because REINZ has prepared a new (and competing) form of agreement using 'plain English'. To help stem the tide of confusion, we look at the pros and cons of both agreements.

Development of ADLS agreement

Before the introduction of fax machines and email, the pace of commerce was very much slower. In the case of conveyancing, this enabled more time to be spent on reviewing and negotiating each contract. As the speed of communication increased, we no longer had the luxury of time to read individual contracts in detail and a standard form comprising an industry-accepted set of terms was jointly developed by the ADLS and REINZ.

The universal acceptance of the ADLS agreement meant that when we acted for clients on a sale or purchase we understood its terms without having to read each agreement from end to end.

This greatly assisted to reduce the cost, and increase the speed, of conveyancing.

Now in its 8th edition, the ADLS agreement has been regularly revised and improved over the past 30 years to take account of changes in law, and in the marketplace. Today most contracts for the sale and purchase of residential and commercial property are based on the ADLS agreement.

REINZ plain English form

REINZ recently released a new agreement claiming that consumers found the ADLS agreement hard to understand and that it was difficult for real estate agents to explain the terms of the ADLS agreement to their clients. One of the imperatives then was to produce a more user-friendly document which eliminated 'legalese'. The REINZ agreement is therefore written in plain English and has an improved layout. Sentences are shorter and paragraphs have been broken down into sub-paragraphs.



However, the changes are not limited to semantics and layout. In preparing its agreement REINZ has reflected what it claims consumers want in terms of balancing fairness between the respective rights of the buyer and the seller. This is particularly evident in the new 'promises' given by the seller in favour of the buyer, and the heightened degree of disclosure that the seller must make in the case of unit title developments.

Reaction to the REINZ agreement

Despite the benefit of the general public being better able to read the REINZ agreement, it has not been met with universal acclaim. In fact, many lawyers have been openly critical about it. The ADLS has been particularly critical of the REINZ agreement, and has written to all lawyers recommending they advise their clients not to use the REINZ agreement in its present form. This was supported by a prominent property law specialist's opinion outlining the deficiencies of many aspects of the new agreement.

While not endorsing the ADLS's sharp criticisms, the New Zealand Law Society's Property Law Section has also acknowledged there are problems with the REINZ agreement.

Pros and cons of both agreements

Putting aside the commercial motivations of both REINZ and the ADLS in promoting the continued use of their respective agreements, there are positives and negatives for each agreement.

In the case of the ADLS agreement, these are easy to quantify:

- It has near universal acceptance throughout the property market, and there was no groundswell opinion that it needed replacement
- The terms of the ADLS agreement are 'tried and proven'. Its provisions have been tested and reviewed by the courts, and legal texts have been written about its terms and application. The ADLS agreement is taught in our law schools and to people applying for membership of the Real Estate Institute
- The agreement is regularly revised and improved to take account of changes in the marketplace and in the law. As a consequence, all lawyers know that the agreement is regularly updated to accord with the judicial interpretation of words and phrases used in the ADLS agreement
- The agreement is written by lawyers for lawyers to ensure that issues that would concern lawyers in the course of buying and selling property are addressed, and
- As the agreement has been modified and refined over time to reflect judicial interpretation and developing law, the agreement has become more 'legal' and this can be difficult for the general public to understand.

In comparison, some of the perceived advantages and disadvantages of the REINZ agreement include:

- The use of plain English and better formatting make it easier for the general public to read. One of the criticisms of this however is that many provisions in this agreement are ambiguous and loosely drafted and, in a number of cases, open to subjective interpretation. This is not a desirable feature of any legal contract. As yet there have been no court cases on the new agreements to test, and no one would wish to be the first experimental guinea pig
- The agreement recognises the problem of leaky buildings with the introduction of a standard condition that a purchaser obtains and be satisfied with a building report on the property

- The standard general terms and conditions are located in three alternative separate sections (in a separate booklet) and are applicable to sales by private treaty, sales at auction and sales by tender
- There is a significantly increased degree of disclosure required in the case of unit titles. When signing an agreement, the seller promises that it has given the buyer full details of anything the seller is aware of that will, or might, have an 'unfavourable effect'
- The REINZ agreement alters the balance struck under the ADLS agreement between the interests of the buyer and the seller, generally to favour the interests of the buyer. This was considered by REINZ to be something required by consumers, particularly in the case of issues relating to the structure of, and leaks in, a building. From a buyer's perspective, this change is a welcome one and provides more fairness in terms of obligations of a seller to disclose information about the property. Some commentators believe this change is an unwelcome one because it upsets the long grounded principle of 'buyer beware'. Obviously from a seller's perspective, the fewer promises that are given about the property, and the less onerous the disclosure requirements, the better. To that extent, a seller is likely to favour the continued use of the ADLS agreement, and
- There are numerous technical deficiencies that legal commentators have identified, and the Property Law Section has recommended changes be made to correct the REINZ agreement.

