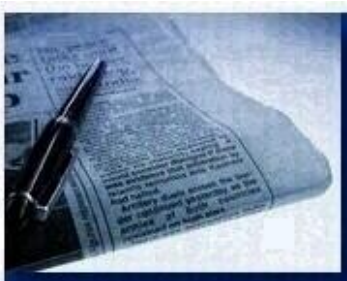

# S J SCANNELL & CO

## NEWSLETTER-JUNE / AUGUST 2020

## INSIDE THIS EDITION






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## Mortgage free holiday overview

During these unprecedented times with COVID-19, the term mortgage free holiday has been heard more now than ever. As many New Zealanders' incomes have been negatively affected, which can make it difficult to meet mortgage payments (amongst other payments), a mortgage free holiday may be an option worth considering.

The mortgage free holiday has always been an option for mortgagors even before COVID-19. Its purpose is to offer some reprieve during unexpected events that come up through life such as a change in income, death of a loved one, an injury etc. In the normal course, each bank has their own application process and criteria that is required to be met to be eligible for a mortgage free holiday. If you are approved in the normal course, a mortgage free holiday is usually for 90 days in length. During COVID-19 the banks have worked with the government to create a mortgage free holiday that is for a length of 6 months, with the only criteria required to be met is that you have been affected financially by COVID-19.

It is important to keep in mind when considering a mortgage free holiday that the interest payable will still accrue on the loan amount. This simply means that the principal payments are deferred for the length of the holiday, but since interest is still accruing, your loan amount will increase through the mortgage free holiday, which means that it will take longer to pay back your loan.

There are potential alternatives to a mortgage free holiday such as:

1. Make interest only payments. This would mean that the principal amount of your loan would remain the same but the interest would not accrue as you would be making this payment.
2. Extend the term of your loan. This would likely make the loan payments less than what you have been previously paying, but again this will potentially mean that you will be paying the loan back over a longer amount of time.

3. Discuss lowering payments with your bank. Many banks will consider the possibility of lowering your payments for a period of time.

It is worth remembering that banks must act in a responsible manner and treat mortgagors fair and reasonably, which includes when mortgagors are experiencing financial hardship. With that said, if you are experiencing financial difficulty and making your mortgage payments has/will become difficult, the first action you should take is to contact your bank and discuss all your options in full.

In these times of hardship and uncertainty that have come with COVID-19, a mortgage free holiday is a way to relieve some of the financial stress from life at the moment. However, as illustrated in this article, it is important to understand the repercussions of a mortgage free holiday in the long term.

## Access issues - commercial leases during COVID-19 lockdown


Many commercial tenants were forced to close down non-essential businesses during the nationwide lockdown. As a result, many commercial tenants and landlords face difficulties in meeting daily business expenses. There is a "no access in emergency" clause within ADLS leases, which was included following the 2011 Christchurch earthquakes and the creation of the 'red zone' where people were not allowed to enter and operate.

Although not a natural disaster type situation, the current pandemic has been considered an emergency during which tenants are unable to fully conduct their business because of reasons of safety of the public. The ADSL lease clause provides for 'a fair proportion of the rent and outgoings' ceasing to be payable for that period. The fairness should be to both the tenant and the landlord. There is much discussion on what is 'fair' in the circumstances where tenants cannot trade, as this is subjective. To determine what that reduction should be, there should be some engagement between the parties, hopefully to agree on what is fair.

While unable to trade, arguably tenants still obtain some benefit from the lease continuing; being able to continue to store their equipment and to resume trade without difficulty once they can re-access the premises for trading. Similarly, because most leases are continuing, landlords do not have the ability to otherwise make any use of the premises (as they remain for the tenant's use), and under a pandemic, they are unable to make insurance claims for the loss of rental.

The insurance position being circulated is that even where business interruption/loss of rent insurance is in place, there will not be a claim available under the insurance cover, as there are exclusions for pandemics. The exclusions are to deal with the underlying idea that insurance companies operate by diversifying their risk worldwide so that there are only portions of insured ever claiming under policies; as they cannot fund claims across the entire pool of insured parties at once.

Because there is no insurance claim available to landlords, and they will continue to face the costs of the premises, including rates, insurance, interest payments etc., it will likely be viewed that it's not 'fair' to the landlord for no rent and outgoings to be paid during the closedown, but rather that fair, would be for the 'downside' to be shared.

In some cases, a 50% reduction in rent is somewhat acceptable to parties (given the situation), although some (but not many) landlords are offering to waive rent completely. There are also some landlords who, while not reducing rental further, are agreeing to different payment arrangements, such as it being deferred until their tenant's business is operating again.

Landlords may have the option of changing any lending for the premises to interest only, or even having a 'mortgage holiday'. Such measures should assist them in dealing with any rent reduction during the period.

