

undermine the certainty of the contract for the other party.

#### THE PROBLEM

The Court found that the Flemings had behaved unreasonably when they adopted an unconventional approach to marketing their house by using covert strategies. This involved minimal marketing and, although there were discussions with real estate agents, there was no formal listing.

The main reason the Flemings adopted the low profile marketing approach was concern

about the effect the sale of their house might have on their local lawn mowing business. However, when the Judge weighed up the importance of protecting the lawn mowing business against the obligation to attempt to sell their house, he concluded that there was an obligation on the Flemings to take a much more proactive approach to achieving a sale of their house.

#### CONCLUSION

If you sign a conditional contract to buy a residential property, you need to be aware that you must be proactive and do all

things reasonably necessary to ensure the conditions are fulfilled within the permitted time frame.

There is no set formula as to what is reasonable.

It will depend on the circumstances of each contract. However, to avoid the problems faced by the Flemings, you should discuss the steps you are proposing to take to satisfy the conditions with your lawyer at an early stage.

## HERITAGE TREES

During June 2007, a public debate erupted in Hamilton about the protection of trees. What gave rise to the debate was the felling of trees by a developer in the middle of the night on a historically significant Hamilton location. Debate centred on the tension between a landowner's freedom to fell trees at will and the degree of heritage protection that should be afforded to significant trees. It is the role of District Councils to determine the degree of heritage protection afforded to trees.

#### TREE REGISTER

Hamilton City Council's policy on heritage protection protects some trees through its District Plan. A register of protected trees known as the "Significant Tree Register" ("the Register") set out in the District Plan currently lists approximately 400 protected trees that cannot be felled without resource consent. New trees can be placed on the Register by agreement with private owners although most of the trees that are registered are located on Council reserves. The trees felled in Hamilton were not on the Register and the Hamilton City Council, if it had known and taken issue with the felling, would have been powerless to prevent their destruction.

Councils within the greater Auckland region including Manukau City, Waitakere City, Rodney, and North Shore City have a far

less relaxed regime. These Councils place severe restrictions on what landowners can, and more specifically cannot do, with trees on their property. In the greater Auckland region, a schedule of notable trees exists together with a general tree protection policy that protects trees which meet certain size criteria.

Two categories of trees are protected by the general tree protection policy in Auckland. The first category is exotic trees over 8 metres in height or girth of greater than 800mm and the second is New Zealand native trees over 6 metres in height or girth of greater than 600mm.

Thus, the aforementioned situation in Hamilton could not have occurred in Auckland.

#### PROTECTING TREES

For those Councils that operate a register such as the Hamilton City Council, an arborist's assessment is required before the tree can be listed.

This involves assessing the tree against a set of criteria contained in the district plan so it can be categorised.



These categories include the size of the tree, the importance of position, presence of other trees, occurrence of the species, role and location of setting, usual life expectancy, form (overall appearance), scientific, historical, cultural, functional, ecological value, and stand landscape value (in relation to stands of trees). If a tree meets the criteria then a landowner can choose to protect it under the district plan. A member of the public can also nominate a tree for protection. However, the Council cannot have the tree assessed unless the landowner gives their approval for this to happen. The only other option is to covenant trees for protection on certificates of title.

#### A CHANGE FOR HAMILTON?

The Hamilton City Council is currently considering adopting Auckland's tree protection policy, which some consider to be in the best interests of the general public. Others consider that Auckland's tree protection policy is too restrictive and involves excessive bureaucracy. The issue that arose in Hamilton has wider implications for other Councils throughout the country that are grappling with this problem and do not currently have a general tree protection policy such as the one that operates in Auckland.

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# LAW2DAY

## WELCOME TO ANOTHER EDITION OF LAW2DAY

Welcome to our final edition of Law2Day for this year.

Time always seems to accelerate from October onwards, and the Christmas break is not too far away.

Galbraiths has enjoyed a good 2007 year, and although we have seen a slight flattening of the property market in the last third of the year, overall things have been very positive. We have enjoyed working with all of our clients and assisting them with their legal requirements.

We continue to update our technology to ensure that we are among the leading law firms in that area, both in the transactional areas and in legal research.

Ross Sly, our commercial lawyer, left us in October to go and work on the Gold Coast. We wish him and his family all of the best on their big adventure. We are hoping to find the right replacement for him soon, but in the meantime we are very lucky to have a senior Legal Executive, Collette Rohloff looking after Ross' clients.

We will be closing the office at 2.00pm on Friday 21 December and it will re-open on Thursday 3 January 2008.

Best wishes for Christmas and the New Year

From all of the team at Galbraiths.

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## RELATIONSHIP PROPERTY – CONTRACTING OUT AGREEMENTS

Increasingly New Zealanders are becoming more alert to the implications of the Property (Relationships) Act 1976 ("the Act") and are seeking legal advice about the preservation of their hard-earned property.

