S J SCANNELL & CO

NEWSLETTER- DECEMBER/FEBRUARY 2023

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If you have any questions about the newsletter items, please contact me, I am here to help.

Occupation Right Agreements

Purchasing an Occupation Right Agreement (ORA) at a retirement village is a big decision, and it can be a daunting task reviewing all the paperwork that villages are required to provide to you. Set out below is a brief overview of the more salient aspects of life within a retirement village.

A retirement village is governed by the Retirement Villages Act 2003 ("the Act"). This Act protects residents and the village by providing a legal framework in respect of financial reporting, regulation and monitoring, oversight provisions and the security and protection of rights. All retirement villages must be registered; you can check that your intending village is registered via the Companies Office website.

Most villages use a contractual licence to occupy, this is not the same as owning a freehold house; you have no legal interest in the village or the land. However, some villages do offer unit title ownership and the usual body corporate rules will apply.

Retirement villages will not allow your family trust to be noted as the owner; you must enter into the licence personally. Where an ORA is held jointly, upon the passing of one owner, the ORA will transfer to the surviving joint owner automatically. That said, if you are a blended family, you may wish to consider how you are going to hold the ORA particularly if there is unequal contribution of funds towards the purchase price of the ORA. Some retirement villages will provide a one-page document of 'Directions as to Payment' of the sale proceeds once the ORA has been terminated. This will sit behind the ORA.

All retirement villages will ask that you confirm you have a valid will in place (they do not need to see a copy of this). They will also require you to have an Enduring Power of Attorney in place for both Property and

Personal Care and Welfare (they will need to see copies of these).

Each retirement village has a form of 'Deferred Management Fee' which is your contribution to the overall running of the village including management, your villa/unit and the amenities that are provided by the village. This fee is only paid on the termination of your ORA. This means your estimated financial return on termination of your ORA is going to be less the deferred management fee – which can vary from village to village but can be around 25% of the initial purchase price.

By way of an example, if you purchased your ORA for $650,000, and your deferred management fee is a maximum of 25%, the amount you will pay to the village upon termination of your ORA will be $162,500. Some deferred management fees accrue over periods of 2, 3, 5, or even 10 years, each ORA is different and your lawyer will know to carefully review this provision.

On top of the purchase price for your ORA, there will also be weekly fees to pay and/or a service charge fee – depending on what type of care you need.

Once you have met with your lawyer, received legal advice and signed your ORA, you will be provided with a 15 working day cooling off period, which is covered under the Act. This period of time can differ if your unit/villa is still to be built.

Residential Land Withholding Tax – When and who pays it?

Residential Land Withholding Tax (RLWT) was introduced in July 2016. This is where lawyers and conveyancing agents acting for an offshore person in a residential sale will withhold the RLWT and pay it directly to the Inland Revenue Department.

If the vendor is not an offshore person and the sale of the residential property happens within two years of obtaining the property where the house does not qualify as a "main home", this sale will be subject to tax also. There does not have to be a dwelling on the section for the sale to be taxed, it can be any residential sale.

An offshore person is typically a company, partnership or trust that was not formed in New Zealand or can also be a person who is not a New Zealand citizen and does not have a New Zealand residence visa. An offshore person can, however, also be a New Zealand citizen who has not visited New Zealand within the last three years or a residence visa holder who has not visited New Zealand within the last 12 months. Certain companies, partnerships and trusts could also be offshore persons if directors, shareholders, partners, trustees, appointors, or beneficiaries of the entity are living outside of New Zealand.

RLWT is collected prior to the funds from a sale reaching the recipient. Where there is a failure to pay RLWT, the sale itself would not be held up, but monetary penalties would be imposed on the withholding agent.

The amount of RLWT that is to be paid is the lesser of either 33% of the vendor's profit, or 10% of the gross sale price. It is important to note that the amount withheld is not a final tax and the vendor is eligible to file a tax return to claim back any overpaid tax on the transaction.

It is, however, possible to be exempt to RLWT. If you are a developer and have provided an acceptable security to the IRD and met all of your tax obligations, you may be eligible for exemption. As well as this, if the vendor is an offshore person that is disposing of their main home, they may also be exempt.

When completing a residential sale that falls within the criteria of the Brightline test, you will need to fill out a RLWT declaration. This requires information such as your details, whether or not you are associated with the buyer and whether or not you are an offshore person.

If you are an offshore person, you will need to fill out the applicable section, which includes information such as your share of the property being disposed of and why you may not be subject to RLWT; such as having an exemption certificate, where the transfer is due to the settlement of relationship property or the disposal of the property is by an estate upon the death of a person.