For those that are not on the recent version of the ADLS lease with the "no access in emergency" clause, and no other right under the lease to a rent abatement, landlords are encouraged to consider their tenant's financial situation. Reaching an agreement such as a rent payment holiday, reduction in rent or variation of the lease, is likely to be in both parties' interests.

The Government announced its intentions to introduce a Bill to assist tenants with late rental payments for commercial tenancies, and landlords for meeting mortgage payments – so watch this space.

If you are a landlord or tenant within the commercial realm (for the purposes of this article), it is important you contact your bank and lawyer for further assistance in respect of rental matters, advocating for you with the landlord, or documenting any changes within a lease (where applicable). Whether formally documented or not, it is important to ensure there is clear agreement between the parties to preserve commercial relationships during this unprecedented time.

## Employment rights for ACC claims: both sides of the coin

In 2020, it would be hard to come across a New Zealand household who has not either had a member of the household claim ACC for an injury or at least known someone that has had to. Statistics New Zealand reports that in 2018 alone, there were just short of 240,000 work place injury claims across the country. With so many people relying on ACC to maintain a livelihood, what do employees and employers need to know about their rights in the process?

If an employee is injured in their workplace and meets the ACC pre-requisites to receive compensation for their wage/salary, under the Accident Compensation Act 2001 ("the Act") the employer must account for the first week of the employee's wage (of up to 80% of their normal weekly wage) if they are incapacitated due to the workplace injury.

This provision further encompasses employees with multiple jobs, whereby if the injury has incapacitated the employee, resulting in them losing the opportunity to earn a wage in their other jobs also, the employer of the job on which the employee was injured must also cover the wages for the employee's other jobs for the first week of the employee's injury leave.

As an employer, if your employee obtains a workplace injury, you are entitled to complete due diligence investigations to ensure their injury and leave is justified. For example, you may pay for the employee to go to a medical or health professional to be assessed and require a medical certificate is provided that reiterates the state of the injury and medical recommendations.

In recent years, many employers have tried to make employees take their sick/holiday leave whilst on ACC. This cannot be enforced and is a breach of the Act. However, if an employee cannot work because of an injury obtained outside of work, under the Act, an employer can make the employee use any unused sick leave in that first week of incapacity.

Whilst on leave for a workplace injury, the Act and the Human Rights Act 1993 provide protections for employees from being dismissed during their injury leave. An employer is permitted to dismiss the employee only if through a thorough process of medical examinations/evidence and professional advice it is determined that the employee will not be able to return to the job or an adapted version of the job at any point. The case of McKean v the Board of Trustees of Wakaaranga School ([2007] ERNZ 1) sets out a series of factors which should be seriously considered and investigated prior to dismissal by an employer on medical grounds. These factors, amongst others, include the length of employment, type of employment, nature of the injury and probability of recovery.

In many cases, whereby the injury leave is more than a week, the employer and employee can agree that the employer will top the employee's ACC compensation wage up to 100% by using existing sick leave available to the employee. There is no obligation on either party to do so however.

If you are an employer where a workplace injury has occurred, and you are unclear on your obligations, it is advisable that you contact ACC and/or an ACC legal professional as soon as possible.

## Overview of the redundancy process

Redundancy can be defined as a situation where an employee loses their job because their position is no longer needed or useful to the employer. As in all employment affairs, the employer must act in good faith and follow a fair process during the redundancy process.

The process of redundancy can be an emotional time and cause uncertainty for many employees and this is one reason why the redundancy option, from an employer's perspective, should be a last option. Redeployment should always be considered in the first instance, where applicable.

To start the redundancy process, the following steps must be followed:

1. Employers are to document their proposal in writing. This document needs to clearly explain the changes that will be made to the business, an outline of how the employer will be making their decision, and timeframes for the employer's decision making process.
2. The employer then gives this written proposal to all employees in a similar category of employment and is required to allow employees the ability to meet with the employer to discuss further and to invite the employees to provide their feedback.
3. The employer then gathers the feedback and considers all responses received.
4. After considering all the feedback, the employer will confirm the new structure of the business. This should be given to all employees in writing followed by a meeting with the employees. The employer is required to advise all employees of

their decisions. At this point, the employer would give the employees their notice, in accordance with their Individual Employment Agreement ("IEA"), that his/her position is no longer required. If there is no IEA in place, a reasonable notice period must be given. This can be decided based on the employee's length of service, the reason for the redundancy, the industry norms and/or the employee's ability to find other employment. The employer will have to choose whether to pay the employee for their notice period or have the employee work out their notice period. If an employee resigns during this notice period, the employer is not required to pay for the balance of the notice period owing.

5. The employer will then make the changes to the business and support the employees throughout these changes. Support can include (but is not limited to) counselling sessions, career advice, interview training, curriculum vitae support etc. As the redundancy process can be a very stressful time for employees, it is extremely important to make sure that all employees are receiving the support they require.

Regarding final payments of employees that have been made redundant; this pay must include any unused annual leave and wages, along with any other entitlements up to the end of the notice period.

