S J SCANNELL & CO

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INSIDE THIS EDITION

Simon Scannell
S J Scannell & Co
122 Queen Street East,
Hastings 4122
New Zealand

office@scannelllaw.co.nz
www.scannelllaw.co.nz

Phone: 06 8766699
Mobile: 021 439 567

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Rollover relief to the brightline rule

The brightline property rule applies to properties purchased after 1 October 2015. It looks into what period the property was acquired and when it is being sold. If the property is sold after owning it for less than ten years, you may be obliged to pay income tax.

The date that the land of the purchased property is transferred to you is the date the brightline period begins, and this date determines whether the 2, 5 or 10 year brightline period applies, which subsequently determines which rules you are subject to. The brightline period ends the day you enter into a binding sale and purchase agreement to sell the property.

The exclusions to this rule are property considered to be your main home, inherited property or if you are the executor or administrator of a deceased estate.

Roll over relief is applicable to relationship property settlements and amalgamations, with full relief for transfers on death. The recently enforced rollover relief allows for the owners of a property to change how the property is held, without triggering the brightline property rule.

This also applies to certain transfers to family trusts and transfers to or from look-through companies and partnerships, Māori authorities and as part of a settlement claim under the Treaty of Waitangi.

Rollover relief will only apply if the amount received on transfer equates to or is less than the original acquisition cost to the owner. Where a larger amount is received, no relief will be awarded, however the original owner will be taxed based on this amount if this differs to the market value of the property.

The rollover relief rules apply to property that is sold on or after 1 April 2022, regardless of whether the original date of the property being acquired was before the introduction of the brightline property rule.

It is important to note that the rollover relief does not provide an exemption to the brightline property rule.

Essentially it is relief of income tax when a property is transferred, as it is ignored. In this instance, taxation is deferred until later disposal. Once the property is sold or disposed of later on, the date that the original owner acquired the property will be used as the beginning date for the brightline period, which will help determine which brightline period to apply.

Rollover relief is now in action as of 1 April 2022.

Overview of the Official Information Act 1982

The Official Information Act ("the Act") came into effect in 1982 in order to repeal the 1951 Official Secrets Act, with the purpose being to increase the availability of official information.

Information that is governed by this Act is specified as information held by a department, a Minister of the Crown or an organization, as per s 2. The Act provides access to information relating to the public that is held by local authorities, whilst being aware of public interest and mindful to the preservation of personal privacy.

In order to access this information, you must be either a New Zealand citizen, a permanent resident of New Zealand, a person who is in New Zealand, body corporate that is incorporated in New Zealand or body corporate that is incorporated outside of New Zealand but has a place of business in New Zealand. When accessing information, the agency providing it must give reasonable assistance in doing so.

Section 5 mandates that official information must be made available unless there is a good reason for withholding it, while s 6 outlines these reasons as being if the information is likely to:

- prejudice the security or defence of the Government of New Zealand; or
- prejudice the entrusting of information to the Government of New Zealand; or
- prejudice the maintenance of the law; or
- endanger the safety of any person; or
- damage seriously the economy of New Zealand.

The Law Commission in its 2010 review of the Act explained that information requests are usually rather vague and end up seeking large amounts of information. To combat this, the Commission suggested that when information is requested, the agency which it is requested through should offer consultation into the amount of information that is being requested and the amount of information that is actually required. In doing so, this assists in clarifying the nature of requests to ensure that it can be obtained efficiently, thus reducing time and cost.

In terms of timeframes, any agency that receives a request for information is required to take no longer than 20 working days to decide if the request fulfils the criteria mentioned above and can be granted, and to notify the person who lodged the request of this decision.

There are certain limitations to the scope of rights the public can exercise regarding official information. They cannot ask for an agency's opinion on any issue as this would be interpreted as a request to create information, which is not permitted under the Act.

It is also not permitted that an individual requests information about themselves. If an individual does wish to obtain information on themselves, this falls under the jurisdiction of the Privacy Act 1993, and is obtained by a different process.

If you are wanting to make an official information request, the easiest way to do so is via FYI.org.nz. This online tool ensures that your request is made public and anyone can see your request and how this has been responded to. Other ways to request information is to contact the agency via email, phone or social media.

Guarantees – Discussing anti-discharge clauses

Most guarantees have an "anti-discharge" clause, these clauses are designed to prevent a guarantor from being discharged from liability and allows the creditor to vary the underlying contract without the guarantor being discharged from their obligations.

