Evans Bailey
LAWYERS

DECEMBER 2011

# LEGALease

Wishing you all a

# Merry Christmas

## and safe and happy holidays

**Evans Bailey will close for Christmas at 4.30pm on Thursday 22 December 2011 and re-open at 8.30am Monday 9 January 2012**

## Inside this edition



## Abolition of gift duty – options and risks

The Government has passed legislation abolishing gift duty from 1 October 2011, which means you are no longer limited to making gifts not exceeding $27,000.00 in any 12 month period.

The abolition of gift duty will change the nature of asset and estate planning.

It will be tempting for some to make large gifts to their existing trusts. Others may consider setting up new trusts and making large gifts to those trusts.

Before making any large gifts, however, there are important issues to be considered, to ensure that such gifts remain valid and unable to be challenged or set aside.

Insolvency and the timing of any debt forgiveness is relevant. Section 346 of the Property Law Act, relevant provisions of the Insolvency Act and the Supreme Court decision in Regal Castings v Lightbody all need to be addressed, and full information of a donor's financial position is required. This is to ensure that making a large one-off forgiveness of debt does not have the effect of rendering the donor effectively insolvent i.e. with more debts and liabilities owing than assets available to meet those liabilities if called upon. Any guarantees that a donor may have given should also be calculated and taken into account – otherwise the gift could potentially be set aside and rendered ineffective.

If you consider that at any time you may apply for a Residential Care Subsidy, or other means tested benefit, you need to be aware that the provisions of S147A of the Social Security Act have not been amended. The practical outcome of this is that if you gift any more than $27,000.00 in a year, the Chief Executive of WINZ may decide that you have deprived yourself of property. In such a case, the Chief Executive may add back the excess gift to your assets, when you apply for a subsidy. Making a gift of more than $27,000.00 could mean that you would never become eligible for a subsidy or benefit.

As was the case prior to the abolition of gift duty, if any relationship property is disposed of or transferred to a trust, either through a gift of property or through the forgiveness of a relationship debt, it may be possible for the

disposition or gift to be overturned on application of the Property (Relationships) Act 1976 or lead to additional remedies against the person making the gift, or the trust. Any significant gifts of relationship property should be recorded in a Relationship Property Agreement if the gift is being made in fulfilment of relationship property rights.

The possibility of claims under the Family Proceedings Act 1980 must also be taken into account. If there is any question as to disadvantage, the prudent course of action will be for both parties to take independent legal advice before the gift is made and for the reasons and basis for the gift to be recorded.

When making a gift, there will no longer be a requirement to file gift statements and associated deeds with the Inland Revenue. However, although there is no legal requirement that gifts (other than land) are recorded in writing, in the absence of any formal record of a gift, proving that a gift has been made may be difficult. Appropriate documentation to ensure the legal certainty of gifts, such as deed of gift to trusts, will still be required.

We will progressively contact each client operating a gifting programme to discuss their position and requirements, so as to ensure that the appropriate steps are taken to complete or continue with each gifting programme. We will do this on the normal anniversary of the last gift.

Those clients, who are now considering making more substantial gifts to existing trusts, or forming new trusts, should contact us to arrange an appointment. Each individual case must be considered on its merits before a decision is made.

# Buying and selling a unit title property

Unit Title properties are becoming more common in New Zealand and the ownership structures of these properties are becoming increasingly complex. It is therefore more important than ever that buyers understand the rights, obligations and benefits associated with owning a Unit Title property prior to becoming committed as a buyer under an Agreement for Sale and Purchase.

The Unit Titles Act 2010 ('the Act') came into effect on 20 June 2011 and addresses some of the concerns traditionally associated with Unit Title property ownership. The Act provides for more information to be available to buyers so they can make better and more informed decisions regarding their purchase of Unit Title Properties.

When a Unit Title is sold the seller must now provide the buyer with pre-contract and pre-settlement disclosure regarding the Unit Title property. The purchaser will also be entitled to request additional disclosure at their own expense.

## Pre-contract disclosure

Under the Act a pre-contract disclosure statement must be prepared and provided by the seller to any prospective buyer of a Unit Title property before the parties enter into any Agreement.

Pre-contract disclosure must advise the buyer on:

- body corporate charges,
- proposed future maintenance, including how the costs will be met,
- the balance of any fund or bank accounts of the body corporate as at the date of the last financial statements,
- whether or not the unit or common property is or has been subject to a claim under the Weathertight Homes Resolution Services Act 2006 or any other similar civil proceeding,
- and explain matters such as unit title property ownership, body corporate operation rules, unit plans, ownership and utility interests together with other matters to ensure the information provided is meaningful to the buyer.

