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MORTLOCK MCCORMACK LAW CLIENT NEWSLETTER ISSUE 17 APRIL 2017

EDITORIAL

It has been a while since we captured your attention and it's autumn 2017 already! The landscape here in the CBD seems to change and grow every day and we are excited about being back in the CBD community.

In this edition, we bring you a number of key articles we hope you will find to be of interest and value. We would love to hear your feedback about our newsletter. Enjoy.

Shayne Te Aika
General Manager

INSIDE THIS ISSUE

Andrew Logan and Billy Clemens

A New Trusts Act

New Zealanders have a great affinity for trusts, with use rates far exceeding that of comparable countries such as Australia and the United Kingdom. Trust law is currently governed by the Trustee Act 1956, which is beginning to show its age. The language used is antiquated, and the Act can be difficult for settlors, trustees and beneficiaries to navigate.

Following a report from the Law Commission in 2013 recommending reform, the Government appointed a reference group of seven experienced trust lawyers and academics to review the Commission's proposals. MML partner, Andrew Logan, is one of the panel members, and Andrew has directed much of his time and energy into the project. A draft exposure bill has now been prepared, and is expected to have its first reading in Parliament this year. While the new Trusts Bill does not contain any substantial reform of trust law principles, it will clarify the law and simplify trust processes. This will be a relief to many.

Some of the more notable changes include:

- **Increased accountability.** The Trustee Act currently allows trusts to operate in a reasonably secretive fashion. The Trusts Bill would introduce a presumption that a trustee must make basic trust information available to any likely beneficiaries under a trust. This includes details such as the names of beneficiaries, contact details of trustees, and details of appointment and removal of trustees. Likely beneficiaries, such as children under a discretionary family trust, will be able to request a copy of trust information, or the trust terms.
- **Clarifying trustee duties and powers.** The Bill clarifies the duties of trustees, which are currently spread between the Trustee Act and a number of court decisions. The Bill specifies which duties can be modified or excluded by the terms of the trust. Trustees' powers and indemnities are also clearly set out. Trustees are permitted to manage trust property as if they were the absolute owner, as they see fit. Trustees cannot be indemnified for a breach resulting from dishonesty, wilful misconduct or gross negligence. These changes will help ensure trustees and beneficiaries are aware of their rights and obligations under the law.

- **Maximum duration of trusts.** The maximum life of a private trust will extend from 80 to 125 years. The rule against perpetuities will also be abolished, meaning that after 125 years a trust can be resettled upon agreement by beneficiaries. The perpetuities rule was originally developed to prevent "dead hand control" where wealthy individuals tried to lock up their wealth indefinitely. However, the Law Commission and the Government's expert panel were convinced that it was reasonable that a private trust should be able to continue unimpeded for two or three generations. They also agreed that increased life expectancy made an 80 year limit impractical.

All in all, the changes should help to simplify and clarify trust law in New Zealand, and will bring the law up to date – with the aim of making trust administration and management easier and clearly outlining the roles of both trustees and beneficiaries.

If you have any question or if you think we can be of assistance, please call Andrew Logan on DDI: 03 3438452.

MML PEOPLE

CONGRATULATIONS

Legal Executive, Tania Cochrane (and Matt) on the birth of their second child Madelyn. Tania will return to the firm for five weeks in June 2017 and then return on a regular basis in September 2017.

Solicitor, Grace Hawthorn (formerly our law clerk), on her admission to the bar in October 2016.

Solicitor, Sarah Fitzgerald on her marriage to Todd in late January 2017.

WELCOMES

Partner, Sarah Manning joined the firm on 7 February. See Sarah's bio on page 4.

PA/LE, Morgan Gray re-joined the firm after a 4 year absence looking after her two young children. Morgan is the lead PA for Tony Herring and his team.

PA, Claire Smith comes back to us as a regular part time staff member in our support team.

Law Clerk, Billy Clemens joined the firm in December 2016. Billy is profiled in this newsletter and has also co-written an article on the new Trusts Act.

Office junior, Kate Boreham started in December 2016. Kate previously worked in a child care centre, and lives with her family in Sumner. Kate plays tennis and likes to spend time with her family and friends.

FAREWELLS

Partner, Prue Robertson retired from the partnership in September 2016. The Partnership and staff all wish Prue the very best for the future.