#### WHO CAN ENTER INTO AN AGREEMENT?

Section 21 of the Act provides a husband and wife, civil union partners, de facto partners, or two persons in contemplation



of entering into a marriage, civil union or de facto relationship may contract out of the provisions of the Act.

#### WHY ENTER INTO AN AGREEMENT?

In a recent decision of the Court of Appeal, Harrison -v- Harrison, the court commented, "the paradigm situation in which a contracting out agreement will be sought is where one party has pre-relationship assets of a significant magnitude to render justifiable the social awkwardness of insisting on a contracting out agreement..." There are numerous reasons for electing to

contract out of the Act. Usually, it is to avoid the presumption of equal sharing of property that arises when the relationship ends. However, an agreement may also assist with asset, estate or tax planning. It may be a desire by one or both parties to preserve all of the property owned or acquired by them prior to the commencement of the relationship as his or her own separate property. Alternatively, the parties may simply wish to record their decision to treat certain property differently.

#### WHAT CAN BE INCLUDED IN THE AGREEMENT?

Section 21D of the Act sets out what can be included in an agreement. An agreement can

- declare property to be separate or relationship property;
- define the share each party to the agreement has in any part or all of the relationship property;
- define shares on death;
- provide for the calculation of the shares; and
- prescribe the method by which the relationship property is to be divided.

Section 21 of the Act permits parties to an agreement to make any arrangements they think fit with respect to their property,

including property acquired in the future by one or other or both of the parties. "Property" is specifically defined in Section 2 of the Act and includes the following:

- real property (i.e. land);
- personal property;
- any estate or interest in any real property or personal property;
- a debt; and
- any other right or interest.

#### HOW IS THE AGREEMENT MADE VALID?

Section 21F of the Act records an agreement will be void unless it complies with certain requirements. Those include the following:

- The agreement must be in writing and signed by both parties.
- Each party to the agreement must have independent legal advice before signing the agreement.
- The signature of each party to the agreement must be witnessed by a lawyer.
- The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

## FUTURE CONSIDERATIONS

It is important to recognise that an agreement contracting out of the provisions

of the Act needs to be revisited on a regular basis. It is impossible when drafting an agreement to anticipate every eventuality

just as it is impossible to foresee, at the outset, the longevity of a relationship.

users are obliged to update their computer security systems in accordance with their bank's recommendations. Failure to do so means that the Internet user will be liable for losses up to their overdraft limit.

for Internet banking information or accounts.

## REMEDIES

If you become involved in a dispute with your bank over liability for Internet fraud, then you should initially attempt to resolve the matter through the bank's internal complaints procedure.

If this is unsuccessful, a complaint may be made to the Banking Ombudsman, provided the amount at issue is less than \$200,000. The Banking Ombudsman in turn

can refer complaints to another party such as the Insurance and Savings Ombudsman, the Privacy Commissioner or the Human Rights Commissioner. Banks are bound by recommendations made by the Banking Ombudsman.

If a claim is unsuccessful with the Banking Ombudsman, or it is for an amount exceeding \$200,000, then an application will have to be made to the Court. Either way, it would be advisable to consult your lawyer at the outset.

## CLAIMS AGAINST A DECEASED ESTATE

The Family Protection Act 1955 ("the Act") enables persons to make a claim against the estate of a family member whom they believe should have made provision for them in their Will by virtue of the family connection, but have not done so.

or a person who does not have mental capacity in which case the application may be brought two years from the date of grant of administration.

and the applicant as well as the size of the deceased's estate.

## WHO CAN CLAIM?

The persons who may bring a claim under the Act are as follows:

- The spouse or civil union partner of the deceased.
- A defacto partner provided he or she was living in a defacto relationship with the deceased at the date of his or her death.
- The children of the deceased.
- The grandchildren of the deceased.
- The stepchildren of the deceased who were being maintained either partly or wholly by the deceased immediately prior to his or her death.
- The parents of the deceased.

Claims are most commonly brought by children who for one reason or another, have not been provided for under their parent's Will. In some instances, provision may have been made for them but the share which they receive is disproportionate to the share received by other beneficiaries.

In considering applications under the Act, the Court must have regard to the moral duty of the deceased towards the applicant.

Frequently, an application will be brought because of economic need. However, there have been instances where adult children have brought a claim even though they were wealthy in their own right. The basis of the claim is that their parent had a moral duty to provide for them by virtue of their filial relationship.

Family protection claims are essentially a balancing act between the wishes of the deceased and the needs of the applicant coupled with the consideration of the deceased's moral duty towards her or his family.

