

NEWSLETTER

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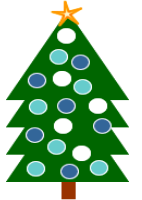
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TIS THE SEASON

2011 has been in a year in which New Zealand has experienced the exhilarating high of the Rugby World Cup win and devastating low of the Christchurch earthquake. These events have highlighted to us that it is important for us all to have our personal and business affairs in order. We encourage you to think about making a New Years resolution to review your personal, trust and business affairs to ensure that they are in order. We invite you to contact us if you would like us to assist with your review.



The Directors and Staff wish our clients and their families a Merry Christmas and Best Wishes for 2012.

Christmas Hours

The office will close for two weeks over the Christmas period, with the last day of work for 2011 being Friday 23rd December. The office will reopen on Wednesday 4th January 2012 with limited staff.

BUYING AND SELLING A UNIT TITLE

Unit Title properties are becoming more common in New Zealand and the ownership structures of these properties are becoming increasingly complex. It is therefore more important than ever that buyers understand the rights, obligations and benefits associated with owning a Unit Title property prior to becoming committed as a buyer under an Agreement for Sale and Purchase.

The Unit Titles Act 2010 ('the Act') came into effect on 20 June 2011 and addresses some of the concerns traditionally associated with Unit Title property ownership. The Act provides for more information to be available to buyers so they can make better and more informed decisions regarding their purchase of Unit Title Properties.

When a Unit Title is sold the seller must now provide the buyer with pre-contract and pre-settlement disclosure regarding the Unit Title property. The purchaser will also be entitled to request additional disclosure at their own expense.

PRE-CONTRACT DISCLOSURE

Under the Act a pre-contract disclosure statement must be prepared and provided by the seller to any prospective buyer of a Unit Title property before the parties enter into any Agreement.

Pre-contract disclosure must advise the buyer on:

- body corporate charges,
- proposed future maintenance, including how the costs will be met,
- the balance of any fund or bank accounts of the body corporate as at the date of the last financial statements,
- whether or not the unit or common property is or has been subject to a claim under the Weathertight Homes Resolution Services Act 2006 or any other similar civil proceeding,
- and explain matters such as unit title property ownership, body corporate operation rules, unit plans, ownership and utility interests together with other matters to ensure the information provided is meaningful to the buyer.

The requirement to provide pre-contract disclosure cannot be contracted out of by the parties. All sellers must comply.

PRE-SETTLEMENT DISCLOSURE

After the buyer and seller have entered into an agreement for sale and purchase the seller must provide the buyer with a second disclosure statement with further information, including a certificate from the body corporate, no later than the fifth working day prior to the settlement date.

FRUSTRATED CONTRACTS



The common law 'doctrine of frustration' allows a contract to be discharged on the occurrence of certain events beyond the control of the parties which would make the performance of the contract impossible. As the doctrine is a departure from the traditional view that contractual promises are absolute, its application in

law must satisfy strict legal tests in order to be successful. It requires an event to occur that is firstly unforeseen and one which significantly alters the relationship between the contracting parties.

CATEGORIES OF FRUSTRATION

Although not exhaustive, the following are five situations where the doctrine of frustration has been successfully applied.

1. **Where the subject matter of the contract ceases to exist:** In *Taylor v Caldwell* (1863) 3 B & S 826, a hall which was hired to host a series of concerts burnt down before the concerts could commence. Both parties were relieved of their obligations as the contract was held to be frustrated.

ADDITIONAL DISCLOSURE

The buyer of a Unit Title may request additional disclosure from the seller. Any request for an additional disclosure statement must be made by the earlier of either:

- five working days after the date of the agreement, or
- the tenth working day before execution of settlement.

If a request for additional disclosure is made, the seller must provide the additional disclosure to the buyer no later than five working days after the request was made. The seller is entitled to recover any reasonable costs they incur in providing the additional disclosure.

The additional disclosure may be of great assistance to a buyer, and serious consideration should be given to requesting information even though it may incur additional costs.

