# The Property Lawyer

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CONTINUED FROM PAGE 13

## Current identity verification requirements for LINZ

The definition of "Acceptable Photo ID" and section 2.2.2 of the interim guideline was amended on 7 September 2021. The requirement that acceptable photo ID be either current or expired within the last 12 months has been removed. Provided it clearly links the client to the identity (i.e. is not deteriorated etc) it will not matter how long it has expired. This reflects that once an individual is appropriately bound to an ID like a passport, it remains valid for ID even if not for travel. Also, with prolonged Covid restrictions many people are not renewing passports.

When executing an Authority and Instruction form via AV it is imperative that the witness wording in clause 5 is modified along the following lines:

(a) I have witnessed the client(s) sign this form **by way of audio visual meeting using Skype / Zoom / Microsoft Teams / Other (specify)**

(b) I have sighted the original form(s) of identity ticked above **by way of audio visual meeting using Skype / Zoom / Microsoft Teams / Other (specify)**

## Summary

The primary obligation remains on the lawyer who Certifies and Signs an instrument in an e-dealing to be satisfied as to the identity of the party on whose behalf they are certifying. In the event of a challenge or allegation of fraud or forgery the certifying lawyer will be called upon to justify the certification(s) made.

LINZ and the Property Law Section will keep you informed of any changes made to the guidelines, so please ensure you read our PLS e-bulletins and LINZ updates to keep up to date.

*While the Ministry of Justice is primarily responsible for the administration of the Act, the Department of Internal Affairs is the supervising body for lawyers. ■

COMMERCIAL LEASES

# Establishing the nature of occupational arrangements

BY **MICHELLE HILL** AND **JAMES COCKRAM**

THE NATURE OF A PARTY'S OCCUPATION of land is not always clear, but determining it can be critical to ascertaining the rights and obligations flowing from that arrangement and, ultimately, whether that party has security of tenure.

In *Enviro Waste Services Ltd v Remediation (NZ) Ltd* [2021] NZHC 3270 the Court ultimately determined the murky nature of the occupying party's rights but this involved a process of eliminating what it was not.

## Background facts

On 1 June 2017, the Tauranga City Council (TCC) granted a lease over a Mt Maunganui property (Te Maunga property) to Remediation (NZ) Limited (RNZL) for its organic waste processing business. The lease was subsequently varied twice, extending the term with a final expiry date of 28 February 2021.

In late 2019, the TCC and Western Bay of Plenty District Council (WBPDC) released a joint request for proposals in relation to multiple refuse and waste collection and processing services which included TCC's tender for the lease of the Te Maunga Property.

ESL tendered for all contracts offered including the lease of the Te Maunga property. ESL and RNZL discussed a proposal in which ESL would subcontract certain services to RNZL and on 11 February 2020 ESL and RNZ signed a letter of intent (Letter) as required by the proposal documentation. The Letter said that ESL would submit a tender, provide for RNZL to effectively be subcontracted for the provision of green and food waste processing services and that ESL and RNZL agreed that ESL … "may require that RNZL enter into a Deed of Lease with either ESL or [the TCC] in order to be able to comply with the Service Agreement."

On 7 August 2020, ESL was awarded the contracts and the lease of the Te Maunga Property with possession commencing on 1 March 2021. Notice of termination was given by TCC to RNZL confirming the final expiry date of 28 February 2021, and the grant of the lease to ESL. While ESL and RNZL negotiated the agreement for the provision of the green and food waste processing services (Services Agreement), RNZL consented to ESL remaining in possession of the Te Maunga property from 1 March 2021. The Letter provided that the Services Agreement would commence on the last day of signing by the parties and that, unless otherwise agreed, it expired on the "failure by the parties to execute the Services Agreement within 6 months of the award date". ESL and RNZL could not reach agreement and the Services Agreement was never signed.

Michelle Hill

James Cockram

As a result, ESL wrote to RNZL's solicitors giving RNZL 20 working days' notice to vacate the premises expiring on 22 June 2021. RNZL refused to vacate and RNZL filed proceedings against ESL contesting that the service of notice was ineffective as it was served not on RNZL but on its solicitors. ESL served another notice to RNZL to vacate, expiring on 26 October 2021 and RNZL refused again.

## The parties' positions

ESL submitted to the Court that RNZL had an implied tenancy at will and it was entitled to terminate the tenancy without notice. It also argued that RNZL was in possession as a prospective sublessee while the parties negotiated a sublease (Services Agreement) therefore section 210 of the Property Law Act 2007 (PLA) applied (which would make the occupation terminable at will on 20 working days' notice). In addition, ESL sought an order to cancel the sublease and require RNZL to grant possession pursuant to section 251 of the PLA (which gives the court powers to make an order for possession of land comprised in a lease).

RNZL argued that the Letter provided for its rights of occupation and that under the partially implemented joint venture agreement and successful tender, it had possessory rights unaffected by cancellation. Furthermore, RNZL submitted there was no lease between RNZL and ESL therefore the application of sections 210 and 251 of the PLA could not apply.

## The matter to be decided

The key determination for the Court was simply whether "the plaintiff (ESL) could show a better right of possession than that of the defendant (RNZL)."