Which form to use?

There are advantages and disadvantages in selecting the REINZ agreement ahead of the ADLS agreement. REINZ considered that a new agreement needed to address consumer concerns over lack of disclosure under the ADLS agreement, and that a consumer-led focus would benefit buyers. The new agreement, despite being available for several months only, is in the process of being redrafted to address the concerns of many lawyers. For that reason, very few lawyers would currently recommend using the REINZ agreement.

In the meantime, our advice to you is that if you are planning to buy or sell a property in the near future you should call us for advice before any agreement is signed. ■



Photo by Roland Maier

Summer Holidays



GET YOUR HOLIDAY PAY CALCULATIONS CORRECT

It can't be denied, we're all looking forward to the summer holidays with the sun, sand and surf, and we all want to have paid annual leave. This article looks at how holiday pay can be calculated and alerting both employers and employees to some of the pitfalls.

Under the Holidays Act 2003 there are two methods of calculating the amount an employee is entitled to be paid while on annual leave. It can sometimes be confusing to understand which method should be used to calculate the amount of holiday pay.

The amount that an employee is paid while on leave can either be the employee's ordinary weekly pay as at the beginning of the leave period, or the average weekly earnings of the employee for the 12-month period leading up to the leave. Let's look at two employees, truck driver Brian and office worker Mary, who both want to take a week's annual leave.

Truck driver Brian

Brian works flexible hours – whatever it takes to get the job done. His hours vary from 35 hours/week to as many as 60. Brian is paid an hourly rate.

A year ago, Brian's pay rate was \$15/hour. Six months ago, he received a pay rise to \$17/hour. In the first half of the previous 12 months (November 2008 – April 2009) Brian worked a total of 1500 hours. In the second half of the year (May – October 2009) he only worked 1000 hours. Therefore, his average gross weekly income for the first six month period was \$865.38, and for the second six month period it was \$653.85.

Now that Brian wants to take a week of annual leave, should his rate of holiday pay be calculated on his ordinary rate of pay at the time he goes on leave, or should it be the average he received per week for the preceding 12 months?

The law requires that the employer pays the employee at whichever rate is greater. In Brian's case, he should be paid the average of his

weekly income for the previous 12 months, \$759.62, rather than his ordinary pay immediately before he begins leave of \$653.85.

Office worker Mary

Mary's job provides her with a regular 40-hour week with an annual salary of \$26,000 (\$500 per week). In Mary's situation, her average weekly income for the preceding 12 months is the same as her ordinary weekly pay, so the method of calculation used should not be an issue.

If, however, after six months work Mary receives a salary increase to \$30,000 then the situation will change. Her ordinary gross pay will increase to \$576.92, with her average weekly income for the previous 12 months being \$538.46. In this case, Mary should be paid her ordinary pay, \$576.92, for each week that she is on leave, rather than her average weekly earnings over the previous 12 months as this is the higher amount.

The same law applies to those who are employed part-time.

Know your entitlements

For employers, it is important to ensure your staff holiday pay calculations are correct to avoid unwanted trouble from the relevant authorities.

It is just as critical for employees to have some understanding of how their holiday pay is calculated.

If you cannot make sense of holiday pay calculations, or you think that there may have been an error, we suggest you approach your employer or your organisation's accountant in the first instance. If this does not satisfactorily address the situation, then you may wish to contact us.

NB: There has been widespread criticism of some aspects of the Holidays Act 2003. In July the government established a Holidays Act advisory group which will review, in particular, calculations for holidays and leave, trading in some part of an employee's annual leave for cash, and allowing employers and employees to agree to transfer the observance of a public holiday to another day. The group's report is due in December this year. ■

Mind your Ts and Cs



READ THE TERMS AND CONDITIONS CAREFULLY

You're doing a spot of online shopping and about to hit the 'buy' button when up pops 'please accept the terms and conditions'. Be honest – do you read them? Or do you just click on 'I agree' without giving them a second thought?

Every time you agree to buy something you are entering into a contract. Even if the agreement is verbal, it is still a contract. The terms and conditions (Ts & Cs) are as much a part of the contract as what you are buying and how much you have to pay. So, if you don't know what the Ts & Cs are, you don't really know what you are agreeing to.

The Ts & Cs need to be decided before you agree to make the purchase. So before you agree to buy, read them and decide if you accept them or would like to change or add some. After you agree to the purchase it is still possible to ask to change the contract, but the seller may refuse your request.

What should I look out for?

