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Land covenants

SELLING LAND AND RESTRICTING ITS USE

Landowners commonly want to place restrictions on the use of land when they decide to sell it, particularly if they are retaining some neighbouring land. This article explains how this can be done by arranging a land covenant and what it entails.

Why restrict the use of land?

There are various reasons why you might wish to restrict the use of land after you sell it. If, for example, you are retaining some neighbouring land you might wish to prevent the new owner subdividing that land, to restrict the number and quality of buildings erected on the land being sold, or you might want your views to be preserved. Having these restrictions might also mean that the land you are retaining will be more valuable if and when you come to sell it in the future.

Nowadays, it would be very rare for lots in a new subdivision not to be subject to numerous restrictions on their use.

How can you do this?

You can restrict the use of land by registering land covenants against the titles to the affected land. A covenant is a promise by someone to do, or not to do, something. A land covenant is a promise which is tied to the ownership of land.

The document creating the land covenants sets out the restrictions and describes the affected land. The land covenant

is registered against both the land benefiting from the land covenant (called the dominant land) and the land being subject to the land covenant (called the servient land). Anyone buying land subject to a land covenant can search the title and see that the land is subject to the land covenant.

Before the Property Law Act 2007 was passed, only land covenants containing negative obligations could be enforced against future owners of the subject land. An example of a negative covenant was when the owner could not erect a dwelling unless it had a minimum floor area of 200m². As a result of this, covenants were couched in negative terms, although they effectively imposed a positive obligation on the landowner. Positive land covenants created since 1987 can now be enforced against future owners of the subject land. For example, a covenant stating that the owner must erect a dwelling having a floor area of at least 200m² can now be enforced against future owners, not only the landowner at the time it was created.





A land covenant must be in favour of nearby land to be enforceable. If you want to ensure that you can enforce restrictions against a landowner when you don't own nearby land, you can register a different type of document called a Memorandum of Encumbrance.

Not complying?

Having a land covenant means that the owner of the land benefitting from a land covenant can take legal action against the owner of the land subject to the land covenant to require that owner to comply. For example, if the land covenant stated that the land must be landscaped in a certain way, the owner of the subject land could be legally compelled to do the landscaping work.

The document creating a land covenant also usually allows the owner of the land benefitting from the restrictions to claim a substantial fixed amount from the other owner (for example, it could be as much as \$50,000) if the covenant is not complied with.

Once the land subject to a land covenant is sold, the new owner becomes liable to comply with the restrictions, and the seller is no longer liable, except for non-compliance while he or she was the owner. By the same token, the owner of the land benefitting from the land covenant can usually only enforce non-compliance with the land covenant while he or she is the owner of the land benefitting from it.

In the case of a modern subdivision, the land covenants are usually enforceable by each owner of a lot against all the other owners of lots.

Can they be removed from titles?

If all of the affected owners agree, then documents can be registered against the affected titles extinguishing or varying the land covenants. If the land benefitting from the land covenants is subject to a mortgage, then the mortgagee would have to consent to the variation or removal.

If all the affected owners don't agree, an affected owner can apply to the court for an order varying or extinguishing the land covenants. The court could grant such an order if, for example, circumstances have changed since they were registered, or their removal would not prejudice the owner benefitting from them.

It's not that simple

Although it's now possible to create and register a wider range of land covenants than in the past, a landowner's ability to enforce land covenants is subject to some complex legal rules. Whether or not land covenants can be enforced may depend on when they were created. Some of the land covenants registered in the past are unenforceable, either because they are poorly drafted or the law will not support them. Existing land covenants may require careful scrutiny to determine whether they can be enforced.

If you're considering registering a land covenant, you should ensure it is carefully drafted so it provides you with the solution you are seeking. ■

ALEX AND SUE'S PROBLEM

Several years ago Alex and Sue subdivided two extra titles off the main title to their dairy farm. These two extra titles could be built on and sold as lifestyle blocks. Although Alex and Sue didn't intend selling off the lifestyle blocks at the time they subdivided the farm, they wanted to preserve their right to subdivide in future in case the district plan changed.

A few years have passed, and Alex and Sue have now decided to sell the two lifestyle blocks and want to know if they can ensure that the homes that will be built on the lifestyle blocks will be up to a high standard.

