

Fleming Foster Solicitors

NEWSLETTER

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The Bright-line Test

In 2015, the government introduced the "bright-line test", a method which attempts to tighten the property investment rules.

The bright-line test states that (subject to exemptions) any gain from disposing of residential land within two years of acquiring it will be taxable. The test only applies to residential land. Residential land is land that has a dwelling on it or could have a dwelling on it and does not include farms or business premises.

The bright-line test applies where a person's "first interest" in residential land is acquired on or after 1 October 2015. Generally, a person acquires their "first interest" on the day they enter into an agreement to purchase residential land. The start and end dates may vary depending on the circumstances of each transaction.

For standard sales, the two year bright-line period starts when title for the residential land is transferred to a person under the Land Transfer Act 1952 and ends when the person signs a contract to sell the land. In other situations, such as gifts, the date of "first interest" is the date the title is registered by the donor and the end date is when the donee acquires registered title.

In simple terms, when a person purchases their main home after 1 October 2015 and then sells it within two years, the income they receive for the sale is not taxable. A person can only have one main home to which the bright-line test does not apply. If a person has more than one home, it is the home that the person has the greatest connection with that is considered the main home for the purposes of the test. Factors to assess when determining what constitutes a main home include; how often a person uses the home, where their immediate family is, where their social and economic ties are and whether their personal property is in the home.



The test is based on actual use of the property and not just a person's intention to use the property as a main home. This exemption cannot be applied on a proportionate basis; therefore, if a house is used only partly as a main home, the exemption does not apply. Where a main home is held in a trust, the exemption is usually available; however, additional information is required to ensure trusts are not used to avoid tax.

A habitual seller cannot use the main home exemption. If a person has used the main home exemption more than twice in the previous two years at the time of selling their property, they are considered a habitual seller. A habitual seller also includes a person who regularly acquires and

disposes residential land. Where property is inherited by a person as a beneficiary and they subsequently sell the property, the disposal will not be subject to tax under the bright-line test. Where property is transferred between partners or spouses under a property relationship agreement, there are no tax implications. However, if the property is subsequently sold; the bright-line test may apply.

There have been cases where tax obligations arose through the disposal of residential property which did not result in financial gain to the seller. As a result, it is highly recommended that specialist advice is obtained in respect of all property transactions.

The Human Tissues Act

Until we are confronted with death, an emergency or illness, few of us are likely to turn our minds to the interplay between the law, and how it affects the way we deal with a loved one's remains, let alone the choices we make or leave in respect of our own bodies.

The Human Tissue Act 2008 ("the Act") currently governs the way human tissue is dealt within New Zealand. Under the Act, Human Tissue ("tissue") is defined as including any material that is, or is derived from a body or material collected from a living individual. The definition is wide reaching and encompasses amongst other matters an individual's organs, blood, skin or stem cells. Human embryo's, including female eggs and sperm only qualify as human tissue in certain instances, including where human tissue is collected for non-therapeutic purposes or in relation to exporting or importing human tissue.

The Act provides for compromise in its framework, by facilitating an 'opt in' approach. Informed consent or an informed objection may be given by the individual from whose body the tissue may be collected during their life and upon death. Where no informed consent has been given or no informed objection has been raised, the Act provides a hierarchy of who may consent to tissue being collected from the body of a deceased, including an individual's nominee(s), immediate family and then a close available relative.

Several assumptions exist within the Act, including:

- a) that an individual over 16 years of age is capable of making an informed decision;
- b) consent or objection is free and informed, immediate family members providing consent have

undertaken consultation with other immediate family members; and

- c) that the individuals have taken into account the cultural beliefs of their families.

The cultural context for decision making in respect of donating or collecting tissue is woven throughout the Act. There is a requirement and expectation on those who collect human tissue, that they will take into account the spiritual needs, values and beliefs of the individual and their immediate family. Potential donors are encouraged to consider the impact that their decision will have on their family following death.

