

# Property Speaking

ISSUE 40 | Winter 2022

## Welcome to the Winter edition of *Property Speaking*.

We hope you find the articles published are both useful and interesting.

To talk further about any of the topics in this e-newsletter, or indeed on any property matter, please don't hesitate to contact us – our details are on the top right of this page.



### Co-owning a property

#### Think about having a property sharing agreement

For many, owning a property simply involves having your own name recorded on the title. There are some situations, however, where you might share property ownership with friends, family or business partners. This type of co-ownership seems to be rising in popularity – the difficulty for a single purchaser to meet finance requirements is only one reason we are seeing more co-owners.

Whatever the reason, co-ownership comes with many more issues to consider. We give some pointers on a property sharing agreement.

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### Land covenants

#### Rules on how you can use your land

A covenant is an instrument registered against land that governs how an owner or occupier can use their land. The covenanted land is referred to as the 'burdened land' as that has the burden (although not all covenants are negative) of complying with the terms of the covenant.

There can be either positive covenants which compel the owner or occupier to do something, or restrictive covenants that prevent the owner or occupier from carrying out a particular activity.

We look at how covenants work and how they are enforced.

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### Property briefs

#### Healthy homes standards have changed

Changes to the healthy homes standards came into force on 12 May 2022. Primarily affecting the heating standards, there are also modifications to ventilation, moisture ingress and drainage standards.

#### Rent relief for commercial tenants

There continue to be a range of factors that could find a tenant without reasonable use of their premises, including lockdowns and protests during this pandemic. The ADLS Deed of Lease may offer some rent relief to tenants.

#### Rising interest rates causing anxiety

Many borrowers are feeling anxious that interest rates are rising which impact on increasing repayments. We offer some options to property owners.

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# Co-owning a property

## Think about having a property sharing agreement

For many, owning a property simply involves having your own name recorded on the title. There are some situations, however, where you might share property ownership with friends, family or business partners. This type of co-ownership seems to be rising in popularity. Amongst other things, the difficulty for a single purchaser to meet finance requirements has seen an increasing number of people sharing a roof. Lately, whole developments have been designed to accommodate this type of arrangement.<sup>1</sup> For others, co-ownership may come about through inheritance, for investment reasons or in situations where the property is only needed part-time, such as a shared holiday home.

Whatever the reason, co-ownership comes with many issues to consider. The greatest risk with co-ownership is making assumptions about how things will work, only to find out at crunch time that your fellow owners see things very differently.

## Put it in writing

In this article, we focus on a common way of dealing with co-ownership – a property sharing agreement. Completing a written property sharing agreement before you first purchase the property allows all the co-owners to establish upfront how the co-ownership will work, rather than relying on assumptions and potentially ending up in a long legal dispute.

Some issues that you might want to consider include:

### + Recording ownership on the title:

You can structure the title in a number of ways to reflect your agreements about the property such as setting out the particular shares that each owner has in the property. Bear in mind that whether you are listed as tenants-in-common or joint tenants will affect, for example, what happens to the property if one owner dies. You also should agree on who the owners will be – are you owning with another person or, for example, the trustees of a trust?

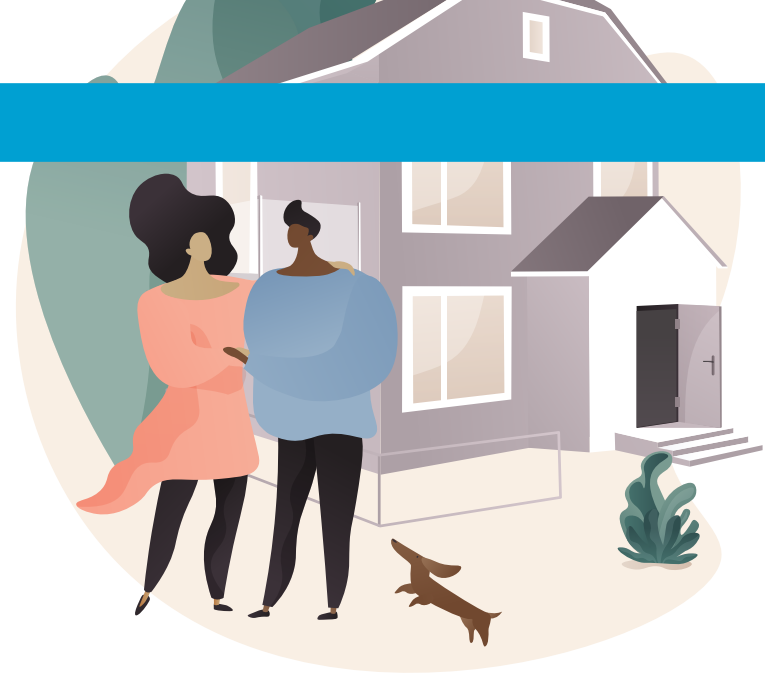
### + Funding the purchase:

Co-ownership does not necessarily mean that you each contribute equally into the property. For example, one owner might be only involved to help you gain finance approval rather than contributing funds.

### + Meeting expenses:

All properties have outgoings to be met such as mortgage payments, council rates, insurance costs, and repairs and maintenance. You should decide not only how these will be paid, but also what should happen if one owner fails to contribute as required and how you will decide when to incur expenses for things such as maintenance.

Any agreement will sit alongside, not override, your agreements with your lender or other creditors. Usually, mortgage repayments come with joint liability and the lender can seek repayment of its loan from any of the borrowers regardless of what is stated in your property sharing agreement.

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### + Use of the property:

You should consider, for example, whether any of the owners may let the property to a third party or whether ownership is for personal use only. Think about how any income or capital gains will be shared.

### + Selling the property:

There have been cases where people have found themselves co-owning a property that they no longer want to own.<sup>2</sup> To help avoid this situation, you may want one owner to be able to force the sale of the entire property where, for example, the other owners have failed to pay outgoings, an owner has died or where that owner simply wants their funds back. On the other hand, so that no one is unexpectedly required to sell, you could agree to allow the remaining owners the first option to buy the share of the owner who wants to leave.

### + Relationship property claim?

To help limit the effects of relationship property claims by non-owners, you might agree that everyone with an interest in the property is obliged to enter into a relationship property agreement with their partner/spouse. If you are

buying a property with a relationship partner and want to contract out of the default position under the Property (Relationships) Act 1976, a relationship property agreement is a must.

### + Resolving disputes:

You can set out in your agreement the process for resolving any disputes. For example, you could agree that you must first try to resolve disputes through alternative dispute resolution methods, such as negotiation or mediation, before any court proceedings can be filed.

These are just some of the matters that you should think about before embarking on co-owning a property.

We can take you through these matters and many other issues, and help you prepare an agreement reflecting how you want your shared ownership to work.

If you are interested in other ways to structure a co-ownership model, please get in contact with us to discuss whether a trust or company structure would be more appropriate for your circumstances. +

<sup>1</sup> For example, the Bremner Ridge development.

<sup>2</sup> Marks v Halse [2021] NZHC 1595.

# Land covenants

## Rules on how you can use your land

A covenant is an instrument registered against land that governs how an owner or occupier can use their land. The land bound by the terms of the covenant is referred to as the 'burdened land' as that has the burden (although not all covenants are negative) of complying with the terms of the covenant. There can be either positive covenants which compel the owner or occupier to do something, or restrictive covenants that prevent the owner or occupier from carrying out a particular activity.

## Common covenants

Generally, people encounter covenants when their lawyer reviews the Record of Title of a property and advises that it is subject to a land covenant. Often the covenant will dictate that certain activities or uses are restricted or prohibited on the property. Examples include the maximum height of buildings allowed to be built on a property or a prohibition on keeping certain animals.

Covenants are commonly seen in subdivisions where the developer intends to sell multiple sections for the construction of new homes. Often a developer will register extensive land covenants that prescribe various design features of the houses to be built in the subdivision. This helps the developer dictate the look and feel of the subdivision; it will generally include covenants such as a minimum build cost, the type of cladding permitted for the exterior of new builds and maximum heights of fences and plants, along with prohibitions on collecting rubbish on properties, the visibility of clotheslines and many other visual features which are

all designed to help the developer preserve the aesthetic appeal of the subdivision.