Solicitor, Netta Egoz departed the firm and the legal profession (for now) in late February and is currently in Japan working for a new and exciting start up venture. We wish Netta all the very best in her new role

PA, Michaela McGrath and her partner Hugo headed off to South Africa and Europe in December for a long term adventure. Have fun and keep in touch.

Office Junior, Bella Stone headed to the City of Sails in November.

STAFF PROFILE

Law Clerk, Billy Clemens

Having joined MML through the Summer Clerking programme, Billy Clemens has been appointed as a law clerk. He received his LLB from the University of Canterbury, and spent a semester studying on exchange at Nottingham University. Billy enjoyed negotiating and debating competitively throughout his studies, as well as volunteering for a number of community groups. Upon his admittance to the bar in July, he will begin working as a graduate solicitor at MML. His legal interests include employment and property law. In his free time Billy enjoys cycling, swimming, and wine tasting.

Solicitor, Shaanah Valdez

Construction Disputes & New Retentions Regime Coming into Force

Construction disputes are often complex, time consuming and expensive to resolve. This article outlines how you can avoid common pitfalls, including a basic outline of useful features of the Construction Contracts Act 2002 (the Act).

Watertight Terms and Conditions

Watertight terms and conditions will ensure you are well prepared for any dispute. Attach them to every quote or estimate you provide. Make clear to your clients and customers that accepting a quote or estimate will constitute acceptance of those terms. Care is needed with drafting your terms but some of the essential things to provide for are:

- When payment will be due.
- A set period, being less than the default 20 working days, for a client or customer to respond to any payment claim issued by your business.
- That any payment due to your business must be made without deductions and without setting off anything which a client or customer may claim you are liable for
- Interest to be charged at a bank default interest rate on payments not made on the due date.
- Legal fees and other fees incurred in enforcing your rights under the contract to be payable in full by your client or customer (the actual costs as incurred between solicitor and client, rather than the lower amount of "scale" costs usually awarded by a Court).

Payment claims and schedules

The Act allows you to issue payment claims for construction work you carry out. We recommend issuing all of your invoices as payment claims. You should issue a payment claim at the end of the relevant period in the contract and generally in accordance with the contract terms, and it is essential that you comply strictly with the Act's requirements for a valid payment claim (see section 20 of the Act for a list of these). You also need to ensure that you comply with any contractual terms concerning service.

Once you have issued a payment claim, the person who is required under the contract to make payment (the payer) must respond to your payment claim with a payment schedule if they wish to dispute any aspect of the claim. They must do this within 20 working days or any shorter time set by the contract. If the payer fails to do this, they are legally required to pay you on the due date for payment set in your payment claim, and the amount payable becomes a debt.

If your business is the payer, you should take a payment claim seriously and respond to it strictly within the contract timeframe. You need to be very careful that your payment schedule complies with the requirements of section 21 of the Act, in order to make it valid.

Dealing with disputes

If you issue a payment claim and it is met by a valid payment schedule from the payer, the question becomes how to resolve the dispute and obtain payment. The Act provides for a special set of adjudication procedures for construction disputes, which are faster and often cheaper than going to Court. In most cases the other party in a construction adjudication process will have to provide the adjudicator with an initial response to your claim within 5 working days of receiving it.

Retentions

On 31 March 2017, a new regime came into force for the management of retentions. If a construction contract provides for any retention over a prescribed amount, the payer will be required to hold enough cash to pay the retained amount (or another asset easily converted into cash) on trust for the contractor. The money can't be used for anything other than paying the contractor or fixing any defect in the contractor's work (specifically, it can't be used for working capital) and best of all, it won't be available to any creditor other than the contractor who did the construction work.

Having to put retention money out of reach may provide a payer with an incentive to avoid raising needless disputes about work. The retentions regime may also provide some helpful protection for contractors who use retentions if a head contractor runs into financial trouble.

Final comments

There is no "one size fits all" approach to resolving construction disputes, but there are plenty of ways in which businesses can help themselves. We can advise you on the best way to proceed and it is especially important to get in touch early if you have any concerns about the other party's solvency.

Solicitor Sarah Fitzgerald

As Is, Where Is – What Is?

The 'as is, where is' phenomenon has swept through the Christchurch property market since the earthquakes. With no clear definition or practices established prior to its introduction, lawyers and agents had to work together with clients to establish what was acceptable and have since watched the concept evolve. 'As is, where is' remains a popular and convenient option for vendors to move on with their lives post-insurance battles and provides potential for purchasers to get a great deal.

