

CROSS LEASING - PROBLEMS WITH ADDITIONS

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Introduction

Cross leasing is a term which applies when more than one separately owned dwelling unit is built on a single section. These are often referred to as “home units” or “town houses” and an owner referred to as a “flat holder”. The title to these units is often referred to as a “composite title” reflecting the inclusion of leasehold estates with freehold estates in the title which makes up the ownership of the unit.

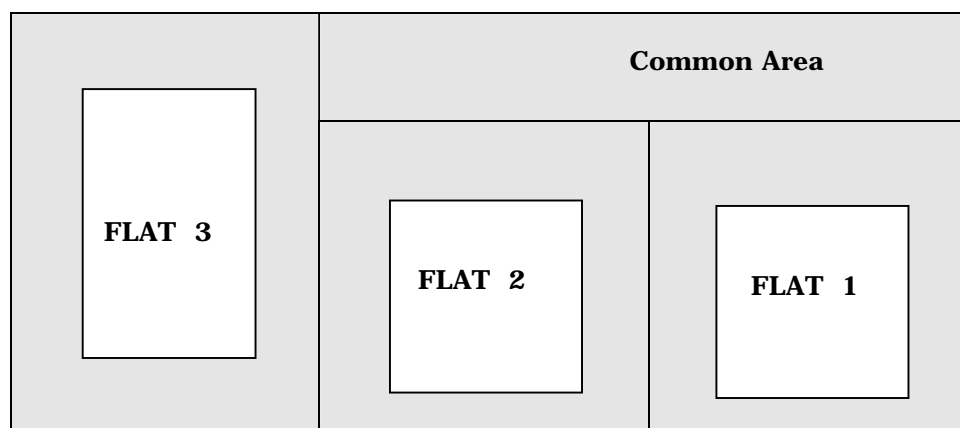
Initially the creation of cross lease titles did not come under the definition of a subdivision under the old town planning legislation and cross leases proliferated because they enabled the circumvention of ordinances relating to subdivision. Even though for the last 10 years, the creation of a cross lease title has been subject to subdivision rules, it has remained popular as it has been cheaper than freehold subdivision and conforms to the modern trend of smaller land lots and smaller gardens especially for in-fill housing.

Note that multiple units on the one section can also be achieved under the unit titles system (Unit Titles Act 1972), a strata title, and the company share block but these are not the focus of this article.

The Cross lease title

In a cross lease there will usually be two such units on a section, but there can be any number, all under a form of individual ownership.

A typical position is illustrated in the diagram below.



Each of the three units has a different owner. Each of the three units has had a 999

year lease granted. The effect of the lease is to give exclusive rights of ownership and occupation of the three respective units.

Before a cross lease is entered into, a flat plan has to be approved by the local authority under the provisions of the Resource Management Act and deposited at the Land Transfer Office. A survey of the building to be the subject of the lease is made by a surveyor who submits the flat plan to the land registry. This may include the designation of courtyards to a flat and may also show other detached buildings (eg garages), common areas of land, common walls and fences. The accuracy of the survey is limited to the footprint of the buildings and structures, there is no survey of the land (unless required to confirm the definition of the title), no dimensions or land areas are surveyed and there is no check that the land allocated to each flat adds to the total land area of the site. A flat plan shows the outline of the building (building footprint), subject to the cross lease, and its position on the property.

The entire land parcel is owned as tenants in common (undivided specified ownership), usually in equally shares, but subject to the 999 year leases granting the exclusive possession of the flat.

The common area is the drive, which gives access to the units. This is a part of the section and remains in the ownership of all the flat owners. There is no lease exclusive to any single area over the common area. Instead each of the owners will enjoy rights to drive over and use this common area.

The leases are usually expressed at a nominal rental (10 cents per year is common). If the buildings on the section are adjoining and depend upon each other for support there will be provision in the leases to protect that right. The leases will also contain provisions enabling rights of access for maintenance and provisions on maintenance and repair of the common areas and the sharing of the outgoings on the common areas. The lease will also include the restriction of undesirable behaviour or noise and uses, which may cause a nuisance. Cross leases will also include a provision that the tenants in common interest and lessee interest must be sold to the same purchaser.

