LAW2DAY

GALBRAITHS LAWYERS

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WELCOME TO ANOTHER EDITION OF LAW2DAY

Welcome to another edition of Law2day. As I write this the wind is howling around the building, hail showers are being blown through every half an hour or so and the heater is on. Yes, there is nothing like late spring/early summer in Auckland!

The year is almost over and looking back it has been a good one for us here. Despite all of the doomsayers in the middle of the year we noticed only a slight downturn in the property market over the winter months. Things are really picking up in that area now and it was interesting to note last week that it was that the average price for a house in Auckland has now topped $500,000. The Real Estate Institute of New Zealand says that sales increased nationally from 8,671 in September to 8,857 in October. In Auckland, statistics show that total sales were down slightly but the median price went up from $397,500 to $415,000. The number of days required to sell, fell from 31 days to 28 days, suggesting buyer demand was strong.

Weather aside, it is always a pleasant time of year to be looking ahead to Christmas and hopefully some time off to enjoy with family and friends.

From all of the staff at Galbraiths we wish all of our clients a very Merry Christmas and thank you all for your custom.

Best wishes
Galbraiths

IN THIS ISSUE

DEBT COLLECTION

Are you owed money or has your property been damaged? Are you at the point where you need to look at your options for recovery? This article will cover in general terms the various options open to you, depending on the nature of the debt and the amount you allege is owed.

OPTIONS FOR LANDLORDS

If you are a landlord and you are owed money by your tenant, you have the option of making an application to the Tenancy Tribunal. Normally parties represent themselves, although in some circumstances a lawyer is allowed.

The application is heard by a tenancy adjudicator who will listen to your side of the story and that of your tenant. They will also hear any other witnesses and evidence you or your tenant want considered.

The decision is recorded as a Tribunal Order. The kinds of orders that can be made include:

* possession order – which means the tenancy is terminated and the landlord takes back possession of the property.
* monetary order – whereby the tenant is ordered to pay the landlord a sum of money.
* work order – which requires the tenant to do specified work on the property.

However the making of an order in your favour does not necessarily mean you won't still be out of pocket so read on for enforcement options later in this article.

NASTY DISPUTE?

While you may believe you are out of pocket this does not necessarily mean the other side agrees. If there is a dispute about whether, or how much, money is owed you may have the option of filing a claim in the Disputes Tribunal. The Disputes Tribunal can hear a claim of up to $7,500 or up to $12,000 if both parties agree.

Disputes are heard by a referee who will either help you to come to your own solution or if you can't, will determine the dispute for you. The referee's ruling is binding and if necessary, will be enforced by the Courts. No lawyers are involved at the hearing.

There are limitations on the types of dispute the Tribunal can hear. For example, the Tribunal cannot determine disputes about wills, relationship property, or ownership of land.

CLAIMS IN THE DISTRICT COURT

If you have sent a letter of demand to the person who owes you money and have not been paid, then a further option is to file a statement of claim in the District Court. Most people will instruct a lawyer to assist with this process as there are procedures and rules of evidence that must be adhered to. If the other party does not defend your application you may be awarded judgment by default. If the other party does defend your claim a hearing may be required.

NO DEFENCE?

Another method of obtaining judgment is through the summary judgment procedure. This can be used if you believe the other party has no arguable defence to your claim. It can be a more efficient way of obtaining an order in your favour.

GOT YOUR ORDER BUT STILL OUT OF POCKET?

As stated above, a judgment or order in your favour does not necessarily mean the other side is going to pay up. A common method of enforcement is to apply for the debtor to attend an examination. The debtor appears in Court and is required to give evidence as to their financial means. If an order is made you can also apply for an attachment order which ensures the money is paid directly from the debtor's wages or benefit to you. If the debtor fails to attend the examination a warrant for their arrest can be issued.

Another enforcement option is a Distress Warrant. This authorises the bailiff or constable to seize the debtor's money, goods or chattels to satisfy the judgment sum.