Another type of land covenant is a *reverse sensitivity covenant* (sometimes called a *no-complaints covenant*). These are used where a party in a rural or industrial setting may wish to subdivide or develop part of their land for residential use. A no-complaints covenant would be used in this instance to protect the existing property use of the farm or the factory from complaints made by the new residential neighbours who might object to certain smells or noises generated by that existing use which will continue on the retained land. This ensures that farms and factories can continue their normal business despite the development of purely residential property next door without fear of those neighbours complaining and interfering in how those businesses operate.

If you are looking to purchase a property, particularly if it is bare land, it is important to check that it isn't subject to covenants. If there are any covenants registered against the Record of Title, you should ensure they won't restrict your intended use of the land or leave you bound to put up with offensive noise or smell from neighbouring properties without any right to complain.

## Enforceability of covenants

In a similar way that the owner or occupier of 'burdened land' bears the obligation of complying with the terms of a land covenant, the owner of 'benefitted land' has the right to enforce covenants affecting the burdened land.

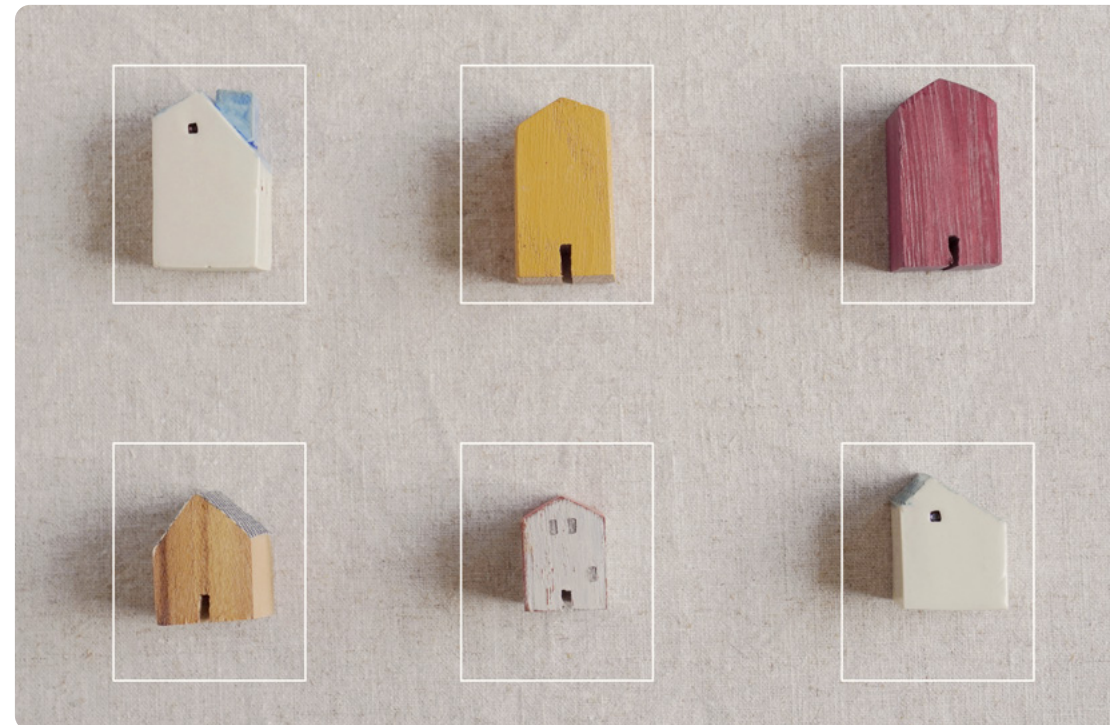
The covenant will often contain penalty provisions that state the burdened landowner will be penalised a punitive amount for non-compliance with a covenant registered against their land.

If the burdened landowner fails to comply, the owner of the benefitted land may have the right to have the work required to comply with the covenant completed and to recover those costs from the burdened landowner.

Covenants can also benefit a party *in gross* meaning that the party with the right to enforce the terms of the covenant isn't necessarily an adjoining landowner but often the development company responsible for a subdivision, or a local or

territorial authority. Covenants in gross can give the developer the control over the design of buildings in their subdivision to ensure they can maximise the profitability and marketability of their sections without having to rely on individuals to enforce covenants themselves.

