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MORTLOCK MCCORMACK LAW CLIENT NEWSLETTER ISSUE 18 SEPTEMBER 2017

EDITORIAL

With the cold winter months now mostly behind us and warmer weather on the way, we hope this edition of MML News finds you in good spirits.

There have been a number of exciting developments for the firm and the firm's clients this year. The city centre is definitely getting busier as more businesses move back in to town, and it is great to see the buildings filling up with new tenants.

We wish to congratulate Sue McCormack on her recent appointment to the Board of KiwiRail. Sue has held several directorships, and is currently also the Pro-Chancellor of the University of Canterbury.

We hope you enjoy this newsletter, and we wish you all the best for the next few months in the busy lead up to Christmas.

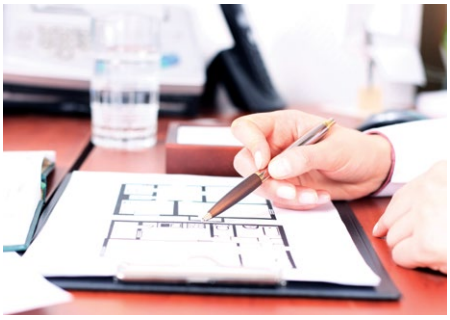
Sarah Manning
Partner

INSIDE THIS ISSUE

Chris Egden

Purchasing "Off the Plans"

Following the Canterbury earthquakes, Christchurch has seen a number of new residential developments, many of which are sold prior to construction or "off the plans".



Developments can range from stand-alone dwellings to multi-level residential apartment style (unit title) developments, with Body Corporates established under the Unit Titles Act 2010.

Purchasing "off the plans" can be an attractive option for purchasers as they not only secure the property early, but the purchase price is often favourable. For the developer, its development finance is often dependant on securing a number of pre-sales.

There are a number of considerations purchasers of "off the plans" properties need to bear in mind. These include the following:

- Purchasers need to carefully check that the plans and specifications correctly represent what they are intending to purchase. Construction of the building has not been completed and it can therefore not be inspected. Dimensions, floor areas, chattels, construction materials and colours all need to be understood. For unit title properties, these matters could include whether carparks or storage units are included, and the locations of these.
- What rights does the developer have to alter any part of the plans and specifications, including any change to the layout or floor area and/or materials used? While some degree of flexibility is required, the purchaser needs to understand the extent of these rights.
- Agreements should have a conditional period whereby purchasers have the opportunity to approve matters such as title, LIM, finance, insurance and any other matters considered relevant. Purchasers should engage with their lender as soon as possible in the process.
- The deposit should be held by a stakeholder and only released to the developer once the agreement is unconditional and title and code compliance have issued and/or practical completion is achieved.
- Provision should be made for completion of the development by a specified date. Purchasers should ensure that they have the option of cancelling the agreement and having their deposit (including any interest earned) refunded if this deadline is not met. Note the developer's lender may have requirements that impact on what date the developer is able to agree to.
- Provision should be made for a "defects period" whereby the developer agrees to remedy any defects within a specified period from settlement. These should be consistent with any relevant legislative provisions relevant to a commercial on-seller.
- Construction warranties and guarantees should be transferred to the purchaser (or Body Corporate in cases of unit title developments) where possible.
- For unit title developments, there are a number of other considerations, including the terms of the Body Corporate Rules and the extent of ongoing costs such as Body Corporate levies. Levies are determined annually and ordinarily include insurance which the Body Corporate must hold. These can be significant, particularly multi-level apartment buildings which often contain lifts and other infrastructure requiring regular maintenance. Local authority rates are likely to be separate from levies.

This article is intended to be general in nature only. We strongly suggest that you seek legal advice prior to signing an agreement to purchase a property "off the plans", as our input into the terms of the agreement can have a significant impact on your obligations and rights as a Purchaser.

If you have questions or think we can assist, contact Associate Chris Egden – DDI 03 343 8584 / chris@mmlaw.co.nz or Partner Sarah Manning – DDI 03 343 8456 / sarahm@mmlaw.co.nz today.

MML PEOPLE

WELCOMES

Trust Administrator, Jessica McIntyre has returned to Mortlock McCormack Law after a brief stint travelling and gaining further trust administration experience. Welcome back Jess!