Other options include charging orders over land and bankruptcy. Unfortunately some enforcement procedures are time consuming and costly so it is helpful to have an idea of the debtor's means prior to embarking on an enforcement option. Private investigators, credit checks or company and title searches can be used also.

In summary, it pays to research the options before embarking upon the debt collection process to ensure the most cost effective process is used.

EMPLOYMENT ISSUES

THE BILL AND JOHN CASE STUDY

John is employed as a mechanic and has been working for the same employer for around six years. One day John arrives at work 10 minutes late and finds his employer, Bill, looking very unhappy. Bill says to John that he is sick and tired of John being late and then shouts at John, "That's it – go home".

John works the standard 37.5 hour week from Monday to Friday and is paid $14.50 per hour. He receives a tool allowance for hours worked and minimum statutory leave entitlements as set out in the Holidays Act 2003. The employment agreement between John and his employer is not recorded in writing. As far as John can recall Bill has never commented on the time that John arrives at work.

WHAT SHOULD JOHN DO?

John believes he has been dismissed.

All employment relationships are governed by the Employment Relations Act 2000 ("the Act"). The Act sets out that the parties to employment relationships have obligations to deal with each other in good faith. It also sets out that all employment agreements must be in writing and provides the minimum details that an employment agreement must contain – such as hours of work, place of work and rate of pay.

The Act provides a number of grounds upon which an employee can raise a personal grievance claim against an employer including unjustified dismissal. It also stipulates time limitations within which an employee must raise his/her personal grievance claim. Outside of the statutory time limitations and unless the employer agrees to extending them, the employee may make application to the Employment Relations Authority ("the Authority") for leave to raise the claim out of time. In John's case, he has 90 days from the date on which he believes he has been dismissed.

To be successful in his personal grievance claim, John must first establish that he has in fact been dismissed. Once this has been established, the onus then shifts to Bill who must show that there was good cause to dismiss and that John's dismissal was implemented in a procedurally fair manner.

WHAT SHOULD THE EMPLOYER, BILL, HAVE DONE?

Putting aside the issue of whether John's lateness to work justifies dismissal, there are a number of basic elements to procedural fairness in the context of managing employment relationships that Bill may have failed to carry out. These are:

* John should have been warned of the misconduct and given an opportunity to improve or correct the conduct. If the misconduct is serious, John should also have been told that he may be dismissed for ongoing misconduct.

* Bill should have carried out a full and fair investigation of the facts before taking any action and then communicated his findings to John.

* John should have been given a real opportunity to be heard and to offer an explanation as to the alleged misconduct.

* The reasons for John's dismissal should have been given to him before the dismissal was effected.

Turning now to the question of whether Bill had good cause to dismiss John in these circumstances, it is unlikely that the Authority and/or the Employment Court would consider lateness to work as a justifiable basis for John's dismissal. In December 2004, amendments to the Act saw the addition of a statutory test to determine whether a dismissal or other action by an employer is, are, or was justifiable. Simply, the objective test would consider whether Bill's actions were those of a fair and reasonable employer (in all the circumstances) at the time that John's dismissal occurred.

As it transpires and although John claims that he cannot recall Bill having spoken to him about persistent lateness to work, Bill believes the issue had been addressed with John before. On investigation, it became apparent that the reason John was 10 minutes late every day was because his bus arrives outside the workplace at that time. Having considered John's explanation for ongoing lateness, Bill believes he reasonably requested John to catch an earlier bus and ensure that he was at work on time. Bill also believes that since this request it was necessary to speak to John on several occasions without any improvement on John's part.

Assuming that John successfully argues in the Employment Relations Authority ("the Authority") that he was unjustifiably dismissed; the question then arises as to what remedies John may be entitled to.

The Employment Relations Act 2000 ("the Act") sets out statutory remedies that the Authority or the Employment Court ("the Court") may order in John's favour. These are briefly set out as follows.

