THE LAW

LOWDOWN

magill earl LIMITED

BARRISTERS AND SOLICITORS

AUTUMN 2024

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Welcome to the first edition of the Law Lowdown for 2024.

With the change of Government, there will be a number of legislative changes that will affect many aspects of our lives.

We delve into a few of those changes here, explore a recent case, and touch on matters relating to employment and personal secuirty laws.

As always, we encourage you to contact us if anything here, or elsewhere, is causing you concern.

Regards

The team at Magill Earl Ltd

TOP NEWS INSIDE

- Should you make a new Will if you and your spouse separate?
- Probationary and Trial Periods: What's the difference?
- Upcoming changes to property tax and tenancy laws.
- A man's home is his castle.

SHOULD YOU MAKE A NEW WILL IF YOU AND YOUR SPOUSE SEPARATE?

If you are a client, it is likely that you will have heard from us about why you should have a Will. Sometimes changes to your life or family circumstances require a revision to the Will and this can be overlooked. It is not at all surprising that this can happen as the types of things that can trigger issues with Wills are also likely to be significant life events where emotions may be running high.

For example, if a marriage or civil union ends, a Will is generally rendered inapplicable with respect to the ability of the former spouse to either receive any entitlement to property or gain the administration of the dying spouse's estate.

A complication is that no marriage or civil union can be dissolved (a divorce) until the parties have lived apart for 2 years. So, during that period it is common for matters relating to the marriage or relationship property to be settled and this is usually done by way of a Relationship Property Agreement ("RPA").

You might think that having such an agreement in place would determine the position even if one of the spouses were to die before the marriage or civil union were dissolved. However, a recent case demonstrates the complications that can arise. In the High Court (O'Donoghue v Comia [2023] NZHC 2735) a married couple had separated and entered into an RPA. The agreement provided for a very unequal division of the proceeds of sale of the matrimonial home and each acknowledged the reasons for this.

One of the couple died before the marriage was dissolved and the surviving spouse, Comia, sought to claim a full inheritance, relying on the fact, in this case, there was no Will, the statutory "default" provisions of the Administration Act applied. In other words, Comia argued that the RPA did not have effect.

This would have meant that Comia would have been entitled to receive all the property of the deceased as well as being given the rights to administer the estate, seemingly very much at odds with the agreement of the parties under the RPA.

The High Court determined, following an earlier case (Warrender v Warrender [2013] NZHC 787) that the RPA could still be valid, provided it complied with the safe-guarding conditions set out in the Property (Relationships) Act 1976. While in this case there were questions over this and the High Court directed the determination of those issues to the Family Court, nevertheless the case stands as authority for the ability of an RPA to prevail over the default statutory regime in these circumstances.

CONCLUSION

This case is a very salient example of always checking to ensure that you have an up-to-date Will, and that significant changes to your circumstances can have an unexpected and often unwanted effect, and with the possibility of incurring considerable legal costs, which might easily have been avoided.

PROBATIONARY AND TRIAL PERIODS: WHAT'S THE DIFFERENCE?

In our last Newsletter we covered the imminent changes to employment law flagged by the incoming Government.

One of the most significant of these was the extension of the **90 trial period** to all businesses, not just those with fewer than 20 employees. It will be interesting to see if this change will have any impact on employment rates, particularly given the technical recession in New Zealand as recently announced.

Whether acting on behalf of employers or employees we are often asked about the differences between ***trial and probationary*** periods of employment, and their respective advantages and disadvantages.

Generally, both trial periods and probationary periods serve as introductory phases for new employees, yet they differ significantly in their scope, legal implications, and benefits.

Trial periods, which can be for any period up to but not extending beyond 90 days, can only be used for new employees, and never for existing employees in a new role. To be effective, the trial period must be included in the terms of the employment agreement and signed off by the employee before work commences.

Trial periods allow employers to assess the suitability of a new employee for the role. During this period, the employment agreement can be terminated without the need for a specific reason, although the employer still has responsibilities under employment law including abiding by non-harassment and non-discrimination laws.

This flexibility allows employers to quickly address mismatches in skills or culture fit and may give confidence to "give someone a go". From the employee's perspective downsides could include vulnerability to sudden dismissal without recourse, potentially leading to job insecurity and anxiety. Further, the uncertainty may discourage candidates from taking risks or re-locating.

Employers need to be very careful, however, in using trial periods to ensure they understand the procedures involved in ending the employment. For example, notice must be given before the trial ends, or the employment may inadvertently become permanent.

Probationary periods on the other hand are more structured and typically last longer, often ranging from three to six months. Unlike trial periods, probationary periods require employers to provide valid reasons for termination. Therefore there is a greater degree of protection, including the potential to raise a personal grievance in the case of unjustified dismissal.

Probationary periods provide a longer window for employees to get used to the role, receive feedback, and improve performance. This can mean an employer will need to invest more time and effort as there is an obligation to provide support and guidance to probationary employees, investing in their development even if the outcome is unclear.