In respect of expressing consent, certain obstacles exist in conveying ones wish to be a donor. We are likely to be familiar with the 'donor' indications on a driver licence. However, ticking the 'donor' box on a driver licence may not meet accepted requirements for obtaining informed consent. This is primarily due to the contention that a driver licence has a life span of 10 years, and it may not reflect an individual's wishes at the time of death. In contrast, a Will provides the unequivocal wishes and intentions of a deceased person including an expression of consent.

The issue of expressing consent by way of a person's Will is that it may not be practical and timely to ascertain certainty around the intention and consent of the deceased in times of emergency, or where a timely decision is required. The Act has attempted to alleviate this problem by providing an 'opt-in register', where consent may be given after the fact and at a later date.

To ensure that your wishes and intentions are adhered to, we recommend that you discuss these matters regularly with your family and lawyer.

Reckless Trading

The Companies Act 1993 ("the Act") provides the framework that applies in respect of directors' duties and reckless trading. The Act prohibits a director from allowing the business to be carried on

in a manner likely to create a substantial risk of serious loss to the company's creditors. Any director who fails to exercise necessary care or

prudence may be found personally liable for reckless trading.

New Zealand's largest award against a director for reckless trading was made out in the *Lower v Traveller* [2005] NZSC 79 case. The High Court in this particular case (and subsequently the Court of Appeal) determined that the director was responsible for \$8.4 million in damages.

Reckless trading refers to a director taking illegitimate business risks. In determining the legitimacy of such risks, an objective assessment is undertaken, with focus on the way the business is done, and whether the director's methods have created a substantial risk of serious loss.

The courts have stipulated that a director's "sober" assessment of the ongoing character of the company and its likely future income prospects is required when a company hits troubled waters.

A two pronged approach to determine a director's liability has been adopted, firstly whether there should be liability, and if required, what relief is appropriate.

Material factors to assess that a business risk is legitimate include whether:

- (a) The risk was fully understood by those whose funds were at risk;
- (b) The company was insolvent and continued to trade over an extended period;



(c) The director's conduct was normal, in its ordinary course of business; and

(d) The primary persons interested in the insolvent company are the creditors rather than the shareholders.

Liability for reckless trading can relate to an isolated transaction. The company does not need to be in liquidation and no knowledge of the reckless trading is required.

There are limitations to the Act. The courts have found that recklessness requires more than mere negligence; and a director must either be willfully negligent or make a conscious decision to allow the business to be conducted in a manner that causes substantial risk of serious loss to the company's creditors. A director may also avoid liability where a director has the full support of the creditors and the creditors were fully aware of risks which were incidentally substantial.

One of the criticisms of reckless trading is that it does not allow for high risk company trade where there are prospects of large profit margins. Some do not consider this point well founded, as arguably a risk of loss is reasonably balanced by a prospect of gain. It appears this point is yet to be decisively settled at common law. The wording of the Act does not leave room for a balancing exercise, however the Courts have acknowledged certain academic articles which analyse the duties of directors under the Companies Act 1993, proposing their preparedness to apply such an assessment to balance risk and reward.

I have been named an executor of a will, what do I do now?

When a loved one passes away it can be a stressful time for the family, which can be made more difficult when the deceased has not left a Will. Where the deceased has left a Will they will have named their executor or executors (their representative(s)) in that Will.

The role of an executor is to administer the deceased's estate. This may include settling outstanding debts owed by the deceased, and distributing the deceased's estate in accordance with the deceased's Will.

Before an executor can administer the estate of the deceased, they must first obtain Probate.

What is "probate"?

Probate is a court order determining the Will of the deceased as being true and authentic. The executor(s) is/are appointed in this order. Upon the making of the order, the executor(s) then has/have the legal authority to deal with the deceased's estate.

How do I apply for probate?

The executor(s) named in a Will must make an application in writing to the Wellington High Court for probate. The application must be in a specific

format, as prescribed by a set of rules called the High Court Rules.