REINSTATEMENT

If John has sought reinstatement as a remedy, the Authority or the Court (collectively referred to here as "the Court") must provide for John's reinstatement to his former position or to a position no less advantageous to John. It must be "practicable" for the Authority or Court to make any such order.

REIMBURSEMENT OF LOST WAGES

If John can show that he has lost wages, the Court must order Bill to pay John the lesser of a sum equal to actual wages lost by John or up to three months ordinary time remuneration. However, the Court also has the discretion to order Bill to pay John a sum greater than this.

COMPENSATION

An award for compensation in John's favour can be made at the discretion of the Court. Average awards for compensation are approximately $5,000.00.

EMPLOYEE'S CONTRIBUTORY CONDUCT

The Court must consider whether, and to what extent, John's actions may have contributed towards his unjustified dismissal. If John's actions are found to be contributory then the Court must reduce the remedies accordingly.

LACK OF WRITTEN EMPLOYMENT AGREEMENT

Finally, you may recall from the first article that there was no written employment agreement setting out the terms and conditions upon which John was employed. The Act provides the Court with the full and exclusive jurisdiction for the recovery of penalties under the Act. In this situation, given that John had been employed for approximately six years, oral terms of agreement must have been in existence. Failure to have a written agreement may result in Bill being subject to a penalty issued by the Authority.

An obvious consequence of not having a written employment agreement is that there is no conclusive evidence to establish the terms upon which John was employed, including a term as simple as John's hours of work.

BEST PRACTICE

Employers should ensure that employees sign an employment agreement before commencing work and also ensure that they take legal advice before taking any action against an employee under the terms of their agreement.

BUYING A BUSINESS

You have had enough of working as an employee, and wish to take advantage of the benefits of owning your own business. You are about to make an offer to the vendor of a business and to instruct your lawyer to deal with the matter on your behalf. What happens next? Some of the issues that need to be considered are discussed below:

SHARE PURCHASE OR ASSET PURCHASE?

There are two ways of buying a business. The first is to buy the shares in the company which owns the business. The second is to buy the assets of the business. These include the plant, equipment and the goodwill.

As buying shares in a company can also mean acquiring that company's debts and liabilities, the second method is the most commonly used in the purchase of a business. By acquiring the assets, you have the freedom to incorporate your own company to become the owner of the business, thereby enabling you to start with a "clean slate".

DUE DILIGENCE

"Due Diligence" describes the process of investigating the business and ascertaining whether it is in fact as the vendor has represented it. The vendor should provide access to the company's books and accounting records. You should then undertake an investigation (preferably with your accountant) to satisfy yourself that the company is profitable and that any projections as to earnings which may have been provided by the vendor are realistic and achievable.

The due diligence process can be carried out either before or after an agreement for sale and purchase is signed. Where it is to be carried out after an agreement has been signed, the agreement will need to include a "due diligence" clause which provides, amongst other things, that if the outcome of your investigation is unsatisfactory, for whatever reason, then you can cancel the agreement.

WARRANTIES

"Warranties" are representations made by the vendor about the business. The sale and purchase agreement will include standard warranties but if the vendor has made specific representations about the business that have played a major part in your decision to buy it, then the agreement should specifically record these. It is vital to communicate such matters to your lawyer who can then ensure any such representations are included in the agreement.

LEASE

If the business is being operated on leased premises, then the lease will need to be transferred to you or your company. This is known as an "assignment of lease". As part of your due diligence investigation, you should check the terms of the lease carefully to ensure they are acceptable. In particular, beware of a lease that only has a short term to run and has no right of renewal. You may find the landlord has other plans for the building and you will be unexpectedly faced with expensive relocation costs.

The above is an outline only of some of the issues that arise when purchasing a business. You should seek legal advice in relation to those issues which are particularly relevant to your transaction.

BUILDING CONSENTS

WHAT TO LOOK FOR

When purchasing a property, it pays to investigate the history of the buildings on the land. If there are no records of building consents having been issued by the council, then at best the buildings may have been constructed without council approval and may not comply with the building code. At worst, they may be dangerous for use and occupation.