As the redundancy process is particular and must be followed accordingly, it is very strongly recommended to involve human resource expertise if available and/or a solicitor, to provide guidance in drafting necessary documents and on how to conduct required meetings.

## Overview of Trusts Act 2019

The Trusts Act 2019 was passed into law in the same year and becomes operative on 30 January 2021. The time in between remains critical as we all review the changes outlined. Existing best practice around trust law, together with the thinking and documentation dovetailed into the mix, is currently in the process of being updated around the country.

The last statutory rethink around trusts was in 1956. Both the use of trusts and how they have been judicially interpreted, has been major and influential during the period since then. What trusts have been used for, what they have been used to protect and how they have affected the structure of corporate life along with family succession planning – these are the contributions trust law have made.

The new Act updates current thinking while requiring greater transparency with beneficiaries regarding basic trust information, thereby satisfying current decision making norms and trends. Whether trust busting had been necessary for fairness and equity, or judicial and other forms of the decisions and administration, our relationship with trusts has evolved markedly.

A trust has three main players: the Settlor, the Trustee and the Beneficiary – and multiples of each of these. As each individual trust is reviewed in the light of the new Act, important questions need to be asked again by and of each 'player' to ascertain its relevance. A Settlor will ask whether the underling objectives and reasons for setting up the trust remain relevant. The Trustee will ask whether the true role is being carried out with independence of thought along with rigour of decision making. Linked to that is whether the liability associated with the future scrutiny of what the trust does, is worth the risk of being a trustee at all. The Beneficiary muses on whether he or she has the right to seek and receive information as the trust progresses on, bearing in mind whether they are discretionary or final beneficiaries.

Many of the changes made are linked to either common law or statutory rights in the trust law arena being challenged or examined. Accordingly, as at the operative date of the Trust Act, each trust must be revisited to reach an upgraded level of compliance and equity. Documentation must include reasons, timely interventions to maintain asset values, and accurate directions to best guide the assets entrusted to a trustee's care. Personal agendas, conflicts and prejudices surrender to the common objects and objectives. Failure to do that will embarrassingly come to light if there is a delving into the workings of the trusts down the track.

A trust may no longer gather dust. All assets must be examined for relevancy and value. These principles require at least an annual meeting followed by a suitable vehicle and process for reporting to all interested parties. Without a doubt a trust is driven by its trustees. Often a trustee could wear the hat of a settlor and/or a beneficiary. There is a strong common law duty of care which falls on to the trustee's shoulders. The key parameters are set out in the updated Act.

Your professional advisors are critical to any overview you may now undertake. Often their trustee companies may provide an independent decision making avenue. It is worth a visit to explore with them how your trust can be transparent and relevant with its operations in 2021, while carrying out in good faith its intended purposes.

# Snippets

### Open space covenants

Long before the current focus on climate change and other environmental issues emerged, many indications were already pointing New Zealand in those directions.

One of the key pieces of practical legislation was the Queen Elizabeth II National Trust Act of 1977. Its main stated objective was to encourage and promote the provision, protection and enhancement of open space for the benefit and enjoyment of the people of New Zealand. The role of the Trust evolved from there.

The open spaces that were to be protected, enabled the preservation of threatened aspects of our country that the Trustees deemed worthy of a lifeline. These included special historically significant spaces, animal species, plant varieties; segments of bush, land and views – all at risk.

Regional Representatives were the catalysts who sought out these spaces across the country, often dovetailing in with voluntary environmental and conservation management plans of thousands of New Zealand individuals and entities, both rural and urban.

Open Space Covenants are completed with terms and conditions set out with both the required consents and the definition surveys attached. The covenants, which run with the land in question, are either in perpetuity or for specific time periods.

Your lawyer can assist with all aspects of the process, hand in hand with those Regional Representatives of this superb Trust.

### Residential tenancy requirements revisited

In response to the Covid crises, from 26 March 2020 the Government announced a freeze to residential rent increases and greater protections for tenants against having their tenancies terminated.

The rent freeze is initially for six months. Allied to that, landlords cannot evict tenants over the three months from then, except in exceptional circumstances. Tenants may exit tenancies in the usual manner and under the existing timeframes. Extensions to these dates may be enforced by government regulations at a later date.

Covid-19 aside, there have been changes to landlord/tenant law that you should be aware of by now. The Tenancy Tribunal information updates the underlying position together with amendments, while cross referencing to Healthy Home Standards. Your legal advisor is also able to outline the rights that both landlords and tenants have in the current environment.

Under the relevant legislation in place, more consideration and notice needs to be provided when a tenancy is being terminated. In general, more health and safety issues around insulation, smoke alarms and dry warm houses are being required, and where premises are substandard, known as unlawful residential tenancies, tenants are allowed to exit with only two days' notice.

In this complex area, advice is paramount for both sides of the tenancy equation.