

Thinking about renting out your home or investment property?

The purchase of a residential property with a view to letting it out is a popular investment choice for many New Zealanders.

If you are considering such an investment, or indeed already rent out a property, then you need to be familiar with the provisions of the Residential Tenancies Act 1986 (the "Act") which sets out the requirements for many residential tenancies.

Some of the main points are as follows:

1. Tenancy agreements to be in writing

The Act provides that all residential tenancy agreements must be in writing. However, an agreement is still enforceable even if it is not in writing.

2. Term of tenancy

The Act recognises two types of tenancies:

- Fixed term tenancies that are for a specified term;
- Periodic tenancies that are not for a defined term but continue until terminated by either party in the manner set out below at point 5.

The Act does not apply to fixed term residential tenancies that are for less than 120 days or for five or more years. However, in the latter situation, both the landlord and the tenant must agree that the Act will not apply.

3. Bond

The Act permits the landlord to require a prospective tenant to pay up to four weeks rent as a bond in advance. The money is held by the Tenancy Tribunal and is only refundable once both parties sign a form agreeing on the amount to be allocated to the tenant and/or the landlord. The landlord is entitled to deduct from the bond the cost of any repairs that are the responsibility of the tenant but cannot use it to recover costs associated with fair wear and tear. If the parties cannot agree upon the amount of bond to be refunded, then the matter will have to be referred to the Tenancy Tribunal.

4. Form of tenancy agreement

The Act prescribes a simple form of tenancy agreement; a copy can be downloaded from the website of the Tenancy Tribunal: www.dbh.govt.nz

5. Terminating a residential tenancy

Either the landlord or the tenant can give notice to bring a tenancy to an end. In the case of the tenant, at least 21 days notice must be given. In the case of a landlord, 90 days notice must be given but only 42 days is required if the landlord:

- Requires the premises for his or her own use or that of his or her immediate family;
- Has entered into an agreement to sell the property and the terms of that agreement require vacant possession;
- Requires the property in order that one of his or her employees

can live in it so long as the landlord has previously notified the tenant that the premises are normally used for that purpose;

All notices to terminate a tenancy must be in writing.

6. Disputes

The Tenancy Tribunal deals with all disputes arising out of residential tenancy agreements regardless of the issues involved. Either party can make an application to the Tribunal either during the tenancy or after it has ended.

If you are a landlord, it pays to fully familiarise yourself with the responsibilities and duties imposed upon you by the Act. It could save you a lot of time and trouble in the future. ●

Economic disparity claims

The amended relationship property legislation introduced in 2002 signalled a shift in the way the law viewed relationships, by recognising that the contributions made by parties in a relationship are equal, particularly in the area of earning capacity.

Where a relationship ends and one spouse earns considerably more than the other, section 15 of the Property (Relationships) Act 1976 allows for the disadvantaged spouse to make a claim for compensation as a result of this "economic disparity".

Grounds for economic disparity

The initial challenge is making out the grounds for an economic disparity claim. Firstly, the living standards and income of one spouse must be significantly higher than the other. What constitutes 'significant' is unclear as Court decisions vary.

Secondly, the living standards and income must be due to the effects of the division of functions during the relationship. In most cases this has arisen due to one spouse sacrificing career advancement to remain at home to care for the children thereby allowing the other spouse to advance his or her career.

Once the grounds have been made out, the Court has discretion as to whether it considers an award to be just in the circumstances and if it does, then the amount of compensation will need to be determined.

This resolution may sound straightforward in theory. However, Court decisions regarding economic disparity claims have proved to be inconsistent. Even in cases where claims have been successful, awards have typically been conservative. As a result, it can be difficult to establish the grounds for economic disparity as it is unclear how much weight will be attached to any particular factor.

Career or family?

The decision to advance one's career or take a more domestic role is one that many people face when having families – but what are the consequences upon separation?

In a recent Family Court case, a wife brought a claim for economic disparity for \$686,000 on the basis that had she not given up work to care for the children she would be earning a similar income to her husband. The claim was initially rejected by the Family Court on the grounds that the economic disparity was caused by her own decision not to return to the workforce, rather than any real need for her to

remain at home. The case was appealed to the High Court and the much awaited decision was released recently.

On appeal, the High Court agreed that the division of roles within the marriage was a choice. However, the Court did not consider it appropriate to suggest a different choice could or should have been made. It found the division of roles within the marriage was the primary reason for the disparity in income. The Judge stated, "It is the classic case of a man being given full rein to develop his career and maximise his earning potential while his wife puts her career on hold. The causal link between the economic disparity and the division of roles in the marriage could not be clearer."