There are consequences if the correct disclosures are not made within the appropriate timeframes. These can include the buyer being able to postpone settlement or cancel the agreement altogether.

2. **Non-occurrence of events - the purpose of the contract has become impossible to attain:** In *Krell v Henry* [1903] 2 KB 740 a flat was rented for the purposes of viewing the King's coronation procession. The procession was cancelled due to the King's illness and the contract was discharged as the sole purpose for which it was rented ceased to exist.
3. **Death or incapacity of a party where the contract involves obligations of a personal nature:** In *Robinson v Davison* (1871) LR 6 Ex 269, a contract by a pianist to perform on a specific day was held to be frustrated when the pianist became too ill to perform.
4. **Delay and obstruction of performance:** Where caused by external events, delay and/or obstruction may be held to be frustration if the delay is so long, or the obstruction so extreme that it would make the result of the contract fundamentally different from what had been contemplated.
5. **Performance is rendered illegal by legislation:** If a change in legislation that comes into effect after the creation of the contract renders its performance illegal, the contract is held to be discharged.

FRUSTRATED CONTRACTS ACT 1944 ('FCA')

The doctrine of frustration is supported in New Zealand by the FCA, which addresses the effect of the discharge of obligations on the areas of the contract already fulfilled.

It confers three major benefits on parties that are supplementary to the common law doctrine.

1. It provides the right to a party to recover money paid in consideration of the contract despite payment being made before the date of frustration, and
2. It allows a party to claim compensation for work done and/or expenses incurred for the purposes of a contract up until the date of frustration, and
3. It permits the benefits received up to the date of frustration to be taken into account when determining the recovery of monies paid or expenses incurred.

ABOLITION OF GIFT DUTY

As you may be aware, the Government abolished gift duty legislation with effect from 1 October 2011. While the Government has abolished gift duty, it remains prudent to document evidence of a gift as trusts will inevitably come under closer scrutiny.



Existing laws surrounding gifts are very likely to gain more prominence. Before deciding to gift any balance owing to you by your trust there are therefore a number of issues to consider.

For example:

1. A forgiveness of debt can give rise to income in the hands of the recipient (under financial arrangements rules) unless the debt is forgiven in consideration of natural love and affection.
2. The Insolvency Act 2006 provides that the official assignee can set aside gifts made in the last 5 years if the gift was made when the donor was insolvent. For this reason it is recommended that the donor sign a solvency certificate before making a gift.
3. The Property Law Act 2007 provides for a claw back of gifts made with intent to prejudice creditors.
4. The Property (Relationships) Act 1976 provides that dispositions of property may be set aside if they were made in order to defeat the claim or rights of any person.
5. The Family Proceedings Act 1980 provides for the Courts to vary the terms of ante and post-nuptial settlements when the marriage (not de facto or civil union) of the parties comes to an end.
6. Trust busting has had more publicity lately and the Courts will inevitably be asked to unravel dispositions to “sham trusts” and “alter ego trusts”.
7. If you are a beneficiary, trustee or settlor of a trust and you have lent funds to that trust, you can usually

The FCA can be contracted out of by including within the contract provisions addressing the event of frustration. In such instances, the provision will apply instead of the FCA.

The doctrine of frustration and FCA are examples of options or resolutions that may be available to a party following the breakdown of a contract. Legal advice may assist in identifying resolutions of a dispute or breakdown through remedies available outside the contract.

demand repayment of the loan (subject to the loan terms). This enables you to have access to funds if your circumstances should change. If the loan is forgiven then you will become beholden to the trustees for any future pay outs from the trust. Some consideration may therefore need to be given to whether or not you wish to keep the loan owing so you still have some control over the funds lent to the trust.

8. The Social Security Act 1964 provides for asset testing in order to determine whether a person in long term residential care qualifies for a residential care subsidy. Prior gifts are exposed to a claw back and gifting in excess of \$27,000 in any 12 month period may jeopardise a possible entitlement to subsidies.