Whilst the potential advantages for purchasers may be considerable, these must be weighted against some serious risks in taking on such a property. A basic definition of the concept is that 'as is where is' transactions remove the standard warranties and assurances usually made by a vendor and pass majority of the risk to purchasers. In other words, 'buyer beware'.

Purchasers need to be aware they are buying a property that could have been determined as a write off by an insurer or at least has significant damage. The specific details as to the level of damage the purchaser is inheriting can be difficult to determine to the eye and hence the additional risk to purchasers. The only way to attempt to mitigate such risk is by obtaining professional advice. Purchasers need to carefully consider and take advice on repair costs, liveability, safety, saleability and other factors to ensure they are not simply taking on someone else's headache.

First and foremost, the Agreement for Sale and Purchase needs to be carefully drafted. An 'as is' agreement should have standard clauses removed and additional further terms added. The most common issue we encounter is badly drafted agreements that do not protect our clients' interests. In general, agents are often trying to achieve a balance in the way in which they draft agreements. This can be effective in some situations however an 'as is where is' Agreement for Sale and Purchase needs be varied to encapsulate this unique situation.

In drafting agreements for clients we look to achieve certainty for both parties. This includes written confirmation that the vendor's insurer has no demolition or salvage rights, no EQC or insurance claims will be assigned and the clauses we draft will cover anything else specific to the particular property. Purchasers would be less than impressed to purchase a house and have an insurer arrive later to remove the carpet, heat pump or anything else they see fit. By allowing us to check the agreement prior to signing we can ensure this is covered.

Most 'as is' properties will be uninsured at the time of sale and as the defects will not have been remedied, it is unlikely insurance will be available to the purchaser. There may be overseas insurers that might offer limited cover

but this will come at a cost. If the purchaser intends to remediate the property, it is crucial to obtain construction insurance before even lifting a hammer. Standard home insurance cover will be refused at the completion of the works if construction works insurance was not in place at the very start.

If a purchaser intends to rent the property in the condition it is in, careful consideration will need to be made as to the safety of the property and ensuring all tenants are aware the property is uninsured.

It is not all purchaser risk, there is some risk to vendors, especially in the time between signing the agreement and settlement. There is no argument that the parties agree that the property is damaged, however agents often try to include clauses to cover the situation where further damage is sustained between signing the agreement and settlement. This works in a standard transaction as insurance will cover such damage, however with no insurance in 'as is where is' transactions this would be an incredibly difficult to enforce. Trying to quantify what is new damage or defining what makes the property 'un-tenantable' would be a lengthy and costly legal battle. Complexities such as this are exactly what 'as is where is' sales set out to avoid. Our recommendation to vendors is to remove such clauses and ensure you settle your sales as soon as you can. Long settlements should be avoided.

Until you have insurance in place finance options are also limited. We work closely with mortgage brokers who specialise in the area and understand some lenders are prepared to lend between 50 to 80 percent of land value determined on a case by case basis. But in general, purchasers need their own equity to purchase such a property as full finance will not be available until the work is completed and signed off by the Council, and full insurance obtained.

The costs of remediating the property should also be given serious consideration. A vendor that does not provide a copy of their reports and information is at risk of losing purchasers as the cost of obtaining independent reports can be significant. We encourage all vendors to provide full disclosure to purchasers including all EQC, insurance, building, geotechnical and/or engineering reports available. Purchasers should consider all the information and make an informed decision. If reports are either not produced or not sufficient, purchasers will need to obtain their own reports.

The risks with an 'as is where is' transaction are compounded when dealing with cross lease or complex titles. These properties are unique in their ownership structure with additional onuses on owners. A cross lease will often include a clause that requires the owner of the property to spend any insurance money received on remediating the property. In keeping the insurance settlement funds and selling the property there is effectively a breach of the cross lease that the purchaser takes on. The co-owners could therefore call on the purchaser to attend to the repairs at their cost. The only way to clarify this is to review the title. We suggest anyone dealing with a cross lease property seeks legal advice before signing an 'as is' agreement.

We are more than happy to help clients with every step of the process to ensure they know the risks and make informed decisions. We also work closely with agents, mortgage brokers and insurance brokers who can provide assistance and advice in their respective areas.

