



BOYLE MATHIESON
LAWYERS | NOTARY PUBLIC

ISSUE 18 | AUTUMN 2015



BOYLE MATHIESON 23 Lincoln Road, PO Box 21 640, Henderson 0650, Auckland
Ph: 09 837 6004 | Fax: 09 837 6005 | Email: office@bmlaw.co.nz | www.bmlaw.co.nz

Enjoy reading this Autumn 2015 edition of *Property Speaking*. We hope you find the articles inside both interesting and useful.

If you would like to talk further on any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.

INSIDE:

The Changing Course of a River Can Alter Your Boundaries

Accretion vs avulsion

When you bought your land, your lawyer will have sent you a search copy of the title to your property as recorded on the register at Land Information New Zealand (LINZ). The LINZ register is generally regarded as being conclusive evidence that you own the land and how much land is included in your title. However, it isn't always the case – and it wasn't the situation for the Eldridges when they purchased their farm 'Stansborough' in the Wairarapa ... [CONTINUE READING](#)

Get a Building Report when You're Buying a New House

For many of us, buying a home is the largest purchase we will ever make. That's why spending a few hundred dollars on a pre-purchase building report is so important as it can save you hundreds, maybe thousands of dollars in years to come ... [CONTINUE READING](#)

Property Briefs

Rent reviews ... [CONTINUE READING](#)

The value of a LIM report ... [CONTINUE READING](#)

*If you do not want to receive this newsletter, please [unsubscribe](#).
The next issue of Property Speaking will be published in mid-winter.*

DISCLAIMER: All the information published in *Property Speaking* is true and accurate to the best of the authors' knowledge. It should not be a substitute for legal advice. No liability is assumed by the authors or publisher for losses suffered by any person or organisation relying directly or indirectly on this newsletter. Views expressed are those of individual authors, and do not necessarily reflect the view of this firm. Articles appearing in *Property Speaking* may be reproduced with prior approval from the editor and credit given to the source.

Copyright, NZ LAW Limited, 2015. Editor: Adrienne Olsen. E-mail: adrienne@adroite.co.nz. Ph: 029 286 3650 or 04 496 5513.



The Changing Course of a River Can Alter Your Boundaries

Accretion vs avulsion

When you bought your land, your lawyer will have sent you a search copy of the title to your property as recorded on the register at Land Information New Zealand (LINZ). The LINZ register is generally regarded as being conclusive evidence that you own the land and how much land is included in your title. However, it isn't always the case – and it wasn't the situation for the Eldridges when they purchased their farm 'Stansborough' in the Wairarapa.

Stansborough and Kummerstein

When Stansborough was settled in the late 1800s, the Kaiwhata River formed the boundary between Stansborough and the neighbouring farm, Kummerstein. Between 1879 and 1903 the course of the Kaiwhata River changed which resulted in two pieces of land being cut off from Stansborough by the river. Both pieces of land were on the Kummerstein side of the river; one of these pieces of land comprised 13 acres. The title to Stansborough showed the legal boundary as being the old course of the river and therefore showed it as including these two pieces of land. The owners of Stansborough paid the rates on the two pieces of land on the Kummerstein side of the river, even though they were cut off from their property by the river.

The change in river course wasn't an issue between the owners of Stansborough and Kummerstein – until the Eldridges and the Beanges (the owners of Kummerstein) fell out. Things went downhill and, ultimately, the Beanges fenced off the land on their side of the river. The Eldridges issued legal proceedings seeking court orders including an order that they owned the land cut off by the river. The court therefore had to decide whether the existing course of the river was the legal boundary between Stansborough and Kummerstein, or whether the legal boundary was the old course of the river.

Accretion and avulsion

It was agreed that the answer to this question rested on whether the course of the river had changed gradually and imperceptibly (legally known as 'accretion'), or whether the course of the river had changed suddenly (legally known as 'avulsion'). If the course of the river had changed gradually and imperceptibly, then the Beanges would be entitled to the land shown as being in the Eldridges' title, but now being on the Beanges' side of the river. If the course of the river had changed suddenly (for example, as the result of a flash flood or earthquake), then the Eldridges would be entitled to the land shown as being included in their title, but on the Kummerstein side of the river.

The Eldridges agreed that one of the two pieces of land had become part of the Beanges' land by accretion. For the 13 acre piece of land, the court¹ decided that the river course had changed gradually and imperceptibly and therefore the existing course of the river formed the boundary. This decision meant that Stansborough had lost 13 acres and Kummerstein had gained 13 acres – no doubt to the Eldridges' displeasure.

Including the extra land in your title

If you have gained land by accretion and you want the accretion to be included in your title, we can do this for you by applying to the Registrar-General of Land. You will need to provide a survey plan and evidence showing an accretion has occurred.

The Registrar will notify adjoining owners, local authorities and the Commissioner of Crown Lands of your application. If any interested party provides reliable evidence which conflicts with your application, the Registrar will decline your application. If you don't agree with the Registrar's decision, then it's possible to challenge the decision in the High Court. ■

¹ *Eldridge v Beange* (2005) 6 NZCPR 915

Get a Building Report when You're Buying a New House

For many of us, buying a home is the largest purchase we will ever make. That's why spending a few hundred dollars on a pre-purchase building report is so important as it can save you hundreds, maybe thousands, of dollars in years to come. The report is one of the final hurdles in purchasing a property, so it's important to know the process and your rights as a purchaser and also as a vendor.

Why get a building report?

We strongly recommend that if you're buying a property you make it a condition in the Agreement for Sale and Purchase of Real Estate that a building report is required on the property. It's particularly important when dealing with older homes. The report may reveal hidden defects that you may not have considered an issue. Obtaining a building report, in conjunction with a Land Information Memorandum (LIM – we've more on this on page 4), will also make sure all renovations have had the necessary consents applied for and that they have been granted.