One of the most referred to authorities is the case of Holme v Brunskill. In Holme v Brunskill, the case involved the renting of a farm. The farm had sheep on it and a bond was given in relation to the number and condition of the sheep on the farm. A dispute

eventuated between the farm owner and the tenant.

The dispute was resolved by the tenant giving up half of the leased land and a reduction of the rent payable, this was done without the knowledge of Mr Brunskill who was the guarantor. Mr Brunskill argued that the reduction of the land and rent was a variation of the underlying contract that discharged him.

The guarantee in this case was given for a certain number of sheep in a certain condition from the farm as it was then rented to the tenant. The actions of the owner and the tenant altered that commitment without the consent of the guarantor and the outcome of the case shows that it does not take a major alteration to discharge a guarantor but that it just has to be more than substantial.

An example of an anti-discharge clause is from the case of Dunlop New Zealand Limited v Dumbleton, it reads:

"In order to give full effect to the provision of this guarantee we hereby declare that you shall be at liberty to act as though we were the principal debtors and we hereby waive all and any of our rights as sureties (legal equitable statutory or otherwise) which may at any time be inconsistent with any of the above provisions."

This provision ultimately waived the rights of the guarantor to be discharged. However, the ruling of Brunskill was applied and it was held that a variation of the underlying contract automatically discharged the guarantors and therefore the anti-discharge clause did not apply.

The Courts have since confirmed in further case law that the general principles of contractual construction apply to guarantees and that a variation of the underlying contract has the effect of discharging a guarantee unless it is patently obvious that the guarantor has not been prejudiced.

What solutions are available and how might anti-discharge clauses work? There are suggestions that notifying guarantors and obtaining written consent to proposed amendments that are to be made might help avoid disputes arising, even where the amendments appear to fall within the ambit of the anti-discharge clause.

It is evident through case law that the drafting of principal debtor clauses has given the Court some latitude to construe them in favour of the guarantor.

Therefore, in order to make an anti-discharge clause work, the drafting of these clauses is likely to become more sophisticated and comprehensive over time.

A review of cross-lease issues

It is said that a cross-lease is one of the most complicated forms of property ownership. A cross-lease title creates two or more legal estates having multiple owners who all have a separate lease for the house or flat with an undivided share in ownership of the entire land/site.

The lease of the property can also include and specify exclusive use areas for each house or flat, and with 216,000 cross-leases in New Zealand, owners, prospective buyers and lawyers are most commonly facing the issue of consent.

When making alternations and/or additions to a property, unlike most property ownerships where resource and council consent is all that is required, cross-leases have historically required that all other cross-lease owners must consent to such works.

In more recent times, alteration and/or addition clauses usually only require that consent is to be obtained by the other cross-lease property owners when the works are deemed to be structural.

What is a structural alteration or addition? Whilst this is unclear, you should always have consideration to what affect your alteration or addition will have on your cross-lease neighbour and how your proposed structural alteration may affect their enjoyment of their property.

In the case of Ferguson v Walsh, the Court set out a list of different types of alterations and advised whether they would require consent or not. It was held that cosmetic changes do not require consent.

Other alterations such as loadbearing walls that impact the strength and support of the building, or changes affecting the exterior shape or structure, or that impact the use and enjoyment of the neighbouring cross-lease properties, require consent.

The lease agreement wording will ultimately determine whether or not consent is required. Where consent is required, section 224 of the Property Law

Act states that consent cannot be unreasonably withheld, however, it is noted that where a neighbouring cross-lease owner is potentially negatively impacted, they may have grounds to notify that consent is withheld.

Where consent has not been obtained, injunctions can be sought to put a stop to the alterations/additions to the property.

If works have been taken out on the property and alterations/additions have been made to the external dimensions at the property that are not shown on the flat plan, this then creates a “defect” in the title which can be expensive to rectify.

To avoid issues arising from cross-lease property ownership, it is important to seek legal advice and have the flat plan and lease agreement reviewed to ensure that all rights and obligations as cross-lease property owner are understood.

Understanding what obligations and restrictions are in place in accordance with the lease agreement will minimize the risk of disputes.

However, where disputes do arise, clause 26 of the ADLS Memorandum 2018/4343 requires that disputes are to be referred to an arbitrator.