Watch out for any Ts & Cs that are deal breakers. You might be signing up for future purchases, you could be cancelling any previous conditions that you thought were there, or you might be agreeing to paying an extra cost of which you are unaware.

If there is something strange in the contract, then get it taken out if you can. Check the exceptions, especially for insurance and warranties. The Ts & Cs might exclude certain types of damage, or

Getting Your Fair Share

GETTING FAIR VALUE IN A SHARE TRANSACTION

Have you received 'fair value' in a share transaction? Recent case laws has highlighted the importance of ensuring share transactions in private companies are completed at fair value when a company director is a party to the transaction.

Insider trading is a concept usually associated with large listed companies operating on a public stock exchange. The reality is, however, that insider trading is a constant threat in any share transaction when one party is trading with a person who has more knowledge about the shares and the company than the other, such as a company director. It can result in shares being purchased by a person with inside knowledge for less than fair value, or the purchaser paying too much.

Section 149 of the Companies Act 1993 is designed to ensure that non-director parties to share transactions are not disadvantaged by information a director has by virtue of their role as a company director or employee. This section ensures that what is paid or received by the other party is fair value.

'Closely held' companies such as family-owned companies provide fertile ground for this issue. This is borne out in case law which has generally involved expensive litigation between family members to determine whether fair value was paid for certain shares¹.

Whilst protection from a transfer of shares at a value other than fair value is given by s149, there are several requirements that must be met prior to being able to obtain this protection. These are:

- One party to the transaction must be a director of the company in which the shares are held

1 Examples are: *Fong & Anor v Wong & Anor* HC AK CIV-2008-404-005547 4 December 2008 and *Thexton v Thexton* [2002] 1 NZLR 780

there might be requirements to get the product checked regularly – like getting a car serviced, getting jewellery settings checked or having a health check-up.

However you should be aware that there are specific 'warranties' that are covered by the law on goods or services that you may buy from a commercial seller and which cannot be contracted out of. One example is that the law states that the goods you buy will correspond with the description that the seller supplies. A commercial seller cannot, in their Ts & Cs, validly exclude these warranties unless they are bought for business use.

When looking at the Ts & Cs, important things to check are:

- What you have to do
- Any exceptions
- Things that cancel the contract
- Anything different from what you agreed on
- Anything that stops you from using the product how you want to.

- 
- The director must have received information in their capacity as a director or employee of the company or a related company
 - The information received would not have been available to them if they were not a director, and
 - The information must be material to an assessment of the value of the relevant shares.

Material information

'Material information' is price-sensitive information and any other information that the director knows is likely to affect the value of the shares. This includes information that has been made publicly available. S149 is not designed to force a director to disclose the information to the other party to the transaction.

Disclosure of the relevant information to the other party will not protect the director from liability. The case law suggests that where the requirements set out above are established, the consequence is that the director may only buy or sell at fair value (or above fair value if buying and below fair value if selling). Neither disclosure to the other party nor the agreement of the other party can avoid that consequence.

Fair value

Whilst the Act uses the concept of fair value, it does not define this term and it has been left to the courts to decide its meaning. The question the courts will scrutinise is whether what has been paid or received is fair value for the shares given the information available to the director.

In terms of the value of the shares, what parties have agreed between them as being fair value is irrelevant. Fair value is to be assessed on an objective basis after examination of all relevant circumstances, including, where appropriate, oppressive behaviour by a majority shareholder.

Whilst the breadth of s149 is still unclear, insider trading is a threat, in both public and private companies. Out of caution, by transferring the shares to an intermediary, for example, to a spouse, independent trustee or holding company, in advance of the contemplated transfer, the application of s149 may be alleviated. ■

DIY terms and conditions

You can make your own Ts & Cs, but it is up to the trader to agree to them. Terms can be stated about when a purchase needs to arrive by, and you can add conditions around what will happen in a few days if you don't like it.

You can put conditions on any type of purchase you make. This includes private sales which are not covered by the Consumers Guarantees Act 1993 or the Fair Trading Act 1986. So if you are buying items from a private individual on the internet or at a garage sale, you can put in your contract that if the product doesn't work, you can return it and get a refund.

Get any agreements that protect or benefit you in writing. This makes it much easier to prove if there is a problem later. If you entered into a contract in reliance on a representation by the seller that turns out to be incorrect, you may be able to use legislation such as the Contractual Remedies Act 1979 to get your money back.

Based on material provided by the Ministry of Consumer Affairs. ■

That Old Chestnut

PROBLEMS WITH TREES

Of all neighbourhood disputes, issues with trees top the list. This article looks at some remedies for the problems caused by trees – in particular those on a neighbour's property which may block light, overhang your property or send their roots under the fence. It is not intended to be an exhaustive analysis of the law, but more of a potted summary.