The lifestyle blocks are next to a swampy area which has a large duck population. Alex and Sue don't like duck shooting and want to prevent the new owners from duck shooting from the two lifestyle blocks. They have also heard about farmers having problems selling lifestyle blocks to townies who then complain about the noise and smells from normal farm activities. Alex and Sue want to prevent the new owners from complaining about the noise from their tractors and motor bikes, the smell from their cows, and the weed spraying and fertiliser application on their farm.

A SOLUTION

Alex and Sue can place restrictions on the use of the land they are selling by arranging for land covenants to be registered against the titles to their farm and the lifestyle blocks. The land covenants will state that the lifestyle block owners must build houses of a certain size and of specific materials, they must not shoot on the lifestyle blocks, and they can't do anything which might restrict Alex and Sue's farming activities. (The covenants stating that the lifestyle block owners cannot object to Alex and Sue's farming operations are called 'reverse sensitivity' or 'no complaints' covenants.)

Alex and Sue can either register the land covenants against all the titles before they sell the lifestyle blocks, or they can arrange to register them at the time the lifestyle blocks are transferred to the purchasers. If the land covenants are to be registered at the time the lifestyle blocks are transferred, then Alex and Sue would need to include details of them in the Agreement for Sale & Purchase. ■



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New Zealand should get back to economic basics

New Zealand businesses continue to be impacted by the extreme fragility of the global economy. Deleveraging (debt reduction) has always been a precondition to the global economy returning to a sustainable recovery path, but there is more debt in the global economy now than prior to the 2008 event.

While we don't appear set for a repeat of 2008, there are still some particularly disconcerting signs.

- Policymakers' arsenals have been seriously depleted over the past few years.
- There are signs of stress in money markets (though not dislocation such as we saw in 2008).
- Political gridlock is not helping things.

While we are in no doubt that 'solutions' of sorts will emerge to stabilise confidence and show that policymakers are acting, the reality is that, facing global problems, we need concerted global solutions. None of the solutions are straightforward, none will happen overnight and all involve trade-offs.

The options include:

- *Default like Iceland and, inevitably, Greece but this risks another repeat banking crisis which is not limited to the sovereign in question.*
- *Deleverage with scrooge-like behaviour. This has consequences for economic growth, unemployment and normally has political and social consequences as entitlements need to be wound back or cut. This is the tough love scenario and is often very difficult for politicians who are looking to get back into office.*
- *Grow your way out via increasing income. This is difficult when Western countries' balance sheets are weak and debt needs to be repaid, limiting internal demand compared with the debt-fuelled consumption binge of yesteryear.*
- *Inflate the debt away. This is difficult when deleveraging is deflationary, a lot of assets are still over-valued and the banking system is weak.*
- *Repression which is caps on interest rates and directed lending to government by captive audiences, ie: banks, pension funds. This is the do-as-you're-told approach to fiscal mis-management.*

In reality it will be a combination of all these solutions that is needed. Re-engineering requires fixing legacy issues such as debt and the appropriate pricing of risk with credible plans and policy. Areas of strategic advantage and excellence need to be identified and then a plan needs to be formulated to re-engineer capital and labour into these areas.

Global leadership needed

The global economy is desperately looking for leadership. While the

necessary leadership requires significant fiscal austerity – a negative for growth (and Keynesian economists argue for more as opposed to less fiscal stimulus at this juncture), businesses and markets also need certainty. Lacking such certainty, hiring and investment decisions go on hold. While providing certainty is not without challenge, ie: less government spending or higher taxes detract from aggregate demand, it also leaves the business sector and markets with greater confidence over the medium-term, an elixir of investment and hiring decisions.

Will politicians make the hard decisions? The fear is it takes an 'accident' before we see the political mandate to instigate real change. Witness New Zealand's experiences in 1984 and 1990 before we really bit the bullet.

Of course, not every economy is facing the same challenges. China, for example, continues to see strong growth, as does much of the Asia region.

For New Zealand, focus on the big picture

We are not immune from global challenges. About the only certainty at present is uncertainty itself. A volatile global scene will continue to cast a shadow over the economy for years. We have high levels of overseas debt (70% of GDP) which means we are vulnerable to adverse swings in sentiment.