PA/Legal Secretary, Elaine Fourie – Partners Kent Yeoman and Sarah Manning as well as Associate Chris Egden welcome Elaine who has worked in law in Christchurch for the past 4 years, and prior to that for 8 years with the Department of Justice in her homeland of South Africa.

Receptionist, Leah Smith comes to us from a beauty and retail background. Our friendly new receptionist is well travelled, appreciates good food and enjoys helping her parents on their Swannanoa farm, usually milking cows!

CONGRATULATIONS

Partner, Sue McCormack on her May 2017 appointment to the Board of KiwiRail. Sue specialises in corporate and commercial law. Sue is the Pro-Chancellor of the University of Canterbury, and has previously been a director of the Lyttelton Port Company Limited, the New Zealand Symphony Orchestra and the Public Trust.

PA/Legal Executive, Bianca Nuku on her recent engagement to partner Jamie.

Sarah Wenborn on her recent appointment as Office Manager.

Susan Lyall on her recent appointment as Senior Associate.

Michael O'Flaherty on his recent appointment as Senior Solicitor.

Legal Executive, Stacey Taylor (nee Hogg) on her marriage to Jimmy in late May 2017 and her recent appointment to Legal Executive.

FAREWELLS

General Manager, Shayne Te Aika departed recently to take the position of General Manager with Southern Eye Specialists.

Trust Supervisor, Kerri Newble departed to pursue the new and exciting challenge of Legal Recruitment.

Receptionist, Ellana Wenborn departed MML after 8 years as our receptionist to head up to Auckland.

A little rain won't keep back the smiles on a happy occasion – Nicky Furness (Legal Executive), Stacey Taylor (Legal Executive), Tony Herring (Partner) and Tania Cochrane (Legal Executive) pictured here on the wedding day of Stacey and Jimmy Taylor.

Michael O'Flaherty

The 90-Day Trial Period – for Employers

As one of Mortlock McCormack's employment law specialists, I often receive phone calls from employers requesting advice on the process for dismissal of an employee.

This conversation will frequently involve discussion of the various ways an employment relationship can be ended by an employer, including dismissal for performance reasons, an internal restructure of the business, or dismissal for serious misconduct. In order for an employer to dismiss an employee the employer must have substantive justification for doing so, and the process leading to that decision must be fair.

Occasionally an employer will bemoan how difficult it can be to dismiss an employee, noting that an employee has "all the rights", whereas the employer has none. To an extent these employers are right and dismissing an employee can sometimes be a lengthy process. This is because the employee is the vulnerable party in the employment relationship and is recognised as such under the Employment Relations Act 2000. However, there is one area of the Act that recognises that an employer must be free to run its business how it sees fit; "the 90 day trial period". A trial period can be used in any industry for a position at any level. During that trial period an employee may be dismissed and the employer does not need to provide any reason for doing so.

A trial period is not automatic in every employment relationship. There are certain criteria for a trial period to meet in order for it to be relied upon, including form and content of the provision, and the provision being agreed to prior to work commencing.

A trial period provision will be valid if the provision includes the following:

- That the trial period will be from the commencement of the employee's employment and that the employee will be on a trial for a specific period of no more than 90 calendar days (but the trial period can be less).
- The exact time of the trial period must be stated. The most common timeframe is 90 calendar days, but an employer may choose to have less days if there is reason to do so.
- That at any time during the trial period the employer may dismiss the employee and that if the employer does so the employee cannot bring a personal grievance or any other legal proceedings about their dismissal.

An employment agreement should also include a notice period for any dismissal under the trial period provision.

In order for a trial period to be valid it must be agreed to in the employment agreement prior to work commencing. One of the issues that frequently arises for employers will be where a trial period provision is included in the employment agreement, but that employment agreement is not signed prior to the employee commencing work. It is fundamental that employers have the employee sign their employment agreement prior to starting work. This does not mean handing the employee an employment agreement the morning they start and asking them to sign it before commencing their shift. Prior to commencement an employee must be advised that they are entitled to obtain independent legal advice on the employment agreement and granted a reasonable opportunity to do so. If they raise any issues then an employer must give consideration to what has been raised. An employer must also ensure that the employment agreement has been signed.