There are a number of versions of the standard lease for a cross lease title and the lease document has the flexibility to incorporate aspects appropriate at the time of creation. This also means that there is no uniformity in the lease documents and the rights conferred in various leases on cross lease titles may be different.

Fencing

The fences which separate the land areas are not usually surveyed and are situated in positions agreed to by the flat holders who hold the tenants in common interests in the land. These may or may not be shown on the flat plan. Disputes over fences between two flat holders and other neighbours and a flat holder come within the Fencing Act 1978 and in some cases the other flat holders will need to be consulted. Note that with disputes between a neighbour and the common area of a cross lease it is all the tenants in common owners of the land who are responsible for the fence in the proportion of their specified share or as provided for in the lease.

Altering or Adding to Buildings on Cross Leased Properties

Difficulty can arise on a cross lease title when additional buildings are constructed, or existing buildings are extended or altered. The reason is that a cross lease is technically a lease of the building on the property. It is not a lease of the whole land area.

If a building is extended, or an additional building is constructed on the property (for instance a garage, conservatory or patio/deck), without a re-survey of the flat plan, that extension or addition will not be included on the flat plan. That addition or extension will not be included in the lease. Technically the addition or alteration is on land owned as tenants in common with the other flat holders. Flat plans cannot be simply modified to incorporate an alteration to the foot print of a building and a fresh survey of the flat plan is required.

Most cross leases provide that no alternations or additions to the exterior of the building are permitted without the consent of the other flat holders of the land. Even if you are only planning internal alterations it is necessary to check with the other owner(s) first. Some cross leases contain a restriction against internal alterations being carried out without the consent of the flat holders of the land.

Problems

Considerable problems can be experienced by cross lease owners who have extended their buildings or made additions without first seeking legal advice.

It is not enough that those extensions or buildings may have been built in accordance with building consents issued by the local authority. Local authorities do not require as a condition of the issue of a building consent compliance with the other provisions relating to cross leases.

The result is that there is no cross lease in existence for those extensions or additions and this often only comes known if offered for sale when the title is compared to the actual buildings erected on the site (often by the real estate agent or valuer). This involves an inspection of the cross lease and a comparison of the shape and location of the buildings with the flat plan on the title. A prospective purchaser who searches

the title and checks the documents may find that, in effect, the additions or extra buildings have no right to be there and if not on the flat plan are in effect owned as tenants in common with the other flat holders.

At this point the purchaser will require the matter to be put right and this is likely to involve the co-operation of other owners of cross leases on the section. There will be delays and costs and what had started as a straight forward transaction becomes much more difficult. The cost to rectify vary depending on circumstances but as a guide the surveying will cost about \$2,500 and the legal fees another \$1,000. The existence of mortgages will add to the costs as these will need to be registered against the new titles.

If you are an owner of a home unit or town house proposing alterations or additions, check the situation first. If you are proposing to buy a home unit or town house, make sure that before you sign any agreement to purchase that you have seen the registered flat plan to check that it shows accurately the outline of all buildings.

This difficulty with cross lease titles will become more widespread in the years to come as the buildings on them get older and require alterations and additions to keep them up with modern standards. This is an impediment to minor alterations to buildings on cross lease titles as in some instances the cost of correcting the title may be more than the cost of the alteration itself (including any building consents). As these structures get older, owners will either not upgrade their houses because of the extra title cost or they will go ahead and do minor alterations without correcting the title. This will lead to the incidence of defective cross lease titles probably slowly increasing over time.

Cross lease titles have provided a good ownership structure during a period when restrictions on urban infilling prevented multi-unit development. In the modern environment this no longer applies and the cross lease has served its useful purpose. Cross leases no longer allow the circumvention of the subdivision rules and now only provide a cheap short-term option to effect a subdivision. There will inevitably be much higher costs to subsequent owners when additions, alterations, and renovation will be eventually required. It is now time to prevent further proliferation of this inferior type of title.

While those cross leases that exist now must be allowed to continue, cross lease owners should be actively encouraged to convert to another form of title, preferably a freehold title.