Climate change litigation – a visable legal remedy

It is not new information that climate change poses as one of the biggest threats to the planet. We are seeing unprecedented changes to our environment. New Zealand became one of 33 countries to declare a climate emergency in 2020. Although we are a smaller nation, New Zealand has made consistent attempts to help combat climate change, such as banning plastic bags and enforcing and upkeeping the decision to be nuclear free. However, the real power for change lies in legislation, litigation and the unity of nations.

Climate change litigation needs to be substantial in order to make a difference. New Zealand currently holds responsibility regarding climate change under the United Nations (“UN”) Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. The UN Framework Convention allowed political pressure to be put on developed countries, as their actions have had the biggest impact on our environments state via greenhouse gasses.

Although united with other nations New Zealand is in a strong position to fight climate change, our individual efforts lay in the Climate Change Response Act 2002, our overarching legislation addressing this issue. There is a large scope of climate change litigation in New Zealand courts, which could suggest that it is a viable legal remedy. The world is currently in its worst state to date in regards to the environment and the threat to humankind. Consequently, the problems at hand are sometimes going to be too large for litigation to fully remedy.

In these instances, courts can compromise by awarding damages. With the three branches of government providing parameters over the courts power and ability to award these damages, and climate change being a very polarising topic that sees damages sometimes effecting the economic status of businesses, Judges have reserved making large calls regarding the climate and have left this down to politicians and world leaders. It was recently discussed whether or not these Judges should become more involved in traditionally government-made decisions. Although climate change litigation cannot always fully remedy matters, it is nonetheless a powerful tool that can be used in presenting ideas that challenge current standing legislation and political ways of thinking.

Climate change is a huge issue that does not hold one solution, but legal tools can be used in conjunction with one another to attempt to offer a viable legal remedy. The climate cases that come before the courts today allow for new ideas to be presented which can subsequently facilitate change and shift in perspectives.

Although legislation provides a framework and targets have allowed for hopeful results, it is the power of litigation that is our most viable weapon in the fight against climate change. It is our individual and intentional combined effort that will see the most positive change take place. With the cooperation of citizens, the incorporation of international treaties and the broad scope of litigation we witness in our courts, we have started to see more positive change and enthusiasm than ever before.

Snippets

Power of attorney medical certificates

In recent years the medical condition of a donor under a power of attorney has become increasingly important and therefore documented.

Medical certifications as to mental capability are of particular importance both for property attorneys and personal care and welfare ones.

A certificate around mental capacity triggers the use of both enduring powers of attorneys which have been either put in place in a timely manner, or ordered by a court through the process covering the absence of such relevant documents.

Doctors are most particular, as you would expect, when they put their assessments of the donors in writing. They know that there will be a loss of independence for their patient should the mental capabilities become impaired.

The grey area for all the professionals involved is the earlier stages of the mental incapacity for any reason. The family begin to notice the changes, but it does take some time before the power of attorney document can be unconditionally used by the appointed attorneys.

It is important to check with your donor's lawyer as to whether the medical certificates enable the attorney to commence attorneyship duties.

To obtain clarity, the wording of the medical certificates should be reviewed carefully to ensure the full parameters of the legislation are complied with while confirming inequivalently.

Maintenance agreements

Land Information New Zealand ("LINZ") controls the holding of certificates of title in respect of each piece of land in New Zealand.

There are additional rights and privileges that may be registered in document form against any individual title and these must be cleared with LINZ when they confirm the terms and conditions allowable by the registered proprietors on such titles.

In many instances rights over the titles by other parties are either lodged by councils whose services are to be secured or adjoining owners who are entitled to rights in certain circumstances over the land.

These documents recording such additional rights are called encumbrances. One of the best-known encumbrances is the 'right of way easement'. A new offshoot is the 'maintenance easement'. This option does not have a general range of terms and conditions, but grants more limited and focused specific rights that may be reasonably sought to enable adjoining properties to link more appropriately for both the adjoining registered owners.

An example of how this document might work is if two properties needed a structure between them, like a mirror to enable safe traffic flows. A very specific helpful maintenance easement is able to be locked in for the benefit of each piece of land. Your lawyer can help frame these documents while checking their suitability.

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124 Queen Street, Hastings the top floor has been converted to a self-contained apartment which is now available on Airbnb for inner city accommodation

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massivemusicschool.co.nz
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