An application for probate may be filed in one of two ways either by way of 'probate in common form' or by way of 'probate in solemn form'.

An application for 'probate in common form' is usually made on a 'without notice' basis, where the application is made without notifying anyone else, on the basis that no one will contest the Will.

In the event that it is highly likely that someone will contest the Will, an application for 'probate in solemn form' will need to be filed. In these circumstances the relevant parties will be notified of the application and a trial at High Court will proceed, for which the parties will probably need legal advice.

What would I need to make an application for Probate?

The High Court application fee for obtaining Probate is currently \$200.00; this would need to be paid together with the filing of the following documents:

- The original Will (not a copy);
- An application for probate in common or solemn form;
- A sworn statement (affidavit) from the executor(s) which includes the following information;
- The person who made the Will has died;
- They knew the deceased;
- Where the deceased was living when they died; and
- Confirmation that the Will is the deceased's last Will.

How long does this process take? If the Application has been drafted correctly, in the prescribed form, and filed acceptably with the Wellington High Court, it may take four to six weeks to process the application. However, it could take longer if the High Court is busy or the application is complicated.

This timeframe may also be drawn-out in the event that the application has not been drafted correctly and/or the High Court raises issues with the application. Delays of this nature have the potential to cause a number of problems between the beneficiaries, and can affect an executor's ability to administer the deceased's estate, particularly if immediate action is required (which it often is). With that in mind, legal advice should be obtained when making an application for Probate.

Snippets

Queen's Chain

Historically, the term 'chain' has been used to express a unit of measurement in respect of land and distance. Coincidentally, the "Queen's Chain" describes the kilometres of Crown land which exists throughout New Zealand to provide the public with access to coastlines, rivers, lakes and native bush.

In reality, the Queen's Chain is a term describing what is now generally accepted as the marginal strips of land or esplanade strips, which are normally 20 metres wide and adjoining many lakes, rivers and the foreshore. It can also include land which has been retained by the Crown for conservation purposes. These lands are usually controlled by the Department of Conservation. In some instances, this means there are restrictions on public access. These restrictions are most commonly imposed to protect sensitive areas or endangered animals.

However, there is still a large amount of privately owned land around New Zealand which is not owned by the Crown. The private rights attached to such land are referred to as "riparian rights" and usually extend well into the water, granting unrestricted access to the owner. In any event, whether the land is considered to be part of the "Queen's Chain" or privately owned, government imposed legislation still applies.

The Queen's Chain becomes a topic of contention when it comes to public access to waterways and bush and there is often an assumption that the Queen's Chain applies; when in many cases the adjacent landowner actually holds riparian rights. Archives New Zealand holds records for all Crown land (including land subject to the Queen's Chain) which can be ordered and/or viewed in person. Information on accessing such records may be at this address: <http://archives.govt.nz/research>

The Ombudsmen

The Office of the Ombudsman is an independent authority which handles complaints and investigates New Zealand's government agencies.

Investigations are initiated following receipt of a complaint or on the Offices' own initiative to address wider administrative issues.

The Office manages complaints from individuals about the decisions and administrative acts of government agencies including district health boards and local government. This includes official information complaints which arise where a request is made to a government agency. This may be to obtain information and the applicant is not happy with the response, or the information is not provided within 20 days.

On receipt of a written complaint, the Office may either resolve it without further investigation or investigate further and form an opinion on whether or not the agency has acted unreasonably. Agencies are not required to implement the Offices' recommendations; however, usually they are accepted.

The Office also provides guidance and training to agencies before they implement policies to mitigate future complaints against them by the public. Complaints relating to private individuals or decisions by tribunals and courts are amongst some areas that are outside the Offices' jurisdiction.

The Office may refuse to investigate a complaint if alternative remedies are available, if the complaint is over a year old, if the complainant lacks standing, or if the complaint is made in bad faith.

The Office provides a valuable and vital public service. More information on the Office, its services and how to access them may be found at this address: <http://www.ombudsman.parliament>.

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