Conclusion

Trial and probationary periods can serve useful functions. Trial periods offer employers flexibility and the ability to swiftly address mismatches but do entail risks around the employee's concerns for job security. On the other hand, probationary periods prioritise fairness and due process, providing employees with protection against unjustified dismissal. They usually mean a greater administrative burden on and resource commitment for employers. Ultimately, the choice between trial and probationary periods often comes down to a business's priorities, risk tolerance, and commitment to fostering a supportive and equitable work environment. **Beware though employers.** Whichever route you go down there are fishhooks. Processes and procedures need to be understood and followed to take advantage of these flexible business tools.

UPCOMING CHANGES TO PROPERTY TAX AND TENANCY LAWS

Alongside the changes to employment law, the National-ACT-NZ First coalition is bringing in major changes to the property sector.

Among the most significant and those likely to affect many of our clients are:

- Tenancy and rental market adjustments
- The Bright-line test changes

TENANCY AND RENTAL MARKET ADJUSTMENTS

DEDUCTIBILITY OF MORTGAGE INTEREST FOR LANDLORDS

From 1 April 2024, landlords may claim back 80% of the interest they pay as a business expense for their rental properties. The government also announced that next year from 1 April 2025, this deductibility will increase to 100%.

NOTICE PERIODS

At present, month-to-month and periodic tenancy laws provide for tenants to give at least 28 days' notice to vacate, and for the most common situations, landlords must give tenants at least 63 days' notice if the landlord or a family member will be moving into the property to live there (within 90 days after the termination date); and at least 90 days if they intend;

- to carry out major renovations; or
- to develop the property ; or
- to sell the property

The changes will mean these notice periods will change to 21 days for tenants and 42 days for landlords.

PET BONDS

New laws in relation to bonds for having pets on the property are being promulgated. Property owners will be able to request more bond money than the usual 4 weeks to cover potential damage from pets. Details of the new scheme and how it will be administered are yet to be made available.

REINSTATING 90-DAY NO-CAUSE EVICTIONS:

In 2020 Labour introduced changes requiring landlords to give tenants a reason when they were told to leave a rented property. The new government is restoring "no-cause eviction" and landlords will no longer have to provide their tenants with an explanation as to why they have been evicted, if they give tenants 90 days' notice to vacate.

As at the publication of this newsletter we are waiting for details as to when the above changes are going to be introduced.

BRIGHT-LINE TEST

Currently, the bright-line rules, which determine if tax is owed on property sales within a specified period, apply to properties bought after March 27, 2021, and sold within five years for new builds or within 10 years for other properties. This period starts from the transfer date until you enter a binding sale agreement, except for off-plan purchases.

There are exceptions to the bright-line rules which are:

- If the property was your main residence; or
- If other tax rules govern the property sale; or
- If the property is farmland or business premises.

Effective July 1, 2024, the bright-line period reduces to two years for properties sold after this date. However, some details are still pending confirmation, such as:

- Whether trust transfers trigger the bright-line rules; and
- The calculation start date of the bright-line period; and
- The exemption for the 'main home'.

CONCLUSION

These changes will have a significant impact on tenancy and tax laws and property investment in New Zealand. Please get in touch with us if you need advice on any of these topics.

A MAN'S HOME IS HIS CASTLE...

Or so the saying goes. True perhaps, but one of the problems with modern day castles is they may not have secure parapets and their locations can be known to all.

Through the introduction and initial reading of the Companies (Address Information) Amendment Bill, Parliament is looking at allowing company directors to have their residential addresses removed from public view on the Companies Office website, for safety reasons.

The Bill proposes a mechanism where directors can ask the New Zealand Registrar of Companies (the Companies Office) to remove their residential addresses from the publicly accessible Companies Register. Instead, directors could substitute their residential addresses with an address designated for service.

The process calls for the submission of an application accompanied by a statutory declaration attesting to the potential physical or mental harm they, or their cohabitants, might endure due to the public availability of their residential addresses. A fee would be levied, and an alternate address for service, distinct from the company's registered office or address for service, would need to be provided.

Presently, directors can only seek to suppress their residential addresses from the public register if they have been granted a protection order under the Family Violence Act 2018, leaving a hiatus in hiding addresses based on other privacy or safety concerns.

Debate and submissions to date have focussed on the delicate balance between individual privacy and safety concerns and the importance of company accountability and openness. The proposed exemption calls for directors to claim that the disclosure of their residential address "is likely to result in physical or mental harm." However, the criteria for determining such harm remain subjective, lacking clarity on its definition or threshold.

It's important to note that the Bill only addresses directors' residential addresses, leaving out shareholders, and neglects other registers administered by the Companies Office.

CONCLUSION

While this proposed change may appear cosmetic, there can be little doubt that directors in New Zealand have been harassed and there are serious security and privacy issues to take into account. We will update this in our next Newsletter and if this article affects you or someone you know feel free to get in touch with us.

GET IN TOUCH

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