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# NEWSLETTER

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Dear Client

In this issue we address a number of current legal issues.

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### SUBDIVIDING?

Whether you are subdividing a 1000m<sup>2</sup> section or a 100 hectare block of land, the basic process is the same. You should become familiar at the outset with the following stages of subdivision.

#### Due Diligence Phase

Initially, depending on your particular subdivision, meet with either all or some of the following: surveyor, solicitor, engineer, council planner, architect, and accountant. Usually your surveyor and solicitor can tell you who will need to be consulted. The head title and district plan will be analysed to assess whether subdivision is possible and, if so, what conditions/restrictions might apply. At this point, the decision will be made as to whether it is feasible to continue with the subdivision on the basis of your original subdivision plan.

### Preparation of Scheme Plan and Resource Consent Application

Your surveyor will prepare the scheme plan and resource consent application to submit to council. The scheme plan must show all boundaries on the existing head title and the layout and size of the new lots. It must also show the location of buildings, roads, significant natural areas, rivers or streams, reserves, easements, schedules and any other information required to assess the effect upon the environment (as required by the Resource Management Act 1991). Once completed, the surveyor will submit the resource consent application to the council.

#### Grant of Resource Consent

Prior to granting a Resource Consent, a site inspection is carried out by the council planner checking that the subdivision complies with the policies, objectives and rules set out in the District Plan. The planner will in most cases carry

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out consultation with the Regional Council, Council Engineers and Building Inspectors to check that the subdivision meets their requirements. All going well, the council gives its approval and will grant resource consent. Most subdivisions that comply with the plan will be processed on a non-notified basis and a decision should be made within 20 days.

#### **Implementation of Conditions**

In most cases, Council imposes conditions such as provision of water and sewer connections to new residential lots, formation of rights-of-way and vehicle crossings. These conditions and any others imposed will need to be met before new certificates of title are issued.

#### **Council Approval**

When conditions have been met and development levies paid (if required), the surveyor requests section 223 and 224(c) (Resource Management Act 1991) certificates. These certificates are issued when the council is satisfied that the plan and implementation of conditions conforms to the subdivision consent. If any conditions have not been complied with, the council issues a consent notice.

#### **Issue of Title**

The final stage involves the surveyor submitting the survey plan for approval and deposit by Land Information New Zealand (LINZ). At this stage the solicitor lodges the necessary documents for the issue of title including: order for new certificates of title, easements to grant rights of way, drainage easements, water right easements, and easements to create land covenants. The Solicitor simultaneously lodges these documents together with the section 223 and 224(c) certificates and consent notices with LINZ. The titles are usually issued 10-15 working days thereafter.

#### **Finally**

Make a point of getting to know the above steps. You will then be able to take more control of the process while relying on the relevant experts to guide you through the finer points of that process.

#### **90 DAY TRIAL PERIODS INTRODUCED**

On 12 December 2008 the Employment Relations Amendment Bill was passed. The amendment allows employers who have fewer than 20 employees to terminate the employment of new staff within the first 90 days of employment without fear of a personal grievance for unjustified dismissal; provided the parties have agreed to a trial period in the employment agreement.

The amendments are effective from 1 March 2009. The date of determining whether the employer has fewer than 20 employees is the date the employment agreement was entered into. The legislation does not specify who is counted as an employee and so, potentially, casual and part-time employees could be counted. The following conditions apply to the trial period:

- It will only apply to employees who have not previously been employed by the employer.
- Both parties must agree to the trial period.
- The trial provision must be a written provision in the employment agreement.
- The trial period must not exceed 90 days - so it could be for a shorter period than 90 days.
- During the trial period the employer may dismiss the employee by giving notice of termination.
- The employer must give notice of termination to the employee within the trial period in order to be protected by the trial provision.
- If the employee is dismissed they are not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- Employees will still be able to bring personal grievance claims for unjustified disadvantage, sexual or racial harassment, discrimination or duress.

In all other respects the employee is to be treated no differently from other employees whose employment agreements do not contain a trial period. The obligation of good faith remains during the trial period with the exception that the employer is not required to consult and to provide information to the employee prior to termination.

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Commentators have mixed views on the amendments. Australia and most other OECD countries allow trial periods.

The New Zealand Government has introduced this legislation in an effort to encourage employers to provide employment opportunities to people without financial risk to the employer if the employment relationship does not work out.

In an announcement on 11 December 2008 the Minister of Labour, Hon. Kate Wilkinson, stated that "By lowering the legal risks employers face, they will be more confident in giving people the opportunity to prove themselves" and that "The 90 day trial will provide real opportunities for people at the margins of the labour market".

Given that the trial period must be agreed between employer and employee, those employees who are in demand and have some bargaining power will no doubt attempt to negotiate the removal of the trial period.

Employment problems can take some time to surface so employers will need to be vigilant to ensure they act within the 90 day period.

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### **CONSUMER GUARANTEES ACT - AN OVERVIEW**

The Consumer Guarantees Act 1993 (the Act) does exactly what its name suggests; it sets out statutory guarantees that goods and services must meet. However, although it covers a broad range of day-to-day transactions, the Act does not apply to every sale and purchase.

There are two central requirements of the Act. Firstly, that the goods and services must have been sold or provided by someone "in trade", such as a shop selling goods or a person whose work involves them providing a service. Secondly, the protection only applies to someone who is a 'consumer'. The Act provides that a 'consumer' is someone who acquires goods or services that are ordinarily acquired for personal, domestic, or household use or consumption. The definition focuses on what is being purchased, rather than on who is purchasing it. Examples of things

covered by the Act would include the purchase of goods such as clothes, a DVD player, a car and groceries, or services such as car repairs, house painting, a haircut or accountancy services.

Because the guarantees are statutory, they apply whether or not they are mentioned in any contract that relates to the supply of the goods and services. However, it is important to know that a supplier can exclude the guarantees if the goods or services are bought for business use. For example, if you buy an ordinary household dishwasher for use in the office, the supplier may expressly contract out of the guarantees.

The Act also does not cover goods or services that are ordinarily bought for commercial use, such as farming equipment or a printing press. Nor does it cover items bought privately, such as from a garage sale or a school fair.

There are a range of guarantees set out in the Act. Essentially they require goods to be of acceptable quality. This means they must be fit for their normal purpose, free from minor defects, safe and durable. For example, a hairdryer must blow hot air, not stop working intermittently because it overheats after a few minutes use, and keep functioning for a reasonable time after you buy it.

Similar guarantees exist for services, including the service being provided with reasonable care and skill, within a reasonable time (unless you agree to a specific time), for a reasonable price (unless you agree to a specific price), and fit for the purpose you bought it for. For example, the Act will be breached if you hire someone to paint your small house and they haven't finished the job two months after starting it, or they use the wrong type of paint, or charge you twice as much as painters normally charge for painting a house like yours.

If the fault can be fixed or repaired, you must give the supplier the opportunity to fix the problem. They don't have to refund your money if they repair the problem, or provide a replacement item. If they do not fix the problem within a reasonable time you may take steps to fix it yourself and claim the cost of doing so from the supplier.

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## REDUNDANCY

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.

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## **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,  
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claims under the Property (Relationships) Act 1976 and being eroded by rest home subsidies. 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 both appointers and trustees of the family trust.

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 appointers of a trust have the authority to appoint or retire trustees.

By retiring as both trustees and appointers 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.

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