

Fleming Foster Solicitors

NEWSLETTER

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Restructuring: The Three D's

With the continuing effects of the economic downturn 'kicking in', interest rates on the increase, commentators

predicting a flat property market, and expected changes in the upcoming budget, another wave of individuals may be contemplating

downsizing, debt reduction or disposing. The purpose of this article is to highlight in a brief and general way some of the legal issues to be mindful of.



Downsizing

Downsizing for property investors usually involves the sale or transfer of a rental property or two. The following are some of the matters to consider:

- If the property is held by a company or trust then the sale needs to be in the best interests of the company or the beneficiaries of the trust.
- There may be depreciation recovered on the sale that is subject to tax.
- Valuations of the property may be required if the parties are not dealing at 'arms length', to avoid gifting issues.
- On the sale of shares in a company (rather than the sale of the asset itself), or amalgamation of one company into another, there are 'minimum continuity of shareholding' requirements to be considered to ensure tax losses and imputation credits are saved and not forfeited. There could be tax losses to be set off against taxable income before the sale of shares where that 'minimum continuity of shareholding' may be broken.

Debt Reduction

Debt reduction raises further issues that may need to be considered. The cost of breaking fixed interest rate repayments may be significant. The lender may not be prepared to accept repayment of a particular loan on a property sale and may require all sale funds to be re-paid. The lender also may not co-operate in the release of a security such as partial discharges of land or the release of personal guarantees. New criteria may be imposed on the re-draw of funds.

Dispositions

For commercial property dispositions there are a number of issues to consider. These may include:

- The GST status of the transaction and whether GST is payable or not.
- The 'associated persons' rules, affecting dealers and developers,



that impact on tax gains that would otherwise escape the tax net.

- Commercial tenants may be looking to change premises not only to reduce costs but as a result of lease inducements, incentives (such as rent free periods) or lease surrender payments. This raises issues as to whether they are deductible expenses or not. The tax treatment for each party will depend on how the deal is structured and the tax profile of each party.

Often in fixing up one problem by a disposal you can create another. For example, the transfer of a leaky property to a trust or company. This amounts to a change of ownership. While this may have estate planning benefits for the transferor, it will prejudice any claim the trust has in regard to the leaky problem, as it will break the causative link against the territorial authority. Acquiring the property with knowledge of the leak may also

amount to contributory negligence. If the transferor has already lodged a claim with the Weathertight Homes Tribunal this must be terminated.

With some projects put on hold due to the downturn, it is important to check that resource consents are still valid. A resource consent will lapse on the date specified in the consent unless it is implemented or an application is made to the consent authority to extend the lapse period. In some instances, such as water and discharge consents, these will need to be transferred (e.g. if you are disposing of a beach property). Sometimes restructuring may involve a change of building use (e.g. disposing of flats to a company that operates serviced apartments) that may require notice of a change of use to the territorial authority.

Three Strikes Law

While there is consensus over the fact that there is too much serious crime in New Zealand, debate has raged over whether the proposed 'three strikes' legislation is the correct way forward. The new measures will be introduced in the Sentencing and Parole Reform Bill and will not cover crimes committed before the law is passed.

The proposed legislation lists over 36 offences, which are qualifying offences and count as a strike against the offender:

- **Strike one** occurs when the offender commits the first qualifying offence. The offender will receive the standard sentence and a first warning.
- **Strike two** occurs if the offender commits another qualifying offence. The offender must serve the sentence without parole and will receive a second warning.
- **Strike three** occurs if the offender commits a third qualifying offence. The offender must be sentenced to the maximum sentence for that offence with no parole.

For murder and manslaughter the maximum sentence will be life imprisonment and under the proposed legislation life will mean life (i.e. until the prisoner dies). For aggravated robbery, kidnapping, and attempted murder the maximum sentence will be 14 years, and for sexual violation 20 years. For the second and third strikes all of these sentences will be served without eligibility for parole. Preventative detention will still be available if a longer sentence is required.



The legislation is supported by both the National Government and the ACT Party who are concerned about violent crime, and wish to send a strong message to recidivist offenders and those embarking on a life of crime in New Zealand. It is anticipated that the new law will improve public safety by locking up offenders for a longer period

and improve public confidence in the justice system. It is also hoped the new law will relieve victims of the stress of attending parole hearings, and the anxiety and uncertainty of not knowing when offenders will be released on parole.

Critics argue that the 'three strikes' law will take away judicial discretion and ignore the factors that should be considered when assessing sentencing such as premeditation, an early guilty plea, and an offender who is remorseful. Dr Richard Ekins, Senior Lecturer at Auckland University's Faculty of Law, has highlighted instances where inconsistencies may occur:

- Two men who commit an unpremeditated aggravated street robbery would ordinarily receive a sentence of 18 months to 3 years. If one of the men has previously had two strikes then he has to be sentenced to 14 years in prison – the maximum penalty for aggravated robbery.
- An armed robber, with no prior convictions, may brutally assault a victim while his accomplice, with two previous strikes, may be merely the getaway driver. In sentencing, the

judge will have no discretion with the getaway driver. In sentencing, the judge will have no discretion with the getaway driver – he will receive the maximum sentence with no parole while the armed robber may com-

paratively be punished less severely.

No doubt there will be ongoing debate about the merits and efficacy of the 'three strikes' law into the future. Watch this space for updates.