If you are interested in attending a free seminar on 'as is where is' properties including presentations from specialists in the areas of finance, insurance, engineering and legal please call or email Sarah Fitzgerald for more information (03 343 8388, sarahf@mmlaw.co.nz).

Associate Susan Lyall

What is an EPA?

An EPA is a legal document which appoints someone who can take care of your financial or personal matters if you cannot. Your Attorney is required to act in your best interests and must involve you when making decisions for you.

There are two types of EPA -

1. A Property EPA covers your assets including the management of your bank accounts, payment of your bills, and buying and selling assets. A Property EPA can come into effect either immediately or when you lose capacity to look after your own property affairs. You can appoint more than one person as your Property Attorney. The appointed Attorneys can either be required to make decisions together or on their own.
2. A Personal Care and Welfare EPA covers your medical and personal matters including healthcare and accommodation decisions. A Personal Care and Welfare Attorney appointment only comes into effect when you have lost the ability to make decisions about your own health and personal issues. Only one Personal Care and Welfare Attorney can be appointed, but you are able to appoint another person to take over that role if the first person you appoint is unable to act.

We recommend all adults have both types of EPA in place.

Both types of EPA place conditions on your Attorney. Your Attorney must consult you and keep your best interests at the fore of any decision made for you. If you are appointing more than one Property Attorney, your Attorneys will have to consult each other as well as you when making decisions. In addition, your Attorney can be required to consult others when making decisions for you. For example they can be required to consult and report to other family members or your financial advisor.

The decision about your capacity is made by a medical practitioner, not your Attorney.

Why have an EPA?

Having EPA's in place means you will have peace of mind that people you trust will make decisions when you are not able to. It will save you and your family time and money if no EPA is in place and you lose capacity due to illness or an accident. In those circumstances an application would need to be made to the Family Court for an Attorney to be appointed, causing delay and stress.

What changes were made on 16 March?

The recent review of the PPPR Act was aimed at making the process of putting an EPA in place simpler. Plain English forms have been developed. Plain English explanations of the effects and implications of putting an EPA in place have also been adopted. Everyone putting an EPA in place must still be properly advised on the effects of the appointment and the donor's signature of the forms must be witnessed by a qualified person, such as a solicitor or a legal executive, who has explained the effects of the appointment to the donor.

Things to note:

1. If you have an EPA in place, that appointment will continue.
2. Because of the recent changes, now is a good time to review any existing EPA's to ensure that they reflect your current wishes.
3. Your Attorney must be over 20, not bankrupt and capable themselves.
4. You are able to change your EPA at any time but must give your Attorney notice of this in writing. This can be done by giving your former Attorney a copy of your new EPA appointing someone different.
5. As the power you are giving is significant, you must understand what you are doing when you sign the EPA. We will explain that to you and ensure that you understand before the documents are signed.
6. If you have been appointed as someone's Attorney, it is important that you understand your obligations. If there has been a change in the donor's capacity, you may need to seek a medical certificate. There is now a standard medical certificate that can be completed by the donor's doctor.

If you would like further information on the changes or EPA's in general, please feel free to contact me directly (03, 3438 454 susan@mmlaw.co.nz).

Changes to Enduring Powers of Attorney – March 2017

Amendments to the Protection of Personal and Property Rights Act (PPPR Act) came into effect on 16 March 2017. The changes are aimed at simplifying and demystifying Enduring Powers of Attorney (EPA). The amended regulations include new plain language EPA forms and a plain language explanation of the effects and implications of putting an EPA in place.

MML PEOPLE

Partner, Sarah Manning

Sarah joined Mortlock McCormack Law as a partner in early February 2017, coming from a partner role in another Christchurch law firm. Prior to that appointment Sarah worked as a Senior Associate at Simpson Grierson in Wellington. Before that, Sarah was a Senior Associate in a large London law firm (Field Fister Waterhouse LLP).

As well as her New Zealand law qualifications, Sarah is qualified as a solicitor in England and Wales, and she specialises in property law.

Sarah is on two committees of the Property Law Council, (the Advocacy Policy & Strategy Committee, and the Women in Property Committee)

Sarah is loving her new role at Mortlock McCormack Law and very much enjoying meeting many of the firm's amazing clients.

In her spare time Sarah enjoys riding horses, running and farming on the small farm in Clarkville she shares with her fiancée Clinton. In the community, Sarah is also a member of the Canterbury A & P Association Horse Committee.

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