BACKGROUND TO THE BUILDING CONSENT PROCESS

The Building Act 2004 ("the Act") governs all building works in New Zealand. It states that such work must comply with the building code. The code is made up of regulations which prescribe the functional requirements for buildings and the performance criteria they must comply with for their intended use.

Before undertaking building work, the owner of the property needs to obtain approval from a building consent authority. In most cases, the building consent authority is the local council. Council approval for building work is known as a "building consent".

Once construction is complete, the council will inspect the work to ensure compliance with the conditions of the building consent and the building code. If the council approves the work, then it issues a code compliance certificate.

Under the Act, it is an offence to carry out any work that is not in accordance with the terms of the building consent. Also, until such time as a code compliance certificate has been issued, it is an offence to occupy the building.

Merry Christmas & Happy New Year

Our offices will be closed from
Friday 22nd December 2006 @ 2pm
& will re-open on
Wednesday 3rd January 2007

WHAT HAPPENS WHEN BUILDING WORK HAS BEEN DONE WITHOUT BUILDING CONSENT?

Building consents cannot be issued retrospectively. However, if the work has been completed and a building consent was required but not obtained, then an application to the council for a "certificate of acceptance" may be made. This involves the council inspecting the work to determine if it complies with the building code. If it does, then it may issue a certificate of acceptance. However, such a certificate cannot be issued if the building work was carried out prior to 1992 as the building code was not in existence prior to that date.

It is not uncommon to come across properties where the buildings on the land have been constructed with a building permit or consent but the work has either never been completed, or if it has, the council has not approved it. If the work was carried out prior to 1 January 1993 and provided that the building is not "dangerous" or "unsanitary" as defined in the Act, then the council cannot take any action to require the owner to complete the work in accordance with the original building permit.

LIM REPORTS

The best way to check that there are no unauthorised buildings on a property is to obtain a Land Information Memorandum (known as a "LIM report") before you buy it. This includes a summary of all records held by the council in relation to the property including details of building permits, consents, code compliance certificates and certificates of acceptance.

It is worth remembering that although the absence of permits or consents may not pose a problem while you live in the property, it may well become a problem once you decide to sell it. For that reason, a LIM report is money well spent. It could save you a great deal more at a later date.

ENDURING POWERS OF ATTORNEY AND THE FAMILY COURT

In the last newsletter we focused on the benefits of enduring Powers of Attorney. In doing so we emphasised the need for the Donor to have complete trust in the person being appointed Attorney.

In 2001 the Law Commission produced a report entitled "Misuse of Powers of Attorney". The Commission suggested a law change may be required given the lack of accountability for Attorneys appointed under the legislation. The report notes that although the Family Court has power to intervene, there is often an understandable reluctance to instigate a process which will result in the attorney being brought before the Court, particularly as that person is more often than not a family member.

Whilst the current legislation prevails, it is important to publicise the Family Court's role.

POWERS OF THE FAMILY COURT

An Attorney can apply to the Court for directions. Alternatively, other persons including the Donor, who are disaffected by the Attorney's decision, may apply to have a decision reviewed.

Usually it is a member of the Donor's family, other than the Attorney, who makes the application. Although such applications are not common, when they do occur they often raise issues as to whether the Donor had capacity when signing the documentation or alternatively whether a decision has been made in the best interests of the Donor. This occurs usually where other family members believe the Attorney is not an appropriate person to take on the role or has made an inappropriate decision, often to benefit themselves rather than the Donor.

Such applications will usually pitch family members against family members. The end result, understandably, is an inclination by the Court to revoke the Power of Attorney and replace the Attorney with a professional Trust company.

This legal procedure can be costly, difficult and emotionally charged for all involved. Most donors would not wish to intentionally place their family in such a situation. It is therefore all the more important to give careful consideration to the person you appoint as your Attorney.

