LAWLINES

From JOHN DEAN LAW OFFICE
Telephone 472-9369
PO Box 10107, Wellington
7th Floor, 114 Lambton Quay
E-mail jad@jdlo.co.nz
www.jdlo.co.nz

Merry Christmas
& Prosperity for 2010

Inside this edition:

Our offices will be closed from lunch time, Wednesday, 23 December 2009 until Monday, 11 January 2010.

If you require urgent assistance with any matter during the holiday period please leave a message with our answer service and we will contact you as soon as possible.

The New REINZ Plain English Sale and Purchase Agreement

The Real Estate Institute of New Zealand's ('REINZ') new Agreement for Sale and Purchase ("the new agreement") was introduced in July this year in an effort by REINZ to create its own form of agreement that uses clear language and appeals to the lay person. Before the introduction of the new agreement, it was standard practice to use the Auckland District Law Society ('ADLS')/REINZ Agreement for Sale and Purchase ("the standard form agreement").

The standard form agreement has been in use for over 20 years, is tried and tested, and very familiar to both real estate agents and conveyancing professionals. Consequently, there has been extensive discussion and critique of the new agreement.

Commentators have pointed out that:

- Much of the language in the new agreement is subjective, resulting in the potential for differences in interpretation, leading to a risk of uncertainty between the vendor and purchaser.
- Some terms are not properly defined, which may lead to differences in interpretation.
- The new agreement identifies too many terms as being "essential terms" whereas some are procedural rather than essential in nature. If a party refuses to comply with an essential term the other party may elect to refuse to complete settlement.
- Disputes must be referred for mediation. However, the new agreement does not set out the mediation process to be followed.

A significant difference from the standard form agreement is the way in which the standard conditions (i.e. title approval, LIM, builder's report and tenancy) in the new agreement are dealt with. The party approving the condition ("the approver" which normally will be the purchaser) must not unreasonably withhold approval of a condition. If the approvers withhold their approval they must give notice to the other party that the condition is not satisfied, the reasons why it is not satisfied and what is required to rectify the problems. The other party then has five working days to either agree to rectify the problem or they may elect to cancel the agreement. During this five working day period the approver cannot cancel the agreement.

Some positive changes that the new agreement has introduced include the following:

- Layout - the font size is larger, the agreement is well spaced out and sentences are limited to 26 words.
- A new approach to GST, which requires knowledge of whether the seller is on a payments basis or invoice basis.
- Warnings throughout the new agreement which are useful for readers to alert their attention to a possible problem.
- The addition of a building report condition to the standard conditions to alert purchasers that it may be wise to obtain a report.

Overall, most commentators believe the new agreement will lead to uncertainty for both the vendor and purchaser, an increased number of disputes and a resulting increase in legal costs. It is, therefore. strongly recommended that both vendors and purchasers seek legal advice before signing any new agreement for sale and purchase.

The Partial Defence of Provocation

The debate over whether the partial defence of provocation should be abolished has gained significant attention since the Clayton Weatherston trial. Many people believe that the defence should no longer be available.

The partial defence of provocation is predominantly set out in section 169 of the Crimes Act 1961 and effectively reduces a charge of murder to manslaughter. In order for an accused to successfully argue provocation he/she must prove:

- that the provocation in the circumstances of the case was sufficient to deprive a reasonable person of the power of self-control, and
- that the provocation did in fact deprive the offender of the power of self-control and thereby induced the offender to commit the act of homicide.

Ultimately provocation is a high test to satisfy and although it is often raised, few offenders are successful. Critics of the partial defence argue that it is an archaic and outdated notion about violence. They claim the defence effectively rewards a lack of self-control in offenders who intentionally take another person's life. Historically the rationale for the defence of provocation was to avoid a mandatory sentence for murder (originally capital punishment and later life imprisonment) in cases where factors arising from the circumstances of the case may reduce the offender's sentence. However, life imprisonment for murder is no longer mandatory by virtue of the Sentencing Act 2002, which begs the question, is the defence of provocation still necessary?

Many argue that accusations of provocation can be dealt with by a judge during sentencing and have no place in the actual trial which determines guilt or innocence. Once an offender has been convicted, a sentencing hearing is held where the offender is able to present mitigating factors of the offence (such as provocation) to the judge which may reduce the offender's sentence.

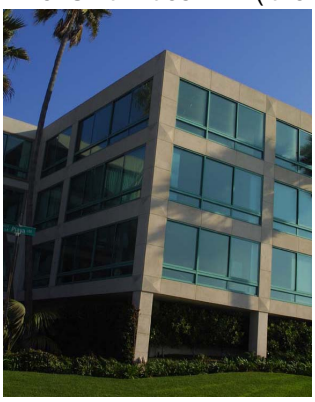
Furthermore, the defence provides the offender with an opportunity to attack and tarnish the victim's character. The resulting experience can be very traumatic for the victim's family and friends.

Not everyone, however, agrees that the defence of provocation should be abolished. Some argue that removing the defence would be playing around with the basic concepts of criminal law.

Parliament has already taken steps to remove the partial defence of provocation from the statute book. The Crimes (Provocation Repeal) Amendment Bill 2009 ('the Bill'), was introduced to Parliament on 4 August 2009, had its first reading on 18 August 2009 and was passed on 26

November 2009. The Bill will effectively repeal sections 169 and 170 of the Crimes Act and therefore abolish the defence of provocation in New Zealand.