Protected Disclosures (Protection of Whistleblowers) Bill

On 1 July 2022 the Protected Disclosures (Protection of Whistleblowers) Act 2022 ("The Act") came in to force, repealing and replacing the Protected Disclosures Act 2000. The Act provides increased protection for whistleblowers who disclose information about an organisation's wrongdoings.
The Public Service Commission ("PSC") released a statement that: The Protected Disclosures (Protection of Whistleblowers) Act 2022 continues

the Protected Disclosures Act 2000. That the purpose is to facilitate the disclosure and investigation of serious wrongdoing in the workplace and to provide protection for employees and other workers who report concerns.

The PSC advised that the 2022 Act makes changes to address identified issues and improvements. The keys changes are as follows:

- extending the definition of serious wrongdoing to cover private sector use of public funds and authority and to cover behaviour that is a serious risk to the health and safety of any individual;
- allowing people to report serious wrongdoing directly to an appropriate authority at any time, while clarifying the ability of the appropriate authority to decline or refer the disclosure;
- strengthening protections for disclosers by specifying what a receiver of a disclosure should do;
- clarifying internal procedure requirements for public sector organisations and requiring them to state how they will provide support to disclosers; and
- clarifying the potential forms of adverse conduct disclosers may face.

The PSC further stated that organisations, both public and private sector, have responsibilities under the Act as receivers of protected disclosures, including sometimes as Appropriate Authorities. Public sector organisations must have appropriate internal procedures for protected disclosures and must publicise these procedures widely.

Appropriate Authorities are defined in the Act and includes the head of any public sector organisation, any officer of Parliament and includes the persons or bodies listed in Schedule 2 of the Act. Further it includes the membership body of a particular profession, trade or calling with the power to discipline is members, but does not include a Minister or member of Parliament.

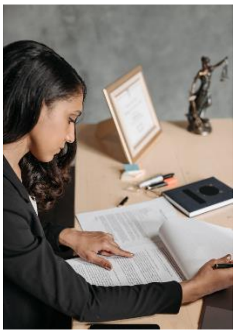
The Act provides for special provisions allowing the Chief Ombudsman to review and guide any public sector organisation that is carrying out an investigation of a protected disclosure. The Chief Ombudsmen can review disclosures directly and investigate them, they are the only appropriate authority for a protected disclosure that is or includes international relations information.

If your organisation is looking to encourage an open reporting culture, or is currently grappling with how to handle a protected disclosure by one of your employees about serious wrongdoing in your workplace, the Ombudsman can provide information and guidance. There are multiple guides available, including the following:

- Whistle-Blowing: A guide to Protected Disclosures Act
- Checklist – Am I ready to make a protected disclosure? (This checklist will assist if you are considering making a protected disclosure about serious wrongdoing in your workplace, or wondering whether you need more information and guidance. It applies if you work in both the public and private (including not-for-profit) sectors.)
- Protected Disclosures – Guidance on internal policies and procedures – July 2022

These can all be found online at: www.ombudsman.parliament.nz/resources/making-protected-disclosure-guide-blowing-whistle.

Changes to the Fair Trading Act



The Fair Trading Amendment Act 2021 came into force on 16 August 2022. The Act has been introduced to put in place new protections against unfair practices, by extending the protections against unfair contract terms under the Fair Trading Act 1986 and prohibiting unconscionable conduct.

The types of contracts that are captured under by the Amendment Act include terms of trade and independent contractor agreements. A contract is subject to the amendments under the new Act when it is in standard form, a trade contract, or a small contract.

A standard form contract is one where the terms of the contract have not been substantially negotiated, for example a template-based contract. A trade contract is a business-to-business contract where the parties to the contract are involved in trade. A contract is considered to be a small contract where the trading relationship has an annual value of less than $250,000 including GST at the time the trading relationship begins.

Under the Amendment Act an unfair term is one which creates an imbalance between the rights and obligations of the parties, is unnecessary to protect the legitimate interests of the party who would benefit from the term and causes detriment to one of the parties if applied, enforced, or relied upon.

A court cannot determine a term to be unfair if the term defines the matter of the contract, sets the upfront price payable under the contract or is required or expressly permitted by an Act. When the court makes a decision regarding a term, they must consider the transparency of such term alongside the contract as a whole. If a court finds a term to be unfair, it must be remedied or removed. If the business does not address the unfair contract term, they may face fines of up to $600,000, or $200,000 for an individual.

The Amendment Act also prohibits traders from behaving unconscionably. There is no definition of unconscionable conduct in the Act. This was to avoid limiting the circumstances in which this protection could be relied upon.

However, section 8 of the Act contains a non-exhaustive list of factors to assess whether conduct is unconscionable. This includes the following:

- the relative bargaining power of the trader;
- the extent to which the parties have acted in good faith;
- whether the affected person was reasonably able to protect their own interest; or
- whether there was undue influence.

If the court finds that a company has acted unconscionably, it may face fines of up to $600,000, or $200,000 for an individual.

In summary, businesses that use standard form small trade contracts are affected by the recent changes as a result of the Fair Trading Amendment Act. It is essential that businesses ensure their standard form contracts are compliant.