We can provide you with advice specific to your circumstances if you wish to make a gift but do not want to affect your entitlement to residential care subsidies.

Important considerations

There is no “one size fits all” approach in deciding whether or not to forgive any balance owing to you by a trust. In order to formulate an appropriate strategy it is prudent to assess the personal circumstances and needs of both you and your family.

Some questions to consider in making an assessment are:

1. Have you given personal guarantees to a bank, finance company, supplier or landlord?
2. Will you still be solvent if you make a gift?
3. Can you be the subject of a relationship property claim?
4. Are the assets to be gifted your own separate property or are they relationship property?
5. Are you considering applying for a government subsidy, such as a residential care subsidy, in the future?
6. Do you want to remain a creditor of the trust so that you have additional rights to the trust assets over and above the beneficiaries?

7. Are you subject to any current creditor or IRD claims?

In Summary

The ability to gift without being restricted to \$27,000.00 per year will be a welcome change to the law for many. You should take your time over the decision to gift and consider

the implications carefully.

We invite you to meet with us to discuss your options and assist you to make the appropriate decision for your personal circumstances.

SNIPPETS

THE “GIFT OF LIFE”

A total of 11 hearts, nine lungs, 35 livers, three pancreases, and 50 kidneys were included in transplants from deceased people in New Zealand last year. These donations were given by a total of 41 organ donors.



The donation of organs and tissue in New Zealand is governed by the Human Tissues Act 2008 ('the Act'). The Act prescribes who may give consent or raise objections to donation of organs and tissue from deceased persons.

Indicating on your drivers licence that you wish to be an organ donor does not constitute consent to the donation of organs; as the decision to donate ultimately rests with your family. It is therefore important to discuss your wishes with them. Where any “close available relative” reasonably objects to the donation of your organs, any consent given could be overridden and the donation will not proceed.

The Act provides that the decision to donate should take into account the family's cultural and spiritual needs together with their values and beliefs. For further information, please refer to www.givelife.org.nz and www.donor.co.nz.

WHEN IS RELATIONSHIP PROPERTY VALUED FOLLOWING SEPARATION?

The date upon which relationship property is valued for division of asset purposes varies depending on whether the parties or the court decide the division of assets. The Property (Relationships) Act 1976 ('the Act') applies to de-facto relationships, civil unions and marriages. The Act provides rules for the division of property for relationships of over three years in duration.

Where the parties agree, they can document their agreement in a Separation and Relationship Property Agreement, and include the values as at the date of separation.

Where agreement cannot be reached, application can be made to the Family Court, where the value of relationship property is determined at the date of hearing, unless the Court exercises the overriding discretion it has to depart from a hearing date valuation.

Be aware of the impact timing can have when disputing the split of relationship property assets following separation. For some people, a quick resolution at the earlier asset value may be a better result than getting a greater share when asset values have fallen.

DOG TALES

We are thrilled to announce that Daniel and Camille are expecting their first child, a boy, to be born 7 March 2012. We wish Daniel and Camille our warmest congratulations.

Not to be outdone, Brigid and Andrew have adopted Jake, a 6 year old boy. We will need to hold an office Santa party.

Office function. The directors staff and partners met for the annual office party, which was held at Westbrooke. Contrary to previous years the day turned out fine, if a bit windy. The outdoor chess set proved very popular and Kevin McMenamin was the acknowledged Grand Master.

Pearl, Andre and family are holidaying at Pukehina from Boxing Day to early January. Andre has his bags packed already.

Pearl and Glenys have booked a bicycle ride on the West Coast over Auckland Anniversary weekend following their successful negotiation of the Otago Rail Trail earlier this year.

Tony will be opening the office with skeleton staff from 4 January 2012. He and Pamela plan to visit Southern France and Spain in April next year.

Congratulations to Denise on the birth of her second grandchild, a little girl named Baylee.

We welcome Kristina Kimber to our staff. Kristina is Pearl's new Legal Executive.

If you have any questions about the newsletter items please contact us, we are here to help:

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