## HOW DO THE COURTS TREAT CLAIMS?

In considering claims under the Act, the Court will consider not just the economic needs of the applicant but the overall merits of the claim having regard to the applicant's circumstances at the date of death of the deceased, relations between the deceased

## CONCLUSION

Family protection claims can be very costly and usually the costs are borne by the estate. If you make a Will and decide to exclude children or other family members who would otherwise be entitled to, or would expect to benefit from your estate, you should state the reason clearly, in your Will. This can be of considerable help to the Court in determining how best to settle a claim under the Act and could also help to minimise the associated legal costs. If you do wish to exclude one or more family members from your Will, consult your lawyer first so that you fully understand the implications of doing so.

## WHEN CAN A CLAIM BE MADE?

A claim can be brought under the Act within 12 months from the date of the grant in New Zealand of administration in the estate. The only exception to this is where an application is brought on behalf of a child

## INTERNET BANKING FRAUD – ARE YOU PROTECTED?

### CODE OF BANKING PRACTICE

If you do your banking on the Internet, then you should be aware that the risk associated with Internet banking increased as of July 2007. The New Zealand Bankers Association (of which all the main trading banks are members) has introduced a new Code of Banking Practice, which includes a section on Internet banking.

If an Internet banking user becomes the victim of fraud and has contributed to the Internet fraud by either:

- a) having a computer or device that does not have appropriate protective

software and operating systems installed and up to date; or

- b) failing to take reasonable steps to ensure that the protective systems such as virus scan, firewall, anti-spyware, operating system and anti-spam software on the computer are up to date; or
- c) failing to follow reasonable security warnings about the appropriate processes and safeguards to follow when using Internet banking;

then the bank is not liable for any loss.

The code provides for the bank to have the right to request access to the user's computer in order to verify all reasonable

steps to protect the computer had been taken. If access is denied then the user may be held liable.

The effect of the new code is that the onus to safeguard a computer has been shifted to the user although the banks retain the responsibility to inform the user of the best way to do so. The Code has been criticised for not being specific enough as to what constitutes adequate protection. However, as matters now stand,



## GREATER SECURITY SURROUNDING FINANCE COMPANIES

In the wake of the collapse of a number of finance companies, cabinet made swift changes to the Securities Regulations 1983. The Securities Amendment Regulations 2007 ("the regulations") came into effect on 21 September 2007.

The regulations affect finance companies that continuously offer debt securities to the public and either lend money or provide financial services. The changes do not affect finance companies that are building

societies, credit unions or co-operate companies.

The regulations add clauses that are deemed to be included in both existing and future trust deeds of finance companies. Under the new clauses, finance companies have more stringent obligations in terms of reporting



their financial position to trustees, regular certification of compliance with trust deeds requirements, and keeping the trustee informed of matters relevant to the trustee's duties.

The new clauses will also give the trustee the power to appoint an independent auditor to audit the financial statements of a borrowing group and the power to appoint an expert to assist the trustee in determining the true financial position of an issuer.

## CONDITIONAL AGREEMENTS – HOME BUYERS' \$300,000 MISTAKE

### BACKGROUND

Mr and Mrs Fleming owned a house at Beachlands, South-East of Auckland. They signed a conditional contract to buy a lifestyle block near Whangarei, owned by the trustees of the Mana Trust. One of the conditions of the contract provided that the Flemings had 90 days within which to enter into an unconditional agreement for the sale of their Beachlands property.

The Flemings failed to secure a contract for their house within the 90 day period. They therefore considered the contract with the Mana Trust to be at an end. The trustees disagreed.

In due course, the trustees found an alternative purchaser for their block. However, the purchase price was less than the amount the Flemings had agreed to pay.

The trustees successfully sued the Flemings

for the difference between the contract price and the eventual sale price (approximately \$100,000) together with interest (approximately \$225,000) and costs. The interest exceeded the damages, due to the length of time before the original settlement date of the agreement and the date of judgment some two and a half years later. Furthermore, interest was calculated at the rate specified in the agreement of 14%.

### THE LAW

The agreement for sale and purchase between the trustees and the Flemings included a provision requiring the Flemings to "do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment".

The question for the Court was whether the Flemings had tried hard enough to sell their Beachlands home. Had they done "all things which may reasonably be necessary"? Unfortunately for the Flemings, the Court

found that they had not and were therefore in breach of contract.

The requirement to take reasonable steps to fulfil any condition e.g. to obtain finance or sell your house etc, is generally implied by the courts. The Court of Appeal described the clause in the Flemings' contract as making explicit what had previously been implicit.



This means that in most conditional contracts to buy and sell property there is an express or implied obligation to take all reasonable steps necessary to satisfy any conditions. Without such a requirement, a party could use a condition to avoid their contractual obligations simply by taking no steps to satisfy the condition and allowing the contract to lapse. This would effectively