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CHANGES TO CREDIT LAWS

On 2 April 2012, a draft of the Credit Contracts and Consumer Finance Amendment Bill ('the Bill') was released by the then Consumer Affairs Minister, Hon. Chris Tremain. The Bill seeks to amend the Credit Contracts and Consumer Finance Act 2003 ('the CCCFA') by introducing the new principle of "responsible lending" in an effort to strengthen the legal rights and protection of consumers when they borrow money.

REASON FOR REFORM

An impressive 250 distinguished members of the community, financial and business organisations joined forces during a Financial Summit last August to consider ways of addressing irresponsible lending. Law reforms were considered necessary in a bid to prevent unscrupulous lenders preying on desperate borrowers who are often further disadvantaged as a consequence of borrowing. On 31 October 2011, calls for reform were agreed to by the Cabinet.

THE PRINCIPLE OF RESPONSIBLE LENDING

The principle of responsible lending will create a duty on lenders to take into account the circumstances of their customers and the effect the borrowing will have on their lives. The overall objective of responsible lending is to improve the standard of lending practices within the finance industry.

Proposed key changes to the CCCFA include:

- Making it illegal to lend money to someone whose loan repayments would be likely to result in substantial hardship. The responsibility of assessing whether

hardship would ensue will be left to the discretion of the lender,

- Requiring more timely and complete disclosure of loan terms – lenders will be required to make all of their loan terms and fees readily available on their websites and in their business premises. The change is aimed at allowing borrowers to make informed decisions,
- Extending the 'cooling-off' period for borrowers to cancel their loan from three working days to five working days after signing,
- Better controls to prevent misleading, deceptive or confusing advertising,
- Introducing a new, mandatory Code of Responsible Lending under the CCCFA. This code will set out responsible lending principles,
- Extending the limitation period under the CCCFA on challenging fees as being unreasonable from one year to three years,
- Obligating lenders to properly consider applications by borrowers for hardship relief, and provide reasons for their decisions.

Unreasonable Fees

Section 41 of the CCCFA currently provides that credit and default fees must not be unreasonable. The Bill in its current form would further define the term "credit fees" along with proposing a new test for unreasonableness. Separate tests are proposed for determining what will constitute unreasonable credit fees and default fees.

According to the former Consumer Affairs Minister, the terms of the Bill will result in "the biggest changes to consumer credit law in a decade." It is anticipated that the new laws will come into force by mid-2013.

Defamation

Defamation claims have been a topic of interest lately with high profile figures such as Chris Cairns and Judith Collins taking legal action against attacks made on their reputations. A brief summary of defamation law in New Zealand and the main points that are needed to pursue or defend a defamation claim are set out below.

What is Defamation?

Defamation in New Zealand is governed by the Defamation Act 1992 and an entrenched body of case law. It is an area of law that is designed to protect a person's reputation against unjustifiable attack. Providing such protection requires a fine balance between the protection of reputation and the freedom of expression as contained in Section 14 of the New Zealand Bill of Rights Act 1990.

Proving Defamation

A defamatory statement can be in either written or verbal form. To be successful, the plaintiff must prove he or she has been defamed by proving the following three elements:

1. a defamatory statement has been made,
2. the statement was about the plaintiff, and
3. the statement has been published by the defendant.

Publication is a crucial aspect of this test. It must be proven that the defamatory statement was published to at least one person other than the plaintiff. If the statement was published to the plaintiff alone then the test for publication will fail. Publication of defamatory statements includes the making of verbal statements.

Defending Defamation

The four defences in a defamation case are:

1. **Honest opinion** - the defendant must provide the factual basis on which the defendant's opinion is based. This defence will not succeed if the defendant simply got the information wrong,
2. **Truth** - a complete defence is provided if the defendant can satisfy the court that the defamatory statement was true, or not materially different from the truth,
3. **Privilege** – privilege provides immunity to certain groups of society for statements or reports made by them. "Absolute privilege" will serve as a complete defence; an example being where politicians often defame each other in parliament but are protected by parliamentary privilege. "Qualified privilege", however, can be defeated if the plaintiff is able to show that the defamatory statements were motivated by malice. Qualified privilege usually attaches to the requirement for fair and accurate reporting by, for example, the media or someone with a social, moral or legal duty or interest to report something,
4. **Consent** - a complete defence is available if it can be established that the plaintiff consented to the publication of the defamatory material.

Defamation and the Internet

Given the prevalence of the internet in our daily lives, caution must be taken to ensure that statements made online are not defamatory. The recent English case of Chris Cairns against Lalit Modi was the first of its kind in England where a 'tweet' made on the social networking site Twitter was held to be defamation. The resulting award in damages was equal to approximately £3,750 per word for a 24 word publication. Although this case was decided in England, it provides a valuable lesson in terms of publications on social networking sites. (At the time of writing, it was reported that Mr Modi would be appealing the decision).

Abolishment of Gift Duty and Impact on Trusts

The abolishment of gift duty in October last year has changed the nature of asset and estate planning by making it possible to gift unlimited amounts directly to a trust in one transaction. There are however, certain consequences which donors (people making a gift) need to be mindful of when considering the amounts they wish to gift. Some of these are discussed below.

Residential Care Subsidy Entitlement

Despite the changes to gift duty, the eligibility requirements for a residential care subsidy have remained the same. One of the eligibility tests for a means assessment is that the donors do not deprive themselves of assets for the purposes of qualifying for a residential subsidy. Deprivation of property includes:

- gifts in excess of $6,000 per year in the five year period prior to applying for a residential care subsidy, and
- gifting that exceeds $27,000 in any 12 month period prior to the five year period.