An employee on a valid trial period attracts the same rights and responsibilities as any other employee including all minimum entitlements, the only difference being that they may not bring a personal grievance for unjustified dismissal. They may still bring a personal grievance for an unjustified disadvantage in the workplace, an example being if they consider that they are being discriminated against in any way by the employer. Therefore it is important for employers to remember to treat employees subject to a trial period the same as other employees.

If the employer decides at any time during the trial period to dismiss the employee then they must provide notice to that affected employee. This notice must be consistent with the notice period provided in the employment agreement and must be provided within the trial period. It does not matter if the notice period expires after the trial period, the dismissal will still be valid. An employer does not need to give reasons for an employee's dismissal during the trial period or any opportunity for an employee to comment on that decision.

If you wish to discuss trial periods and/or our standard wording to include in an employment agreement, contact Senior Solicitor Michael O'Flaherty – DDI 03 343 8587, michael@mmlaw.co.nz or Partner Tony Herring – DDI 03 343 8386, tony@mmlaw.co.nz

Natasha McClure

Buy-Sell Agreements Should Be Part of Your Business Plan

Problem

Imagine your business partner's spouse or children becoming your next business partner. This is the likely case if your business partner dies and leaves their interest in the business to their beneficiaries. It is also likely the beneficiaries will have little or no expertise or experience with the business.

What happens if your business partner is diagnosed with a serious long term illness or has a life changing accident leaving the remaining owners with the task of funding a significant buyout? The business may need to explore different avenues of obtaining finance such as taking out a loan, using cash flow from the business, or by selling off business assets.

In both situations the remaining owners want to ensure the business can continue trading and remain profitable, but also have continuity of ownership, without the involvement of third parties.

A Solution

Hopefully your business will have "Key Person Cover" insurance (or something similar) where the insurer will provide funds to the business to assist with the cost of replacing the outgoing owner. The business may, however, suffer a loss in turnover and incur additional expenses for training and employment of new staff.

A Better Solution

A Buy-Sell Agreement is a binding agreement between owners and shareholders of a business. It sets out what is to happen with the shares of a shareholder who dies, becomes disabled, or is diagnosed with a serious long-term illness. In these situations there is an obligation on the outgoing shareholder to sell their shares to the remaining shareholder(s) on agreed terms and conditions. The source of funding the purchase of shares is an insurance policy.

Each shareholder can own the insurance policies on the lives of the other shareholder(s) so that the outgoing shareholder or their estate receives fair value for the shares which are transferred to the remaining shareholder(s).

Alternatively, we recommend a stakeholder to own the insurance policies on the lives of all shareholders. The stakeholder is a third party and is obligated to make a claim against the insurer when an event occurs. If the claim is accepted then the insurance proceeds are paid to the stakeholder. In the case of disability or illness, the stakeholder may hold the funds during a 'wait and see' period and the remaining shareholder(s) can determine if the affected shareholder is able to perform their usual duties for the business. The agreement takes into account the possibility that the outgoing shareholder may recover from their disability or illness and therefore may not have to sell their shares.

An advantage of having a stakeholder is that it ensures that the terms of the agreement will be adhered to. If the insurance proceeds are paid to the shareholder(s), there is a risk the money may not be used to purchase the shares for one reason or another. If the money is paid to a stakeholder they are accountable to all the shareholders and must deal with the proceeds as set out in the agreement. If the stakeholder is a professional such as a solicitor, they are also bound by rules of professional conduct.

We recommend having a Buy-Sell Agreement and a Shareholders Agreement. Briefly, a Shareholders Agreement contains terms and conditions which govern the relationship between shareholders. A Buy-Sell Agreement together with a Shareholders Agreement is a good "belts and braces" measure for the purchase of shares from an outgoing shareholder. For example, when determining the purchase price, the Shareholders Agreement will have a procedure to determine this. Likewise, if there is a shortfall in the insurance proceeds required to meet payment in full for the shares, the general exit provisions in the Shareholders Agreement would apply, such as the Right of First Refusal and sale to third parties. Both agreements are valuable planning documents every business should have.

Buy-Sell Agreements should be reviewed annually to ensure the cover afforded by the policies is sufficient.

We are more than happy to assist you with your business planning. If you would like further information please give us a call, Solicitor Natasha McClure – DDI 03 343 8451 / natasha@mmlaw.co.nz or Partner Hamish Douch – DDI 03 343 8387 / hamish@mmlaw.co.nz.