Order to act under the Protection of Personal and Property Rights Act 1988

The three most common orders granted under the Protection of Personal and Property Rights Act 1988 (“the Act”) are set out below together with an explanation of what happens when you have been appointed, and what your obligations and responsibilities are.

Property Order: This Order occurs when a person’s item of property does not exceed $5,000 in value or their income/benefit does not exceed $20,000 in any one year. You are required to administer the property, income or benefit in such a way as to enable or encourage the person for whom you are acting to exercise and develop such capacity as that person has to the greatest extent possible.

Property Manager: This Order occurs when a person’s property or income exceeds that as described above under Property Order. The function and duty of a manager is to use the property in the promotion and protection of the best interests of the person for whom you are acting. You must also, as far as possible, encourage that person to develop and exercise the level of competence they may hold.

The Act requires you to report to the Court with a Statement of Management, three months after the Order has been granted. This Statement includes providing bank statements together with copies of supporting receipts and must be completed in the prescribed form. After the first three months, reporting is then required every 12 months on the anniversary from when the Order was made. If you fail to do this, the Court will draw this to the Judge’s attention who may Order that you comply.

Welfare Guardian: This Order is made under section 12 of the Act, and only where a person has been deemed to be wholly incapable. As Welfare Guardian, you cannot:

a) make any decision relating to the person entering into marriage or civil union, or to the dissolution of that person’s marriage or civil union; or
b) make any decision relating to the adoption of any child of that person; or
c) refuse consent to the administering to that person of any standard medical treatment o procedure intended to save that person’s life or to prevent serious damage to that person’s health; or
d) consent to the administering to that person of electro-convulsive treatment; or
e) consent to the performance on that person of any surgery or other treatment designed to destroy any part of the brain or any brain function for the purpose of changing that person’s behaviour; or
f) consent to that person’s taking part in any medical experiment other than one to be conducted for the purpose of saving that person’s life or of preventing serious damage to that person’s health; or
g) request, on behalf of the person, the option of receiving assisted dying under the End-of-Life Choice Act 2019.

In exercising powers under this Order, the Welfare Guardian must promote and protect the welfare and best interests of the person, while seeking to encourage that person to develop and exercise such capacity as the person may have to understand the nature and consequences of decisions being made.

Your appointment under the above Orders will end in a number of situations - with the most common being when the person you are acting for dies.

Snippets

Further thoughts on workplace bullying

The role of the Employment Relations Authority (ERA) and the Employment Court (EC) is more critical than ever in defining and addressing workplace bullying.

As more cases surface, the definition of what is bullying becomes clearer as opposed to what is merely criticism or feedback.

The ERA and the EC are the combined force that brings all the workplace bullying strands together. There are a number of pieces of legislation that all seek to address the bullying from different angles and aspects. The big three are the Employment Relations Act, the Human Rights Act and the Health and Safety at Work Act.

Bullying is persistent, ongoing behaviour which is not considered reasonable. It may also involve harassment, including sexual harassment.

Human rights are part of the bigger picture, as is workplace health and safety, as the stress created by workplace bullying can affect the employees' general health and wellbeing.

The ERA and the EC have the opportunity to place the potential bullying actions in a workplace context. Employers must be on the watch for bullying, for even if they are unaware it is happening, they can still be held liable along with the bully or bullies.

If you suspect bullying in your workplace in your capacity as an employer or are on the receiving end of the unacceptable behaviour as an employee, your legal adviser can assist you with the best course of action.

Executors and trustees of a will

All wills need executors and trustees. While there may be more than one of them, the executor and trustee is usually the same person in a will. This has not always been the case and the roles remain complementary and different.

The executor role is usually related to the coordinating and finance arrangements for and with the deceased's family: whether he or she was to be buried or cremated, reviewing the will content and progressing to carry out the deceased's wishes, probating the will if necessary, and selling or managing Estate assets as appropriate.

The trustee role links to the trusts created under the will in question. These trusts are called testamentary trusts. The trustee controls and administers these trusts. For example, if a capital asset or amount is left to a beneficiary in a will who is a minor at the date of death of the deceased, and the minor beneficiary is unable to unconditionally receive his or her benefit until attaining a certain age, such as 25 years old, then a testamentary trust is created from the will with the appointed trustee administering that amount, until the minor attains 25 years.

As mentioned, the same person tends to handle both roles with the support of the Estate lawyers, accountants and financial advisers. However, with the skill sets being different, when undertaking the appointment of executor and/or trustee the person should ensure the role is carried out in close liaison with their legal advisors".

S J Scannell & Co
Would like to wish you and your family a Merry Christmas and prosperous New Year

We advise our offices will be closing on Wednesday, 21st December 2022 at 5pm and re-opening on Monday, 16th January 2023 at 8.30 am