However, New Zealand is also unique. We have a massive natural endowment in the form of favourable climatic conditions, a huge water resource, natural resources including oil and coal, a large economic exclusive zone and natural beauty (think tourism) to boot. It is imperative that the New Zealand economy unlocks these natural endowments in the form of higher income generation. Changes around the globe are playing into our hands. Rising incomes in Asia are underpinning good demand for protein (and fat) which means a rising secular trend for commodities. We're becoming increasingly connected with the global economy. We have free trade agreements in place with 29% of the global population and are negotiating with another 27%. That represents a potential market of 3.8 billion people for a population of 4.4 million, an enormous playground.

The coming years will see more flip-flops than traverse the beach at Bondi. Sifting between the tea leaves, New Zealand is in better shape than most. But there is a period of what we call 'grumpy growth' ahead as we unlock opportunities and pay penance for previous over-exuberance. It's called getting back to basics. ■

Help I've just separated!



TIPS FOR YOUR FIRST LEGAL APPOINTMENT

A relationship break-up is stressful for both parties and it can become more complicated if children are involved. If you have property or children together, a trip to your lawyer is going to be inevitable. We have some suggestions below that will help you not only prepare for that appointment with us (or your family law specialist) but also will help around the separation process.

When you've first separated

There are a few things that you can do as soon as you separate.

If you're feeling angry or upset you can arrange some counselling. If you contact your local Family Court it can organise six sessions of counselling for you at no cost. This counselling is confidential and anything you say can't be used against you if you go to court.

If you're worried about your children and how to explain your separation to them, there is a useful free course called 'Parenting through Separation'. Its aim is to guide you and your partner to help your children through the separation process, how separation affects your children and how to talk to them about it. For the date of the next course in your area, call 0800 211 211 or visit www.justice.govt.nz/family. If you end up being involved in Family Court proceedings the judge will often recommend you do this course.

You might want to talk to your ex-partner about closing any joint bank accounts and credit cards, and making sure you've accounts and cards in your own name only. If you don't do this your former partner may withdraw all your jointly-held money out of your accounts and/or max out the credit cards.



First legal appointment

When you visit your family lawyer for the first time after your separation, it will help if you bring the information below to the appointment:

- The date you separated
- Your children's full names and dates of birth
- The date and place of your marriage/civil union, or a copy of your marriage/civil union certificate
- The date you first entered the relationship if you're not married or in a civil union
- Recent bank statements
- Current household and other bills
- Any court papers with which you have been served
- A brief written summary of what has happened, including dates
- Copies of financial statements for yourself or your business (if any)
- Mortgage papers or a title for your home

- Details of any agreements you and your former partner may have reached, for example: a contracting out agreement from the Property (Relationships) Act
- Trust deeds
- Minutes of any trustees' meetings
- Details of any money or property you may have inherited, and
- A list of family treasures or taonga; you may need some guidance on how these items can be treated.

If you're worried you might forget something, write it down before your appointment. It's quite natural for you to feel anxious, and it may help if you bring a friend along with you for support.

Your Will

When you are separating, don't forget to ask about updating or making a Will. If you don't do this your former partner could still benefit under your Will until your marriage or civil union is dissolved.

When updating your Will you might want to think about:

- Who do you want to be your trustees?
- Who will be a testamentary guardian of your children? Talk to your proposed guardian and make sure they're happy with doing this if you die when your children are still under 18
- You might want to change where you are to be buried or what you want to do with your ashes
- You might not want your former partner to get all of your belongings, and
- You should also consider whether you should establish a family trust to safeguard your assets in future relationships.

Enduring Powers of Attorney

If you have Enduring Powers of Attorney (EPA) for both property and your personal care and welfare, you may have your spouse or partner named as your attorney. You may want to revoke your current EPA, and make a new EPA and name new attorneys.

Separating can be a very difficult time for both partners, and having to make legal appointments is probably the last straw. The more prepared you are, however, the more useful and cost-effective your appointments will be. ■



Vineyard Magic

THE DEVIL IS IN THE DETAIL WHEN BUYING

It may sound ideal – tending to your vines and relaxing later with a glass of your own pinot in hand. However, with established vineyards selling for upwards of \$80,000 a hectare, buying a vineyard can prove to be an expensive undertaking if details are overlooked in the initial stages.