The requirement to provide pre-contract disclosure cannot be contracted out of by the parties. All sellers must comply.

## Pre-settlement disclosure

After the buyer and seller have entered into an agreement for sale and purchase the seller must provide the buyer with a second disclosure statement with further information, including a certificate from the body corporate, no later than the fifth working day prior to the settlement date.

## Additional disclosure

The buyer of a Unit Title may request additional disclosure from the seller. Any request for an additional disclosure statement must be made by the earlier of either:

- five working days after the date of the agreement, or
- the tenth working day before execution of settlement.

If a request for additional disclosure is made, the seller must provide the additional disclosure to the buyer no later than five working days after the request was made. The seller is entitled to recover any reasonable costs they incur in providing the additional disclosure.

The additional disclosure may be of great assistance to a buyer, and serious consideration should be given to requesting information even though it may incur additional costs.

There are consequences if the correct disclosures are not made within the appropriate time frames. These can include the buyer being able to postpone settlement or cancel the agreement altogether.

# Christchurch earthquake to trigger changes to Resource Management Act 1991

The Christchurch earthquakes have given cause for the Government to re-examine the requirements of the Resource Management Act 1991 ('RMA') with the damage caused to thousands of homes by liquefaction being a significant factor.

The purpose of the RMA is to "promote the sustainable management of natural and physical resources". The catastrophic effects of the earthquakes have highlighted the importance of the RMA as not only protecting the environment from the impact of people and land use, but also to consider the effect on people from nature.

To achieve its purpose, the RMA requires that decision makers consider matters of "national importance" in their determinations. However, natural hazards are not included as a matter of national importance. As a result it is becoming apparent that the zoning of areas for residential use in district plans, and the consideration of Resource Consent applications do not sufficiently consider natural hazard risks.

The recent Canterbury Fact Finding Project ('the Project') has investigated how much was known about liquefaction and lateral spreading risks in Christchurch, and the impact of such knowledge on zoning and development decisions. Since 1991 there have been reports available on the significant liquefaction risk in Christchurch, including "clear maps that are uncannily accurate" on the locations where liquefaction would occur.

Hon. Dr Nick Smith, Minister for the Environment noted in a speech given recently that a significant number of resource consents, covering about 20% of the severely liquefied properties in Christchurch, were approved after the area specific reports funded by the Earthquake Commission (EQC) and GNS Science (GNS) were released in 1991 and 1992 respectively.

The Project has found that Resource Consents issued under the RMA for the development of land in some areas did not take into account identified liquefaction risks. Even post 2004, it is considered consents were being granted without any regard for this significant and by then well documented risk. Not only was the information regarding identified risks non existent with the zoning and consent decision making with the development of these areas, but the risk of liquefaction was not clearly identified on Land Information Memorandum Reports ('LIM Reports') for the affected properties.

The identification of liquefaction risk has now been incorporated into LIM Reports in Christchurch, and these risks will likely be considered with future residential development and zoning. The problems in Christchurch have however identified a shortcoming in the current consenting process, which must be readily addressed.

The Government is to continue with their changes to the Resource Management Act, and have indicated that further substantial changes will be proposed to ensure the risks of natural hazards are considered in planning decisions.

Perhaps these amendments will ensure all Councils look to address the risk of natural hazards beyond flooding when approving applications under the Resource Management Act, and be vigilant in protecting residents from real identified risks.

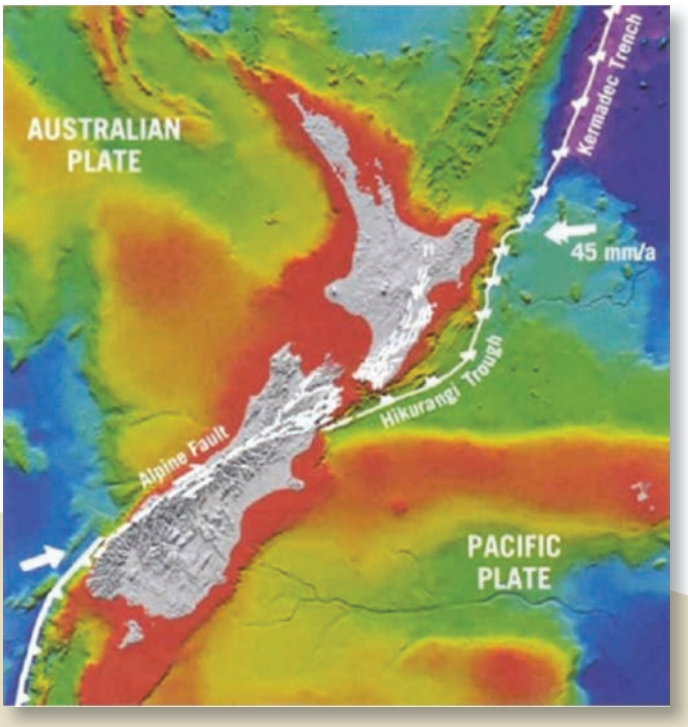
The inclusion of detailed information in LIM Reports will also assist in giving notice to property owners of the natural hazard risks to which the property may be subject, allowing them to account for such risks when building upon or otherwise developing their property.