DEALING WITH A DECEASED PERSON'S ESTATE

People are often unsure of the process to be followed when dealing with a deceased's estate. Where a deceased has not left a will, the administration of an estate can be complex and costly. However, this article provides a brief guideline of the process where the deceased has left a will.

1. THE WILL.

The original will should be held by the firm of solicitors who prepared it. The first step is to contact the solicitor concerned and advise him or her of the death. The will can then be checked to ascertain who has been appointed as the executor of the will and the identity of those named as beneficiaries. The will may contain special directions as to funeral arrangements.

2. APPLY FOR PROBATE.

The executor must appoint a solicitor to act for the estate who will then make an application to the High Court for probate. Probate is the process whereby the Court determines the authenticity of the will and confirms the authority of the executor named in the will to administer the estate. Generally, it is not necessary to apply for probate where the assets of the estate are less than $10,000.00.

The application for probate must be supported by an affidavit sworn by the executor who must swear that he or she is the person named as executor in the will. He or she must also provide evidence of the death of the deceased (such as producing a copy of the death certificate) and confirm their belief as to the validity of the will. In addition, the executor must undertake that he or she will carry out the instructions contained in the will in accordance with the law.

3. ADMINISTRATION OF THE DECEASED'S ESTATE.

Once probate has been granted, the executor can proceed to administer the estate. The executor's duties include:

* Making arrangements for the burial or cremation of the deceased;
* Preparing an inventory of the deceased's assets;
* Paying the funeral expenses and any other debts owed by the deceased from the assets of the estate;
* Paying any gifts or legacies to beneficiaries named in the will;
* Distributing the remainder of the estate to the beneficiaries; and
* Keeping a set of accounts recording all financial transactions in relation to the estate.

The terms of every will differ. For example, there may be provision for a life interest in a particular asset to be granted to a person during that person's lifetime. This means that the executor will retain ownership of the asset until the person who has the benefit of the life interest has died. At that point the asset then becomes part of the "residuary estate" and can be distributed to the remaining beneficiaries.

CONCLUSION

The administration of an estate may take some months depending on the number and the nature of the assets involved. The solicitor who has been instructed to administer the estate will be able to provide a more specific timeframe.

LEGAL DEFINITIONS

CODICIL:
A document (or additional clause), which alters an already executed will. A codicil is executed in the same way as a will.

TESTATOR/TESTATRIX:
The name given to the person who makes a will.

EXECUTOR:
The person appointed in the will by the testator to administer the testator's estate.

TRUSTEE:
A person or trustee company who is directed to hold the assets of the estate in trust for beneficiaries or specific purposes under the will (usually the executor).

INTESTATE:
Where a person dies without leaving a will.

PROBATE:
A High Court decree stating that a will has been proved and that the executor(s) appointed have the authority to act in the administration of the estate.

LETTERS OF ADMINISTRATION:
A High Court decree which authorises an administrator to administer a deceased person's estate where the deceased did not leave a will.

FEE SIMPLE:
This term is used interchangeably with the word "freehold". A fee simple estate in land continues until the owner dies without leaving heirs in which case the land reverts to the Crown. In practice this happens very rarely as most properties will pass either by will, or if the owner dies without leaving a will, then under the terms of the Administration Act 1969.

LEASEHOLD:
A leasehold interest in land is created under the terms of a lease. When the lease comes to an end, then the land reverts to the owner of the freehold and the leasehold state is "merged" with the freehold.

CROSSLEASE TITLE:
This refers to a "composite title" which combines freehold and leasehold interests. It is made up of an undivided share in the freehold of the land and a defined leasehold interest in respect of the buildings on the land.

UNIT TITLE:
Unit titles (or Stratum titles), were created by the Unit Titles Act 1972 to enable individual ownership of units within a larger building complex.

LAND COVENANTS:
These refer to restrictions regarding the use of land. They are particularly common for new residential subdivisions where the developer wishes to ensure a high quality of development and will include such matters as specifications for the materials to be used in the construction of buildings on the land.

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