Billy Clemens

Specialist Courts and Tribunals

New Zealand has a variety of specialist Courts and Tribunals. These Government services provide low cost, easily accessible and informal venues for dispute resolution. Whether you're experiencing a property dispute, contractual difficulty, or an employment issue, the following specialist Courts and Tribunals are a helpful option to keep in mind.

Disputes Tribunal

The Disputes Tribunal operates as a general small claims Court and can consider everything from car accidents to business deals or disagreements about goods and services. The claim limit is $15,000, or $20,000 if both parties agree to it. It costs between $45 and $180 to file a claim. The Tribunal process is deliberately informal. Cases are heard by referees who are respected members of the community but do not necessarily have a legal background. The referee is not obliged to follow the exact letter of the law and can make a decision based on what they consider to be fair and just.

It is important to be well prepared for a Tribunal hearing which will generally last an hour. You cannot be represented by a lawyer at a hearing, but you can bring witnesses and have legal submissions prepared in advance.

Tenancy Tribunal

The Tenancy Tribunal is the most commonly used Tribunal in New Zealand with over 19,000 applications lodged in 2016. The Tribunal deals with disputes relating to residential tenancies and unit titles. The majority of applications are by landlords attempting to recover overdue rent payments. Before attending the Tribunal you can attempt to resolve the dispute at mediation which is run by the Ministry of Business, Innovation and Employment. The application fee is $20.44 and can be completed online. Lawyers can only attend hearings in special cases, including claims over $6,000, if the other party agrees, or in particularly complicated cases. Cases are heard by Tenancy Adjudicators who usually have a legal background. As with the Disputes Tribunal, adjudicators are not bound by legal technicalities. Tenancy claims for more than $50,000 must go to the District Court.

Employment Relations Authority

The Employment Relations Authority (ERA) is the body charged with resolving employment relations problems. This includes cases of unjustified dismissal and disadvantage to an employee. To start proceedings, employees must lodge a personal grievance with the ERA and their employer. Like the Tenancy Tribunal, parties can then attempt to resolve the issue at an official mediation. Should this fail the employee can apply to the ERA for a hearing (known as an investigation meeting). There is an initial fee of $71. The first day of the investigation meeting is free, with any additional time charged at $154 per half day. The process is designed to be simple and unintimidating. An Authority member conducts the meeting, and there is an opportunity for all parties to make statements and ask questions. It is advisable to engage a lawyer to assist with the ERA process.

Real Estate Agents Disciplinary Tribunal

If you are dissatisfied with the conduct of a real estate agent, whom you believe is falling short of the standard a reasonable member of the public should expect, you can take a complaint to the Real Estate Agents Authority Complaints Assessment Committee. Real estate agents are obliged by their code of conduct to act professionally, including disclosing property defects, advertising according to vendor instructions, and acting in the best interests of their clients. Once a complaint is made to the Committee, they will decide whether to take no further action, make a finding of unsatisfactory conduct, or refer misconduct to the Disciplinary Tribunal.

Mortlock McCormack Law has experience in assisting clients to prepare for Tribunal hearings, with positive results. We can also assist with drafting any supporting documents, ensure relevant issues are raised at investigatory meetings attended with clients, and in making convincing legal submissions.

If you are interested in hearing more about any of the above, please contact us today: Partner Sue McCormack – DDI 03 343 8458, sue@mmlaw.co.nz or Law Clerk Billy Clemens – DDI 03 343 8583, billy@mmlaw.co.nz

MML PEOPLE

Office Manager, Sarah Wenborn

On 1 April 2017 newly appointed Office Manager Sarah Wenborn (nee Carr) celebrated 15 years with the firm. Sarah started as a "Launchpad" Student with Sue McCormack straight from high school. Sarah was the Office Junior as well as the Receptionist and a Legal Secretary. When McCormack Law and Simon Mortlock Partners merged in 2006, Sarah became a full time family/litigation secretary. Whilst working full time, Sarah also studied part time with the support of the MML Partners to obtain her Diploma in Human Resource Management.

Outside of work Sarah has played indoor and outdoor netball to a high level, assists in the organisation of her beloved local club Kereru Netball, managed the recent build of her home in Prebbleton with husband Matthew and has recently started to learn the drums (due to a netball injury taking her out for the remainder of the season - thankfully her neighbours aren't close by!).

We congratulate Sarah on her promotion to Office Manager.

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