### Did RNZL have a lease?

In order for ESL to be successful in obtaining an order under section 251 of the PLA for possession of the premises, it had to show that RNZL occupied the premises pursuant to a sublease from it. The Court looked at the three essential elements of a valid lease which are:

1. Exclusive possession
2. A term of a definite period; and
3. Creation in appropriate form.

The Court found that none of those elements existed: RNZL did not have the legal right of exclusive possession, there was no definite term and no appropriate form. The Court accordingly rejected that RNZL could be a subtenant and considered, on the evidence, that it was merely occupying the site. As a result, ESL could not invoke section 251 of the PLA to obtain an order for possession.

### Was this a statutory tenancy under section 210 PLA?

A statutory tenancy is a lease that is terminable at will on the giving of not less than 20 working days' notice under section 210 of the PLA.

The Court held there was no statutory tenancy because there was no lease. Factors resulting in this conclusion included:

- RNZL did not have the legal right of exclusive possession of the Te Maunga property
- No rent was paid (to either ESL or TCC) since 1 March 2021; and
- no definite term or form was established as required of a lease (as defined under the PLA).

The Court said it remains open to hold that section 210 has no application to a tenancy at will at common law, but it does apply "if the tenancy at will is changed into a periodic tenancy by payment of rent." As RNZL had paid no rent to ESL, it was not a statutory tenant entitled to the benefit of section 210.

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### Was this a licence?

A licence is a permission given by one person to another allowing the other to do something that would otherwise be unlawful.[1] An occupation licence can either be a contractual licence or a bare licence. A contractual licence is given for valuable consideration. The Court held that RNZL could not contend that it had a contractual licence from ESL because it had provided no consideration. The Court considered that, at best, any licence held by RNZL would be a bare licence, which is revocable at will by the licensor unless the licensee can establish a grant of an interest in the land, an agreement for valuable

CONTINUED FROM PAGE 15

consideration which is specifically enforceable or conduct raising an equity in their favour. None of those situations applied, although the Court did find that it was arguable there was a bare licence.

### Was this a tenancy at will?

A tenancy at will is created when a person occupies land as tenant with the consent of the owner of the terms that either party may determine the tenancy at any time. It can be created either expressly or by implication. A good example of a tenancy at will is where a party is permitted to remain in possession of premises while negotiations for a new lease are taking place. Another example is where a purchaser is given possession of a property they are under contract to purchase but settlement has not yet been completed (and the purchase contract does not grant a right of early possession). A tenancy at will is therefore regarded as an arrangement that protects the interests of the occupier during a period of transition.[2] No notice to quit is required to determine a tenancy at will. It can be determined by either party on demand.[3]

The Court found that a tenancy at will best accorded with the facts in this case when ESL consented to RNZL remaining in possession of the Te Maunga property while they agreed on the Services Agreement. While RNZL remained on the Te Maunga property, it had a right of exclusive possession.

## Decision of the Court

Finally, the Court held that any claim by RNZL pursuant to the Letter does not confer a better title than that enjoyed by ESL under the lease with TCC. The Court ordered RNZL to vacate the premises and deliver vacant possession to ESL.

## Commentary

These parties would have been saved the time and cost of Court proceedings if only the arrangements between them had made it clear the nature of their respective rights and interests in the land. This would have been a simple matter to record at the outset. If, however, that opportunity had passed then they should have communicated their intentions as early as possible and certainly before the relationship became acrimonious. ■

**Michelle Hill** is a Partner at Dentons Kensington Swan in Auckland. She is also a member of the PLS Executive Committee and the PLS Commercial Leases Working Group. **James Cockram** is a Solicitor with the firm.

1. *Hinde McMorland & Sim Land Law in New Zealand* at [18.001]
2. *Heslop v Burns* [1974] 1 WLR 1241 (CA) at 1253
3. *Errington v Errington* [1952] 1 KB 290 (CA) at 296

## A PROPERTY LAWYER'S BRIEF

# An unwelcome sunset

BY **SARAH WROE**

Sarah Wroe's column takes the format of an informal exchange of correspondence between a property lawyer and barrister. This follows the great success of the "practical, real-life scenarios" panel session at the 2021 NZLS CLE Property Law Conference.

Kia ora Sarah,

My clients Anna and Alexei are buying their first home. They bought off the plans about 18 months ago. The house is part of a new development of about 100 houses and apartments. The contract contains a sunset clause that entitles either party to cancel if the code compliance certificate is not issued by 30 April 2022. When they signed the contract (ADLS 10th Ed 2019), the house was well underway. They were told they would be in by the end of November last year, but now it looks like the house may not be finished before the sunset date. They have driven by frequently over the past 12 months. There were long periods of not a lot happening, which is understandable due to Covid restrictions. Work has picked up pace since then but mostly on other houses and not the block where their house is. They tell me there have been no signs of activity for the last few weeks in that block. What options do they have if the sunset clause is triggered and what can they do in the meantime? They really want this deal to get ahead as they would not be able to afford to buy a property like this at today's prices.

Ngā mihi

**Leo Ray**
*Sunset Law*