If the Agreement is conditional on a builder's report, the condition is solely for the benefit of the purchaser. The standard Agreement gives a purchaser 10 working days to obtain a report that's satisfactory to the purchaser. The report has to be prepared by a qualified building inspector in line with industry methods. The report is an objective assessment of the property as no invasive testing can be carried out.

What are the purchaser's options when defects are discovered?

If the report highlights any negative issues with the property, you have three options:

1. You can avoid the Agreement altogether and you will be entitled to the return of any deposit
2. You can fulfil or waive the condition, and the Agreement continues as if the condition was satisfied, or
3. You can try negotiating with the vendor to have the repairs carried out or to obtain a price reduction.

If you choose to cancel the Agreement or you want to raise any issues from the report, you must first provide the vendor with a copy of the report so they know the issues and the likely costs involved to remedy them.

Trying to renegotiate the Agreement

Proceeding with option three comes with risks. It's not unknown to see purchasers try to negotiate a price reduction, only for a third party to come in with an unconditional offer. The vendor may exercise their right to cancel the original Agreement, as either party has the right to cancel the Agreement if the condition hasn't been satisfied by the due date or by any extension period.

In a recent case² the court held that trying to negotiate a reduction in the purchase price doesn't necessarily mean the condition wasn't satisfied by the purchaser. In this case, the purchaser was found to be able to lodge a caveat on the property after the vendor had purportedly cancelled the Agreement.

The vendor's lawyer was notified that a building report had been obtained that found several issues with the property that the purchaser wanted to be fixed prior to settlement, or they wanted a \$2,000 price reduction. The vendor's lawyer responded saying the vendor would consider the issues raised, and they would let them know the outcome. After the deadline for the condition, the vendor's lawyer advised that the vendor wasn't willing to address any of the matters raised, and said that the Agreement was at an end.

The court found that while there is a requirement for there to be a satisfactory building report it doesn't require a purchaser to be happy with it. If there was no explicit notice of cancellation from the purchaser, then it could be considered that the report contained all the information that was expected. The Judge held *"it is the Court's view that it is sufficiently clear the purchaser was not exercising any rights of cancellation. To the contrary there is evidence of confirmation in terms of which consideration of modification was being explored."*

Always be realistic

Building reports need to be prepared in good faith; therefore attempts to negotiate a price decrease must be based on genuine defects highlighted in the report, such as a roof replacement costing \$20,000. Purchasers need to remember they are not always signing up for a new home, so general wear and tear must be accepted and should not be a reason to try renegotiate the price.

Building reports are a very important condition in the Agreement. If you have any doubt, you should always talk with us as soon as possible. ■

² *Sagar Properties Limited v Tropical Origin* [2014] NZHC 1771

Property Briefs

Rent reviews

Changes to the standard form of the Auckland District Law Society (ADLS) Deed of Lease now make it possible for landlords to review the annual rent payable by either a market rent review or a Consumer Price Index (CPI) rent review. Changes to the ADLS Lease mean that a landlord can now elect to have both CPI rent reviews and market reviews throughout the term of the lease.

Market rent is determined by a market assessment for the property where comparison is made with the rent charged for other properties of a similar type, size and location. There's generally not much room for negotiation when it comes to determining market rent. If there's a dispute over the proposed rent which can't be resolved, the rent will need to be determined by arbitration – an often time-consuming and expensive process.

Landlords will often prefer a CPI rent review over a market rent review because it provides certainty as to annual rent increases. CPI reviews also reduce the cost of the process as a valuation isn't required. A CPI rent review is less likely to result in a dispute as the figures are published quarterly by Statistics New Zealand and the rent is determined from a simple calculation.

However, the risk with CPI rent reviews is that they don't take in to account any increase in property values in the current market. This means that the adjusted CPI rent could be less than what a landlord could achieve if they had undertaken a market rent review.

Landlords will often insist a hard ratchet clause is included in the lease. This means that the rent can never be less than the rent at the commencement date of the then current term of the lease.

There are pros and cons with each rent review process. Whether you are the tenant or the landlord do talk with us before entering into a new lease as we will be able to help you to negotiate terms which best suit your needs. ■

The value of a LIM report

It's a common misconception that you don't need a Land Information Memorandum (LIM) report when you buy bare land, or when the house and buildings have been signed off by your local authority. A LIM is provided by the local authority and contains information it holds on the property. The contents of the LIM vary, but usually include details of the following:

- » Features of the land such as erosion, flooding, subsidence or the presence of hazardous substances
- » Storm water and sewage drains
- » Water supplies
- » Rates and valuation details
- » Building information – building plans, consents and certificates and leaky home notifications
- » Restrictions on the use of the land or buildings
- » Historic buildings or sites or wahi tapu (sacred) sites
- » Resource consents issued for the property, or for neighbouring properties – for example, subdivision consents or water permits
- » Sewage tank and swimming pool information, and
- » Motorway proposals affecting the property.

You can include a LIM condition in your Agreement to purchase the property. If the Agreement contains the standard LIM condition then you must apply to the local authority for the LIM within three working days of signing the Agreement, or we can do this for you. The LIM must be provided within 10 working days of your application. The standard LIM condition gives you 15 working days to approve the LIM report. If you want to object to something in the LIM, it's vital to notify the vendor on or before the 15 working days are up, because if you do nothing you are deemed to have approved the LIM.

If there's something in the LIM you don't like, this doesn't give you the automatic right to end the Agreement. If the vendor cannot, or will not, remedy the matter, then you will be able to cancel the Agreement. In most cases the LIM report doesn't contain information that causes any concern, but it's a useful record of the property to keep. Considering the substantial investment involved, the LIM report can provide valuable peace of mind when you're buying land. ■