

# NEWSLETTER

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## Mortgagee Sales – put your ducks in a row before you put pen to paper

If you buy a property at a mortgagee sale, be aware that you are entering a contract that is quite different in its nature to an agreement entered into in other circumstances. The agreement is likely to be weighed heavily in the mortgagee's favour as mortgagee sales involve factors outside of the mortgagee's control, which it will want to protect itself from. This may include a very unwilling and impecunious owner occupier who is being forced to leave their home by the mortgagee which assisted them to get there in the first place. In such circumstances the mortgagee is usually unwilling

to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

It is not uncommon for purchasers to face difficulties after settlement, such as having to evict a previous owner occupier or having to deal with damage caused to the house by the disgruntled owner. In one instance the occupier took all the chattels from the property and sold them to pay other sundry debts, leaving the purchaser out of pocket.

Other common issues for purchasers at mortgagee sales can include:



- There is less protection for purchasers as the agreement usually does not include standard provisions. For example, the mortgagee will have removed the section in the agreement relating to the vendor's warranties and will have removed the right for the purchaser to approve title. Often purchasers

will not be able to view the property beforehand as the owner does not allow an inspection, so it will not be clear whether work has been carried out that should have required a permit.

- Purchasers may not be able to claim against the mortgagee for late settlement/possession as there may be situations where the mortgagee is unable to evict the owner. The mortgagee does not guarantee that it will give vacant possession on the day of settlement.
- Once the contract is signed it is unconditional and so requires thorough due diligence prior to signing. Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.
- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer an opportunity to buy a property at a reduced cost. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement. You should seek legal advice before the

auction, as well as checking the title, council records and the property in advance, if possible. However, there may still be some issues that arise that are out of your control as purchaser.

The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to put your ducks in a row before putting pen to paper.

## Farm sale time again

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### Introduction

This is the time of year when farmers, together with their advisors, start to prepare for the beginning of June when farms typically change hands. In many instances agreements for sale and purchase are already in place and both parties are waiting. Deposits have been paid, GST issues have been ironed out, and some elections would have been made if the farm supplies Fonterra. In other cases sharemilkers and farm employees have their contracts in place. It is against this backdrop that lawyers move to centre stage.

### Other issues along the way

Establishing the structure by which the farm is purchased will often require the collective wisdom of the farmers, lawyers and accountants. Structural options include a farming company, a trust for land with shares linked to a partnership for the farming operation, or a variation of this. Different structures suit different farming operations and different family circumstances.

In many instances the herd has spent time off the main farm on runoffs and separate grazing blocks. Grazing agreements should be perused now so there are no issues as they terminate. Regular checking of the herd to ensure they are in good condition is imperative.

The agreements for sale and purchase usually include requirements concerning the fertilizing of the farm being sold, which paddocks are to be shut off and protected, what amounts of hay and silage must be left and so on. These details should be worked through early on so any omissions can be rectified, thereby preventing issues at settlement time. Rural real estate agents and farm advisors can be of assistance here. Many agents and farm advisors maintain a real interest and are very helpful on an ongoing basis, long after the deal has been struck. They do a great job in ensuring the finalizing of a myriad of practical farming matters and arrangements that need to happen at 1 June. The

farmers themselves often get together with a round table approach to discuss issues and proceedings. If issues are left too late and become part of the legal settlement requirements, they are often harder to rectify and quantify. That is a position to be avoided if possible.

Plant and equipment should be in good working order. This can be reviewed early with the plant list checked through for accuracy. Another brief look will be necessary at settlement time.

Financiers like all borrowing arrangements and documentation to be in place early. Often there is a sale and a purchase by the same farmer on the same day. All interlinking details, loan repayments, seasonal finance and structural changes need to be in place as early as reasonably possible, giving lawyers a chance to check matters over with the banks and to plan draw-downs.

Farmers now supply milk to various companies, and each company has its own arrangements with its farmer suppliers. The largest, of course, is Fonterra. There are many issues revolving around the Fonterra Share Register, including who is on the Register at 31<sup>st</sup> May 2009, what are the end of season movements and elections, at what price will the shareholding adjustments be made per share, what happens if milk supply has increased or decreased, what to do about additional shares if they are needed, and what forms require signature. And so the list continues.

### Conclusion

As a final note it should be emphasised that lawyers, along with other advisors, must work closely with their clients, and vice versa, to ensure that between them all relevant matters are covered. Not all issues are strictly legal ones, but lawyers play a vital part in the process of buying or selling a farm. Seeking professional advice from the outset is an important step in ensuring a harmonious and successful settlement at the end of the process.

## Redundancy

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With the world in the grip of a recession, New Zealand is facing challenging economic times. Employers are experiencing the economic squeeze

and one of the solutions they are likely to turn to is restructuring and/or redundancy. Unless employers deal with these situations carefully and comply with

the legal requirements they may end up facing additional costs in the form of personal grievances raised. Legal advice at the outset may save time, stress and money.



Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must follow a fair process. It is in the process that employers often come unstuck.

As a guideline employers must be able to show:

- the redundancy was based on genuine commercial reasons
- the provisions of the employment agreement have been followed
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all the circumstances.