It goes without saying that the financial aspects of buying a vineyard are vitally important. However, buyers must also fully understand aspects of the property itself and any related issues to avoid problems after settlement.

Water, boundaries, roads, trees . . .

Water is required for irrigation and during the winemaking process. The sellers must have the necessary consents to take water and must transfer these consents to you. You should note any restrictions on the water take including volume, timing, renewal and expiry. Make sure that the purchase price includes the water reticulation equipment and that the equipment will meet the water consent conditions for your property. You also need to ensure that your property has the legal right to reticulate water and electricity.

Local authorities in wine growing regions have specific policies addressing resource management issues. Do check whether there are any restrictions on the use of land in the area. For example, frost fans are necessary in many areas to help prevent frost damage. However, to alleviate noise concerns there are sometimes restrictions on the types of fans and when they can be used.

The physical boundaries of the property may vary from the actual legal boundaries on the title. An example is where vines are planted up to a riverbed. The river may have altered its course over time and the vines may be planted on land that is not on the title. Although this may be able to be remedied, it's complex and expensive to sort out.

Roads may show on the title but at the property there may be nothing to indicate their presence; these are 'paper roads'. Problems can arise if vines are planted across these paper roads. To stop the road, you will have to apply to the local authority to buy the land from it at valuation, which may include the value of your own vines.

Boundary trees can be a problem in vineyards, particularly if they shade the vines or are perching sites for birds. Some trees, such as blue gums, carry a risk of taint from the oil so you'll need advice on how to deal with this.

If you are supplying grapes to winemakers, you'll need to understand the details of any existing grape purchase agreements. These agreements are crucial as they detail, amongst many things, how you will be paid.

If equipment is included in the purchase, make sure the seller owns, not leases, the equipment. Ascertain whether the seller has any creditors that may have claims over the equipment so that everything you are expecting to be there will be present on settlement. You may have claims to any missing equipment, but these may be difficult to pursue and you will have vines that require that equipment in the meantime!

It is crucial that the Agreement for Sale & Purchase allows for all the above, and any other related issues, for your prospective vineyard. Some vigilance before signing the Agreement will help ensure you can enjoy drinking your own pinot for many years to come. ■

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Postscript



New law may make some coastal properties rates-exempt

The new Marine & Coastal Area Act was passed in April, replacing the controversial Foreshore & Seabed Act. Looking closely at the legislation, some property owners who have homes and businesses built out over the water believe they may be exempt from paying rates. This view appears to be based on the fact that no one owns the seabed under the new enactment.

Clearly property owners will be happy if this view of the Act is correct. Local authorities, however, will not be so pleased as they could lose thousands of dollars each year in lost rates.

Particularly hard hit will be the Far North District Council which has significant numbers of properties built out over the water, including the famous Mangonui Fish Shop. ■

New domain name opportunities

From 12 January to 12 April 2012 businesses will be able to apply to register generic domain names meaning businesses could have a generic top-level domain (gTLD) that incorporates the name of the company, the Internet Corporation for Assigned Names and Numbers (ICANN) board has announced. Your business could have its new domain name as .bloggsandson

"New gTLDs will change the way people find information on the internet and how businesses plan and structure their online presence. Internet address names will be able to end with almost any word in any language, offering organisations around the world the opportunity to market their brand, products, community or cause in new and innovative ways," said ICANN.

But a new gTLD won't come cheap. The application fee per domain name will be an eye-watering US\$185,000 with hefty quarterly maintenance fees of US\$6,250 and additional transaction fees. ■

SMEs to have simplified rules around financial reporting

Proposals to simplify the financial reporting framework for small to medium sized businesses (SMEs), and registered charities, was announced recently. The proposed reforms follow a review of the financial reporting framework which found it to be over costly and not meeting users' needs or expectations.

Under the new regime, non-issuer companies which do not meet the definition of large companies (annual revenue of more than \$30 million, or assets of more than \$60 million) will be asked to prepare targeted reports for tax purposes, rather than financial statements under the Companies Act.

The changes will reduce the number of companies required to prepare general purpose financial reporting from 460,000 to less than 10,000, and are expected to cut business compliance costs by \$90 million annually.

Commentators have, generally speaking, welcomed the simplified rules but have queried the high thresholds.

The government expects to introduce a Financial Reporting Amendment Bill to the House next year. ■

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