# Off the Richter

New Zealand is internationally renowned for it's breathtaking and diverse landscape, however less publicised, until recently, is the fact that we are situated between two major fault lines. Consequently seismic activity is also an undeniable feature of life in our remarkable land. The recent Canterbury earthquakes are a timely reminder of this fact and in light of this here are some key points to keep in mind if you are a tenant, landlord or home-owner.

### Residential tenancies

In the event of a natural disaster, the Residential Tenancies Act 1986 allows both the landlord and tenant to terminate the tenancy. Where a home has been damaged to the extent that it is uninhabitable, no rent shall be payable until the home is reinstated so that the tenant can re-occupy.



Alternatively, the landlord or tenant may wish to terminate the tenancy. If a tenant wishes to terminate the tenancy, the landlord must be given at least two days notice. Where a landlord wishes to terminate the tenancy, the tenant must be given at least seven days notice. In situations where the home is partially damaged, the rent may be proportionately reduced or either party may apply to the Tenancy Tribunal for an order terminating the tenancy.

### Commercial leases

The Auckland District Law Society (ADLS) Lease, the most commonly used commercial lease, allows for the termination of the lease in the event of a natural disaster. In situations where the damages render a property uninhabitable, the lease is terminated instantly. Where the damages are partial, rent shall be abated and the landlord is required to use insurance monies to repair damages as quickly as possible. If the necessary building consents are unobtainable and insurance payments are inadequate to facilitate a timely restoration, the lease is terminated. If premises are uninhabitable and require demolition or reconstruction, the landlord may cancel the lease giving the tenant 20 working days notice.

In the absence of a lease, the Property Law Act 2007 provides similar remedies in the event of specified natural disasters. Landlords can recover rental losses through their insurance providers if they are covered for loss of rent and outgoings.

### Residential property

In the event of an earthquake or natural disaster, homes, personal possessions and land are automatically covered by the Earthquake Commission (EQC) – provided home-owners have pre-existing private and fire insurance policies. The EQC provides cover for:

- damages of up to $100,000 caused to homes,
- personal possessions of up to $20,000, and
- for loss of land value based on a professional valuation.

Any value over and above these amounts may be covered under existing private insurance policies. Claims to the EQC need to be made within 30 days of the damage occurring but can be extended to three months in some circumstances.

## Weddings and wills

Death and Wills! This generally is not a typical topic of conversation when you are preparing for your wedding. But due consideration should to be given to documents such as Wills and Contracting Out Agreements (i.e. Pre-Nuptial Agreements) as marriage imposes significant obligations in relation to property division and the allocation of assets.

If a person dies intestate (without leaving a Will), the allocation of their assets is determined by legislation such as the Property (Relationships) Act 1976 and may be divided differently to the way the person had envisioned it would be.

The advent of a new marriage also automatically invalidates all Wills that were made prior to the date of the marriage.

A review of a person's estate planning should also be undertaken prior to marriage as it too will be significantly affected. Consideration must be given to those who will benefit from a person's estate and legacy (a gift of personal property or money to a beneficiary of a Will). Failure to execute the requisite documents to reflect one's wishes can have negative consequences for all concerned.

## When is relationship property valued following separation?

The date upon which relationship property is valued for division of asset purposes varies depending on whether the parties or the court decide the division of assets. The Property (Relationships) Act 1976 ('the Act') applies to de-facto relationships, civil unions and marriages. The Act provides rules for the division of property for relationships of over three years in duration.

Where the parties agree, they can document their agreement in a Separation and Relationship Property Agreement, and include the values as at the date of separation.

Where agreement cannot be reached, application can be made to the Family Court, where the value of relationship property is determined at the date of hearing, unless the Court exercises the overriding discretion it has to depart from a hearing date valuation.

Be aware of the impact timing can have when disputing the split of relationship property assets following separation. For some people, a quick resolution at the earlier asset value may be a better result than getting a greater share when asset values have fallen.

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