As land covenants can vary so broadly depending on their purpose or the way they are drafted, it is important to talk with us early on if land you own, or are looking to buy, is affected by a covenant. It is particularly important if you have a unique plan for a build or slightly unusual use for your land in mind that might be precluded by a restrictive covenant. A quick check by us can alleviate any doubt and ensure you won't be caught once it is too late. +



## Property briefs



### Healthy homes standards have changed

Changes to the healthy homes standards came into force on 12 May 2022. The changes primarily affect the heating standards, but there are also modifications to ventilation, moisture ingress and drainage standards.

**Heating:** If your rental property was built to the 2008 Building Code and the insulation and glazing meets the 2009 insulation and glazing standards, you can apply the new heating formula when assessing your property's heating obligations. This acknowledges that modern homes are generally warmer, dryer and easier to heat than older properties. The changes allow the fitting of a smaller heating unit in your

rental and, as an added benefit for tenants, a smaller unit uses less power.

**Ventilation:** The standards now allow for certain existing continuous mechanical ventilation systems to comply with the ventilation standards. The key is, however, that the system must extract the air outside, meaning HRV and DVS systems won't be sufficient. If you already have a continuous mechanical ventilation system in place, you may not need to do further work to comply with this requirement.

**Moisture ingress and drainage:** Additional guidance is available in relation to moisture barriers, particularly where installation is not reasonably practicable in the subfloor area.

For more information on the changes, click [here](#).

### Rent relief for commercial tenants

We wrote an article reviewing the rent relief provisions available during the early months of the Covid pandemic in the standard commercial lease (see the the Winter 2020 edition of *Property Speaking*).

There continue to be a range of factors beyond the control of a landlord and tenant that could leave a tenant without the reasonable use of their premises. Some commentators have said that we may be in for another Covid wave and there may be some unforeseen situations (such as the protests in Parliament's grounds in February-March) that could further disrupt businesses and could create genuine safety concerns preventing tenants from accessing their premises.

If your lease uses the Auckland District Law Society Deed of Lease Sixth Edition template, you will find the rent relief provisions at clause 27. Clauses 27.1-27.4 apply where the property is partially damaged so you don't receive the full benefit.

Clauses 27.5-27.6 apply where there is an emergency and a tenant is prohibited or restricted from accessing the premises.

Access restrictions must be imposed by a competent authority (such as the Ministry of Health) as in the lockdowns that New Zealand faced in 2020-21. The rent relief provisions are, however, unlikely to apply if your workplace is infected with Covid and you need to close your premises for a week to isolate.

In each case, a landlord and tenant should discuss their particular circumstances and reach an outcome that works for both parties. If you want to know if rent relief is appropriate in your particular circumstances, please contact us.

### Rising interest rates causing anxiety for borrowers

As property owners are aware, interest rates are rising. If your fixed term mortgage is coming up for renewal, you may be feeling anxious about what your repayments could look like once your current rate ends. If you have a floating rate, your rates will also be increasing.

There are some options available that you can discuss with your lender if you face unforeseen or significant financial hardship.

**Mortgage holidays:** A mortgage holiday is a temporary break from making mortgage repayments; these are generally given for a six-month period. The break can either cover both your principal and interest payments, or cover just your principal payments. It's important to understand that interest on your loan will generally continue to accrue. If you opt for a total payment break then interest will accrue on both the principal and the unpaid interest as it accrues; make sure you discuss with your lender before committing to this.

**Extending your mortgage term:** Lenders can also extend the term of your loan. For example, if your current mortgage is due to be repaid in 10 years, you may be able to push it out to 15 or 20 years. This has the effect of reducing your weekly or fortnightly principal repayments. Remember, however, that you will end up paying more in interest in the long run. Make sure you discuss the implications of this fully with your lender.

**Talk to a mortgage broker:** Before you re-fix or float your interest rate, do talk with a mortgage broker. Mortgage brokers aren't just used when you are looking for finance to purchase a property. They can also compare interest rates offered by other lenders and can negotiate on your behalf. When working with a mortgage broker there is no direct cost to you for using their services; most of the time the lender will pay your mortgage broker's fees.

If your interest rate is coming up for renewal and this is causing you undue stress, come and see us to go over your options before talking with your lender and/or your broker. We are here to help. +