The case is currently being appealed to the Court of Appeal; however the High Court judgment sends a clear message that the decision to take a domestic role or advance one's career is a choice. However, just because one spouse chooses to remain in a domestic role, despite other opportunities being available, does not mean they should be treated as the author of their own misfortune. After all, the purpose of the Act is to recognise equal contributions made by parties in a relationship and every type of contribution must be considered. ●

Update on the Charities Register

Are you the trustee of a charitable trust or involved in the administration of a charitable organisation?

If so, you should be aware that various sections of the Charities Act 2005 (the "Act") have now come into force. One of the purposes of the Act is to provide for the registration of societies, institutions, and trustees of trusts as charitable entities.

Registration

Voluntary registration began on 1 February 2007. Organisations that currently have tax exempt status will need to be registered by 1 July 2008 to retain this status. Applications should be sent to the Charities Commission (the "Commission") by 1 April 2008 to ensure that registration is complete by July 2008.

When registering, each organisation must provide certain information including:

- the sector the organisation operates in
- the charitable purpose of the organisation
- the benefactors of the organisation
- the trustees or board members
- the rules or trust deed of the organisation.

Once registered as a charitable entity, there is an ongoing obligation to provide and update information on the register such as changes to the trustees, constitution, or trust deed or annual returns. For this reason, it will be advantageous for organisations to hold an annual general meeting in order to make such changes before lodging the application.

Purpose of registration

Some of the information provided to the Commission will be accessible to the public. The reason for this is to enhance public confidence in the charitable sector.

Following registration, the Commission will provide organisations with an identifying number which can be used to assure the public that the organisation is legitimate. This will be especially advantageous for organisations that carry out fundraising ventures. ●

Retirement villages – legal titles

Retirement villages are becoming an increasingly popular choice for older New Zealanders who wish to take advantage of the security and flexibility of the lifestyle on offer.

If you are considering purchasing a home in a retirement village, then you need to be aware of exactly what it is you are buying and in particular the sort of legal title that you will purchase when you acquire your new home.

The most common types of legal title used for retirement villages are:

1. Licence to occupy

A licence to occupy entitles the resident to live in the unit but ownership of the unit is retained by the retirement village. For that reason, it is usually not possible to borrow funds from a bank or other financial institution secured against a licence to occupy.

2. Unit title

A unit title is issued under the Unit Titles Act 1972 and confers legal ownership of the unit or house upon the resident. It is therefore technically possible for the resident to borrow against the value of the property. However, the occupation agreement with the retirement village will probably include re-sale restrictions which will in turn restrict the resident's ability to borrow.

3. Cross lease

A cross lease title is one whereby the ownership of the freehold is shared by all of the residents who then grant leases to each other to live in the units and/or houses for a token rent.

4. Lease for life

The retirement village owner grants a lease in a unit or house in the village which continues on until the resident either dies or leaves the village.

The Retirement Villages Act 2003 (the "Act") introduced new compliance procedures for retirement village operators, which are in the process of being phased in. These procedures include a requirement for the following documents to be provided to all intending residents:

- a Disclosure Statement, which includes information about the type of legal title offered and the ownership and management structure of the village, and
- an Occupation Right Agreement, which confers the right of occupation of a unit or house upon a resident, together with the right to use services and shared facilities in the village.

In addition, the Act provides that with effect from 1 May 2007, each retirement village must have a Code of Residents Rights. This code summarises the basic rights which all retirement village residents are entitled to and covers matters such as consultation, dispute resolution

and the right to be provided with services and other benefits promised in the Occupation Right Agreement.

Legal advice

The Act makes it mandatory for intending residents of a retirement village to receive independent legal advice before signing an Occupation Right Agreement. This means the resident's signature has to be witnessed by a lawyer who must certify that he or she has explained the general effect of the agreement and its implications in such a manner which is easily understood by the intending resident. An agreement that has not been properly certified may not be enforceable by the retirement village operator.

In summary, the new compliance procedures introduced by the Act should afford greater protection and security to retirement village residents. ●

Relationship property – contracting out agreements

Increasingly New Zealanders are becoming more alert to the implications of the Property (Relationships) Act 1976 ("the Act") and are seeking legal advice about the preservation of their hard-earned property.

Who can enter into an agreement?