If you wish to avoid jeopardising your eligibility for a residential care subsidy, the amount gifted per year will need to be calculated carefully.

Solvency and Creditor Protection

The ability to gift unlimited amounts at any time provides donors with a greater degree of creditor protection than before. However, donors should be aware that any gifts which are made with the intention to defeat creditors can be set aside at any time under the Property Law Act 2007.

Assessing the solvency of a donor at the time of gifting is also important in the event of a donor becoming bankrupt. Under the Insolvency Act 2006, a gift may be cancelled if it was made within the two years immediately prior to the donor's bankruptcy (Section 204). If a bankrupt donor is unable to pay his or her debts, any gifts made between two and five years immediately before bankruptcy may also be cancelled (Section 205).

A donor wishing to preserve his or her entitlement for a residential care subsidy who also desires to protect his or her assets faces a tricky conundrum. Gifting large amounts/assets to a trust may jeopardise a donor's entitlement for a residential care subsidy. Certain balances must, therefore, be struck to achieve the intended outcome.

Access to Trust Assets

Under the previous gifting regime, transferring an asset to a Trust usually created a debt which was written off over a period of time. The debt was an asset of the transferor, and could be called upon at any time by the donor if the donor needed access to funds. Gifting an asset in its entirety on the other hand has the effect of a donor relinquishing complete control over that asset. You cannot simply 'unwind' the gift. In this regard, adhering to traditional gifting regimes and leaving a loan outstanding in relation to the asset may give some donors greater leverage and will assist in ensuring that there are monies available to the donor personally if needed.

Summary

There are numerous other considerations that a donor should be aware of before any significant amounts are gifted. The impact of gifting on relationship property and family protection for example, are two such considerations. It is sensible to discuss your goals with us, and your accountant, to assess how best to achieve them

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The Dark Side of Mortgagee Sales

While our economy recovers from the recent global recession, signs of economic lags continue to make its presence felt through increasing numbers of mortgagee sales. Figures reveal that by November last year, 1,535 properties were brought to market as mortgagee sales compared to just 571 in 2007. The prevalence of mortgagee sales provides an opportunity for some buyers to potentially "grab a bargain". However, buyers should remain vigilant as the risks attached to mortgagee sales are significant.

Differences in Agreements

Agreements used in mortgagee sales usually differ from standard Sale and Purchase of Real Estate Agreements whereby amendments are made to greatly favour and protect the mortgagee. For mortgagee sales, vendor warranties which are contained in standard agreements are usually removed, as is the obligation to provide vacant possession. There have been cases where previous owners or tenants have refused to vacate the property even though it has been sold. In such situations,

the issue of removing unlawful occupiers becomes the new owners' problem.

Removing Unwanted Occupiers

The options for removing unwanted occupiers include obtaining and enforcing a trespass notice pursuant to the Trespass Act 1980 and/or a possession order pursuant to the Residential Tenancies Act 1986 ('the Tenancies Act'). Section 65 of the Tenancies Act provides that a legal owner of a property can apply to the Tenancy Tribunal for a possession order that can then be enforced to evict unlawful occupiers. While in theory the process seems straightforward, the reality remains that whilst the buyer is obtaining a possession order, the risk of the property being damaged by the unlawful occupants is significant.

Protection Against Damage

Mortgagee sales often leave behind disgruntled mortgagors (previous owners) and it is not uncommon for properties to be vandalised after the mortgagee has sold the property and prior to possession. Obtaining insurance cover for the property upon signing the agreement for its purchase is, therefore, highly recommended. If purchasing at auction, insurance should be arranged before bidding so that insurance cover is effected immediately upon the sale taking place.

Chattels

It is important to note that chattels (such as stoves, light fittings, curtains and carpet) are not included in mortgagee sales. This means that the previous owner is well within their rights to remove such items from the property, as they retain ownership of the chattels despite the mortgagee sale.

Conclusion

The lesson here is simple - know the terms of a mortgagee sale well and be aware of the risks. There are numerous other matters about which a buyer should know beyond those discussed above. It would be wise to consult us prior to signing the purchase agreement - particularly when dealing with unit titles or cross leases. Doing so may prove a worthy investment considering the potential headaches it could save in the future.

Snippets

Changes to Building Laws

A comprehensive review of the Building Act 2004 during 2009-2010 resulted in the enactment of the Building Amendment Act 2012 ('the Act'). The Act received royal assent on 12 March 2012 and is aimed at lifting the overall performance of the building and construction sector. Some provisions that immediately came into effect on 13 March 2012 include:

- new provisions (sections 90A - 90D) which relate to Owner-Builder Exemption from Restricted Building Work,
- new provisions (sections 14A-14F) which clarify the responsibilities of the parties involved in building work,
- changes to the compliance schedule and Building Warrant of Fitness regimes which affect councils and building owners, and
- a clarification of some aspects of the Licensed Building Practitioners Scheme.

Further provisions of the Act will come into force at a later date to be appointed by the Governor General. For more information please visit http://www.dbh.govt.nz/building-amendment-act-2012 .

Marriages and Name Changes

Individuals are able to assume a partner's name immediately after getting married without any formal procedures. It is not necessary to register a name change. In such situations, both the maiden name and new name of a person will be recognised.

When changing names on bank statements for example, a marriage certificate will be sufficient evidence to validate the change. Passports can remain unchanged and carry a maiden name.

However for those wanting to record a name change officially, an application can be made to Births, Deaths and Marriages by making a statutory declaration and completing a name change form. If you were born in New Zealand, changing your name by this method will result in your birth certificate being amended to record the new name.

For more information, see http://www.dia.govt.nz/ or call 0800 22 52 52.