It is sometimes difficult for the owner of a town section to appreciate how a small sapling can grow to a mighty oak that overshadows everything and sheds leaves into your pool – this could escalate into a serious dispute. Whilst beauty is in the eye of the beholder, you may not appreciate the aesthetics of the towering oak quite as much as your neighbour.

Update on the legislation

Recent changes to the Resource Management Act are likely to change the situation with problem trees. Despite strong resistance from the Greens and Opposition MPs, the new legislation came into force on 1 October 2009. The intention was to untangle red tape; in fact the amendment act is called the Resource Management (Simplifying and Streamlining) Amendment Act.

The result is that you can now trim trees without resource consent. The government estimates that in Auckland alone this will save more than 3,000 consents annually. You may be able to cut down a tree on your property without a permit, unless it is on your council's list of protected trees. Make sure you check that list before wielding the chainsaw.

Neighbouring trees

If your neighbour has a tree causing a problem for you, we have some advice – please don't (as some have done in the past):

- Drill a hole in the base of the tree and fill it with poison
- Sneak over the fence in the dead of night and trim the tree
- Abuse your neighbour and call them a 'hemp-wearing tree-hugging hippie', or
- Branch out into any other nocturnal activity such as ordering truck loads of soil (or

worse) in your neighbour's name to be dumped on their driveway.

If a problem tree overhangs your property or its roots have encroached onto your section, we have some suggestions:

- Talk with your neighbour; they may even agree it's a problem and you both can come to a joint decision on what to do
- Ensure the fence is on the correct legal boundary. If the boundary is not clear you may need to have a surveyor re-peg the section
- Check with your local council that the tree is not protected, and
- You can cut or trim branches, or trim tree roots from the bits that overhang or encroach underground on your own property. This is your legal right. If you trim beyond the boundary, you could be trespassing on to your neighbour's property. But don't throw the trimmings onto the neighbour's lawn – get rid of them yourself.

However, trimming a tree may not solve your problem entirely. If your neighbour is unwilling to do anything, the District Court has the power to order trees to be removed or cut back if it is satisfied there is:

- Actual or potential danger to life or health
- Undue obstruction of a view, or
- Undue interference of the reasonable enjoyment of the land.

If you are having problems with your neighbour's trees and cannot resolve those problems by talking with them, call us first before taking the matter into your own hands, or chainsaw. ■

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Postscript

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Maximum claims levels for Disputes Tribunal increase

Increases in the maximum claim levels for the Disputes Tribunal were enacted recently by the passing of the Disputes Tribunals Amendment Act 2009.

The maximum level has increased from \$7,500 to \$15,000. If both parties agree this threshold increases from \$12,000 to \$20,000.

Justice Minister Simon Power said, "This will allow parties to resolve their disputes in a more cost-effective manner. Small businesses and individuals will have improved access to the Disputes Tribunal."

It is expected that 3,600 more cases will now be heard at the Tribunal annually.

Changes to District Court procedure

Sweeping changes to the District Court Rules came into force on 1 November 2009. The new rules completely overhaul civil procedure in the District Court, moving away from formal trials and placing emphasis on the just, speedy and inexpensive determination of disputes.

Parties will be required to file comprehensive fact and issue specific claims and exchange information capsules (comprising the key documents the party relies on) within set time frames. In most cases, formal discovery and inspection will be dispensed with and trials will be conducted within strict time limits. The objectives behind the changes are to ensure better access to justice and to recognise the need for proportionality in connection with the importance of the case, its complexity, the amount of money involved and the financial position of the parties.

Index to *Fineprint* articles

If you would like to refer to articles published in *Fineprint* over the past two years, a comprehensive index in subject order is now available on NZ LAW's website. Go to www.nzlaw.co.nz and then to Publications. The index also includes articles published in three electronic newsletters, *Commercial eSpeaking*, *Trust eSpeaking* and *Property Speaking*.

First aid for the workplace

Every year thousands of people are injured or fall sick at work – some seriously. A quick first aid response can mean the difference between life and death, or can reduce the severity of the injury. First aid can also help protect businesses by reducing the impact an accident can have on productivity and the cost of employees taking leave. There's also a legal requirement (OSH) to take all practicable steps to have first aid facilities in your workplace.

A new publication was recently launched by the Department of Labour entitled *First Aid for Workplaces – a Good Practice Guide*. Helping identify what first aid is needed in individual workplaces, the guide was developed following consultation from a wide range of industry experts.

Useful to employers, the self-employed, people who hire contractors as well as first aiders, the guide can be downloaded from www.dol.govt.nz

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