Shake Up for Legal Aid

The Government hopes that proposed changes to the Legal Aid system will improve public confidence and give taxpayers value for money.



Legal Aid is available under certain criteria to those who are unable to pay for their legal representation. Its provision is based on the premise that all people should have the opportunity to have legal representation. In 2009 there were 85,156 Legal Aid grants at a cost to taxpayers of \$131 million with administrative costs reaching \$20.4 million.

In late 2009 a damning report on the Legal Aid system was released by Dame Margaret Bazley. The report found a number of issues with the current system that were leading to system-wide failings. Some of these issues were:

- cumbersome administrative procedures,
- inflexible procurement provisions, which prevent the Legal Services Agency from reducing the administrative burden and taking advantage of efficiencies,
- an over-reliance on complaints as a measure of lawyers who were failing to perform,
- poor relationships between the Legal Services Agency and the New Zealand Law Society, and
- the Legal Services Agency having a strong operational focus, rather than direction setting to ensure legal services are efficient, effective and sustainable.

The report found that the Legal Aid system was open to abuse by both lawyers and defendants. It recommended a number of changes that culminated in the Government announcing, on 7 April 2010, a comprehensive package of reforms for legal aid services. The changes include:

- A requirement that lawyers demonstrate competency, based on objective criteria, to a selection committee to gain accreditation and that lawyers will have to re-apply after a fixed term.
- A Performance Review Committee will be established to consider concerns or complaints raised regarding lawyers performance and to impose sanctions.
- The functions of the Legal Services Agency will be moved into the Ministry of Justice and an independent statutory officer will grant Legal Aid.
- The Public Defender Service will be expanded into Christchurch, Hamilton and Wellington. This will decrease costs by providing criminal legal services through salaried staff rather than contracted lawyers.
- Transparency in decision making will be encouraged by the replacement of the Legal Aid Review Panel with a Legal Aid Tribunal.
- Consistent standards for all community law centres will be established.
- The duty lawyer scheme will be improved by an enhanced selection criteria and by appointing supervisors.
- A streamlined eligibility assessment process will be introduced for high-volume, low-cost criminal cases, and
- A change to the preferred lawyer process, which will identify when a person can choose a Legal Aid lawyer and when one will be selected for them to ensure that the lawyer is competent for the case.

There will be no changes to Legal Aid funding for Waitangi Tribunal claims, however, administrative functions will be improved.

In announcing the changes, the Hon. Simon Power MP stated that it is hoped the changes will provide quality services for those who need it, give taxpayers value for money and build public confidence in the Legal Aid system.

Mediation

For anyone who has ever been embroiled in any form of dispute, whether commercial or otherwise, it can seem that the cost of justice is prohibitively high. Lawyers cost money, filing documents in

court is expensive and time consuming, and our courts are overloaded so the wait to appear in court is often long, and the outcome is uncertain. It is little wonder then that many people turn to

mediation as a means of resolving disputes, small or large, in a cost effective and timely manner.

The justice system has recognised the effectiveness of mediation. The High Court, District Court and Family Court are all utilizing mediation as a way to promote early resolution of matters rather than proceeding through the court process. Mediation is used to resolve such issues as tenancy disputes, employment disputes, civil disputes, claims to the Health and Disability Commissioner, claims under the Human Rights Act, community issues, environmental issues, and property disputes to name just a few. As you can see the application is endless.

For those of you who wish to resolve matters through mediation, below is a brief outline of what you can expect.

1. Depending on the type of dispute, mediation may be ordered by the court following the initial filing of an application. Alternatively, parties may agree that they will endeavour to resolve their differences through mediation and the parties themselves will choose a mediator.
2. There are many capable mediators in New Zealand (LEADR NZ and AMINZ, amongst others, may be contacted for a list of accredited mediators in your area).
3. You may retain your lawyer to assist with the mediation process if you choose, or you may attend mediation by yourself. Whether you wish to retain your lawyer will often depend on the legal complexity of the issue.
4. Mediation will generally cost somewhere between \$3,000 to \$5,000 plus GST per day, however you should check this fee out with your mediator. The fee will usually be split between the parties and is therefore much less expensive than litigation.
5. The mediator will often meet separately with each party prior to mediation to gain an overview of the issues, discuss the mediation process with you and have an 'agreement to mediate' document signed.
6. Everything that occurs and is said at mediation is confidential to the parties except in circumstances where the parties agree otherwise.
7. On the day of the mediation the parties will meet together with the mediator. The mediator will make a brief opening statement and then each party will have an opportunity to make an opening statement setting out how they see the problem. The mediator will then identify the issues and the parties will agree on an agenda.
8. The parties will then be invited to address each agenda item and the mediator will assist the parties in this process. This is an opportunity to air grievances and express feelings, as well as discuss the facts and the merits of each party's case.
9. At any time during the process the mediator may wish to meet with a party individually to discuss issues in more depth and generate options for resolution. Anything that is said at that time is confidential and will not be repeated or referred to by the mediator when the parties meet together again.
10. There may be several independent sessions or none at all depending on the needs of the parties.
11. The mediator's role is to assist the parties to explore the issues and develop options for resolution, not to make a decision for the parties. If the parties reach agreement this will be recorded in writing.

Mediation generally has a high settlement rate with reports of 75 – 80% of cases settling at mediation. For those who wish to know more about mediation there are several websites that explain the process in more detail.

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If you have any questions about the newsletter items, please contact us, we are here to help.