Unit Titles Law Change Updated



The Unit Titles Bill ('the Bill') was introduced to Parliament on 5 March 2009 and if passed into law will repeal and replace the Unit Titles Act 1972 ('the Act'). The Act governs multi-unit developments such as apartment blocks, townhouses, and office buildings. The Act was not designed to deal with the complex, large scale developments of the present day and the Bill goes a long way to revamp the badly outdated legislation.

One major change to the Act will be the specific disclosure requirements for vendors and developers of unit title properties. Vendors especially will need to be aware of the proposed disclosure requirements as it is mandatory for them to provide disclosure statements to a purchaser on the following occasions:

- before a Sale and Purchase Agreement is signed
- 5 working days before settlement
- at any time before settlement if the purchaser requests.

Vendors need to be aware that if a disclosure statement is not provided to the purchaser within the specified timeframe then the purchaser may be able to defer settlement or even elect to cancel the contract. Vendors will also need to be careful to provide purchasers with accurate information as purchasers will be entitled to rely (in a legal sense) on that information.

Developers will be required to provide the body corporate with disclosure statements dealing with the construction systems of the buildings and their compliance with the Building Act.

Another major change is the move from the need for a unanimous resolution of the members of the body corporate to a 75% majority. The purpose for this change was to prevent voting on important matters from being blocked by one unit owner.

The common property of unit titles will now be owned by the body corporate. Presently common property is owned by the unit owners as tenants in common. It is proposed, however, that unit owners should still have a beneficial interest in the common property.

The body corporate will be required to make a long-term maintenance plan which must include expected maintenance requirements for the following 10 years, an estimate of costs involved with those maintenance works, and the basis for levying the costs from the unit owners.

The Act is very inflexible regarding unit entitlements which determine voting rights and how much unit owners contribute towards body corporate costs. The Bill seeks to address this by separating unit entitlements into two elements:

- ownership interest – which is determined by the value of the unit
- utility interest – which is determined by the extent to which the unit owner uses the shared facilities and services.

Another major change is the way in which disputes under the Act are dealt with. Under the Bill any disputes will be referred in the first instance to mediation and then adjudication through the Tenancy Tribunal. Disputes were previously resolved solely through the courts.

As apartments and townhouses become a preferred style of living in the modern world, having a knowledge of unit owners' rights and obligations under the Act is necessary. After the Bill is passed, all existing unit titles and bodies corporate will have 15 months to bring themselves in line with the provisions of the new Act.

Trustee Duties

The duties of a trustee need not be onerous, but a failure to carry out those duties may, in a worst case scenario, result in a claim against you by a beneficiary who has suffered a loss as a result of your actions or omissions.

For those readers who have consented to act as a trustee for a friend or family member without really understanding what that role entails - the list below, while not exhaustive, sets out some of the most important trustee duties.

The duty of efficient management

- Whether you are an original, substitute or additional trustee you must first become familiar with and abide by the terms and conditions of the trust deed.
- Know the extent of the assets and liabilities of the trust and make sure that these are properly held in the name of the trustees.
- Ensure that the trust is managed and administered properly and that the trustees meet to discuss and agree on issues. Do not be a rubber stamp of the settlor's wishes. Take minutes of these meetings and record all resolutions.

- Make sure that the administration costs of the trust are kept to reasonable levels.

The duty to keep and render accounts to beneficiaries

- Make sure that a clear audit and paper trail is kept of all decisions and transactions. This will involve secure storage of the trust deed, minutes of meetings and resolutions, financial accounts, correspondence and other trust documents.
- If the beneficiaries request information, the trustees have a duty to make certain information available, such as the trust deed, financial statements and investment strategies.

The duty to act personally

- Carry out your trustee duties personally.
- You may instruct an agent to carry out your decisions but you must make your own decisions and not be dictated to by other trustees, the settlors or beneficiaries.
- Trustee resolutions must be unanimous.

The duty of loyalty

- Always act in the best interests of both present and future beneficiaries and be impartial between beneficiaries.
- Avoid conflicts of interest.
- Do not benefit or profit from your position as trustee unless authorised to do so.
- You must always protect the interests of the beneficiaries.

In all things, a trustee's standard of care is measured against that of an ordinary prudent business person managing the affairs of others. Of course, a higher standard is required if the trustee is a professional person such as a lawyer or accountant.

The management of trusts often come under scrutiny and all of the benefits of having a trust may be lost if the trust records and procedures do not meet the required standard. It is, therefore, important to keep a clear audit and paper trail and to bear the above trustee duties in mind. It is also important to insist that you, as a trustee, are kept up to date with all of the trust's affairs.

Snippets

Hand-Held Cell Phone Ban for Vehicle Drivers

From 1 November 2009, motorists are no longer able to text or talk on a hand-held cell phone while driving. This comes from a change in the New Zealand Road Rules.

The change will see drivers using hand-held cell phones behind the wheel incurring an $80 fine along with 20 demerit points. This change is seen by many as a welcome relief and a good step towards making New Zealand roads a safer place.

New Zealand will join at least 50 other countries who all have bans or partial bans on the use of hand-held phones by drivers.

However, drivers will still be able to use cell phones if they do so with a hands-free device and two-way radios. There will also be an exemption for 111 emergency calls.

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

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