#### **Genuine commercial reasons for redundancy**

Genuine commercial reasons for redundancy may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing. Where redundancy occurs as a result of restructuring, the employer must make sure that any new positions formed are not substantially similar to the position being made redundant. A position that has a different title, but the same duties, will most likely be substantially similar. The following are just some of the factors that will be relevant:

- substantial changes to duties

- change in level of seniority
- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff

#### **Process**

Having passed the 'genuine reason for redundancy' hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment
- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions
- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation
- advising the employee of their right to representation and offering support, and
- where possible, providing counselling, career, financial and retraining advice.

Whether the process has been fair will depend on all the circumstances of the case.

Employers should note that the National Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and also those already receiving the maximum accommodation supplement, along with help with securing new employment. A redundancy tax credit is also available that makes taxing redundancy payments fairer when the redundancy payment has pushed the employee into a higher tax bracket as a result of receiving a lump sum redundancy payment.

## **Look before you leap - Family Trusts and the Family Protection Act**

Family trusts are an ideal way to protect assets from various threats, including for example, claims under the Property (Relationships) Act 1976. However, in the recent case of *X v X*, the Court of Appeal has highlighted the risk of losing control over assets placed into trust and the difficulty in getting that control back once it is gone.

Section 182 of the Family Proceedings Act 1980 has been described as being a trust busting mechanism whereby the Court can go behind the provisions of a Trust Deed in situations where there has been a significant change of circumstances since the Trust Deed was entered into.

In *X v X*, the husband and wife settled a trust that, by the time of their separation, owned assets worth between \$7-9 million. During the course of the

relationship the couple had moved to Australia and, in order to make their trust more efficient under Australian tax law, Mr and Mrs X had resigned as trustees of the family trust and relinquished their powers of appointment.



The trustees of a family trust have the authority to deal with the assets of a family trust. This includes the ability to sell or purchase additional trust assets, allow charges and mortgages to be registered over trust assets, as well as distributing trust assets or

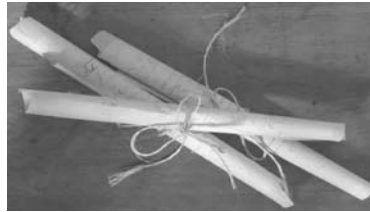
trust income to beneficiaries. The persons who hold powers of appointment under a trust have the authority to appoint or retire trustees.

By retiring as both trustees and appointors of their own family trust, Mr and Mrs X effectively gave control of their assets to independent third party trustees.

Following the breakdown of the relationship, Mr X applied to the Court under section 182 of the Act to have the trust assets of the family trust resettled onto three new trusts. Mr and Mrs X would each control a trust containing 25% of the assets of the former family trust. A third trust would be created with the remaining 50% of the former trust assets for the benefit of the couple's children. Despite the fact that the Trust Deed contained express provisions to allow for the former family trust to be resettled, the Court of

Appeal dismissed the application by the husband. One effect of this decision is to limit the applicability of section 182 of the Family Proceedings Act and make it more difficult for the Court to intervene in trusts that have been set up for a legitimate purpose.

The case highlights that when considering placing assets in a family trust, or dealing with family trust assets, it is crucial to take great care to consider the legal and practical implications of the



decisions that you are making. Mr and Mrs X would have had fewer problems if they had retained the ability to control the trust, either by acting as trustees or, at the very least, by retaining the power of appointment.

## Snippets

### Early release of deposit

If you are a purchaser of a property, have paid the deposit on the unconditional date, and are subsequently asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the stakeholder (usually a real estate agent) is required to hold it for 10 days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house. The agent can do so, provided the purchaser agrees. Be wary of agreeing to the release, because the transaction might not settle. If the transaction does not settle and the vendor has already spent the deposit, you as the purchaser have no security and your deposit is gone.



Retention of the deposit until settlement by the stakeholder has merit, especially where there is a mortgage on the title. If there is a mortgage, be aware that the deposit might be needed to settle the vendor's mortgage debt, and if released early and spent in other ways by the vendor, then the vendor might not be able to discharge the mortgage.

The key is to consider the issues carefully before agreeing to the early release of the deposit, particularly where the title is encumbered.

### The Sale and Supply of Liquor & Liquor Enforcement Bill – Update

Introduced to Parliament in August 2008, the Sale and Supply of Liquor and Liquor Enforcement Bill is a response to public demand for Government action regarding youth drinking and alcohol related offending. The Bill proposes to amend the sale of Liquor Act 1989, Summary Offences Act 1981, and the Land Transport Act 1998.

The Bill takes a multifaceted approach towards encouraging a moderate drinking environment and reducing the normalisation of youth drinking. In summary, it proposes to:

- Improve community input into liquor licensing decisions. Local councils will be able to restrict the number of liquor outlets in an area, as well as their location and proximity to other community buildings such as schools.
- Require grocery-selling stores seeking a liquor licence to be at least 150 square metres or more in size. Existing outlets of less than 150 square metres will be ineligible to renew their liquor licence.
- Make it an offence for anyone, other than a parent or guardian, to supply a minor with alcohol.
- Reduce the blood alcohol limit to zero for drivers under 20 who do not hold a full drivers licence.

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