Section 21 of the Act provides a husband and wife, civil union partners, de facto partners, or two persons in contemplation of entering into a marriage, civil union or de facto relationship may contract out of the provisions of the Act.

Why enter into an agreement?

In a recent decision of the Court of Appeal, *Harrison v Harrison*, the court commented, "the paradigm situation in which a contracting out agreement will be sought is where one party has pre-relationship assets of a significant magnitude to render justifiable the social awkwardness of insisting on a contracting out agreement..."

There are numerous reasons for electing to contract out of the Act. Usually, it is to avoid the presumption of equal sharing of property that arises when the relationship ends. However, an agreement may also assist with asset, estate or tax planning. It may be a desire by one or both parties to preserve all of the property owned or acquired by them prior to the commencement of the relationship as his or her own separate property. Alternatively, the parties may simply wish to record their decision to treat certain property differently.

What can be included in the agreement?

Section 21D of the Act sets out what can be included in an agreement. An agreement can

- declare property to be separate or relationship property;
- define the share each party to the agreement has in any part or all of the relationship property;
- define shares on death;
- provide for the calculation of the shares; and

- prescribe the method by which the relationship property is to be divided.

Section 21 of the Act permits parties to an agreement to make any arrangements they think fit with respect to their property, including property acquired in the future by one or other or both of the parties. "Property" is specifically defined in Section 2 of the Act and includes the following:

- real property (i.e. land);
- personal property;
- any estate or interest in any real property or personal property;
- a debt; and
- any other right or interest.

How is the agreement made valid?

Section 21F of the Act records an agreement will be void unless it complies with certain requirements. Those include the following:

- The agreement must be in writing and signed by both parties.
- Each party to the agreement must have independent legal advice before signing the agreement.
- The signature of each party to the agreement must be witnessed by a lawyer.
- The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

Future considerations

It is important to recognise that an agreement contracting out of the provisions of the Act needs to be revisited on a regular basis. It is impossible when drafting an agreement to anticipate every eventuality just as it is impossible to foresee, at the outset, the longevity of a relationship. ●

Wills update

A Bill updating the law relating to wills is currently in its final legislative stages. Once passed into law, it will be known as the Wills Act 2007 ("the Bill").

The existing law is enshrined in a statute dating back to 1837. It sets out the formal requirements for signing or revoking a will as well as the rules concerning interpretation and correction of wills. However, some considered the existing law too restrictive and that proper effect was not given to the intentions of the person making the will (currently known as the "testator"). The requirements for signing a will under the existing law are strict. There have been instances where a will has been deemed to be invalid because of the lack of formal validity arising from the manner in which it had been signed, despite the testator's intentions being very clear.

The new Act will apply to the will of any person who dies in New Zealand on or after 1 July 2007. One of its purposes is to restate the law in plain modern language. The Bill, once passed, will go some way towards modernising the substantive law but it is not intended to be a wide ranging reform of the current law.

Key Changes

The term "testator" is replaced by the term "will maker". One of the underlying principles of the new law is to ensure that the intentions of the will maker are given full effect. To this end the Bill contains a provision for the court to correct clerical errors in a will that alter the true intention of the will maker. Furthermore, the court may take into account external evidence in interpreting a will where the wording of the will is such that the will maker's intention is "part meaningless, ambiguous or uncertain".

The requirements for a valid will under the new law will be essentially the same. The Bill restates that a will must be a document signed in the presence of two witnesses. Those witnesses must:

- be together in the will maker's presence when he or she signs; and
- each state on the document, in the will maker's presence, that he or she was present when the will maker signed; and
- each sign the will in the will maker's presence.

However, the Bill does contain a new provision whereby the High Court can make an order declaring a document valid where it appears to be a will but does not comply with the above requirements. This does not apply to wills made before 1 July 2007.

Conclusion

The onus is clearly on the will maker and his or her lawyer to ensure that the intention of the will is very clear. Nevertheless, the Bill will give some flexibility to the court with the interpretation of a will where the intention has not been stated as clearly as it should be. It will be interesting to see how widely or restrictively the court will interpret its powers under the new legislation. ●

New staff appointments

We are delighted to welcome to the staff outstanding graduates **Phil Gardyne** and **Mandy Rusk**. Both have completed their law degrees with first class honours from Waikato University and are in the process of completing legal professional courses allowing them to apply to be admitted as Barristers and Solicitors of the High Court of New Zealand early next year. ●



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C L I E N T N E W S L E T T E R

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