// WILLIAMS EASON

BARRISTERS & SOLICITORS

FLOOR 2 61 KILMORE STREET P O BOX 4599 CHRISTCHURCH 8140 NEW ZEALAND TEL(03)379-7444 FAX(03)366-0562

NEWSLETTER

Issue 3
Aug 2007 – Oct 2007

Inside this edition

Evicting a Troublesome Tenant – The Salt Case 1

The End of Spousal Immunity in Court Proceedings 2

Relationship Property – Contracting out Agreements 2

Updates 3

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

Evicting a Troublesome Tenant – The Salt Case

The rights and obligations of tenants and landlords in a tenancy have been placed under the microscope recently with the case of Sharon Salt and her family. The Salt family was initially ordered to leave their state house in Auckland after the Tenancy Tribunal found serious breaches of their tenancy agreement with Housing New Zealand.

On appeal, Sharon Salt was granted a rehearing that subsequently resulted in the Tribunal ruling in her favour and determining that there was insufficient evidence to terminate the tenancy. The Tribunal adjudicator criticised Housing New Zealand for a lack of specific evidence concerning complaints made about the family following the issue of the original breach notice earlier in the year. The adjudicator considered that the evidence presented was neither specific nor sufficiently recent and that it would therefore be unjust to terminate the tenancy.

Housing New Zealand has indicated an intention to appeal the Auckland Tenancy Tribunal decision to allow the Salt family to remain living in their state house. It is likely that the appeal and resulting decision will be significant in further defining the exact nature of the relationship between landlord and tenant.

Tenancy Tribunal
The Tenancy Tribunal is a court charged with the responsibility of determining disputes between landlords and tenants. Decisions of the Tribunal are made in accordance with the Residential Tenancies Act and those decisions affect the interpretation and application of the Act. A hearing before the Tribunal is a public hearing and parties may attend with support people. Generally lawyers will not appear although there are special circumstances where they may.
At the hearing, the adjudicator hears evidence from both parties together with any relevant witnesses. In most cases the adjudicator will give a decision immediately after the hearing. In more complex cases a written decision may be provided at a later date, such as in the Salt case.

© 2007

The Tribunal has authority to make a variety of orders. The most common are described below.

Possession Order
This involves the termination of the tenancy. This can happen where a tenant is behind in rent, has substantially damaged the property, has assaulted the landlord, other tenants or neighbours, or is in default under the tenancy agreement. To obtain a possession order, the landlord must give at least 10 working days notice to address breaches and the tenant must have failed to remedy the breaches within the designated time.

Monetary Order
This requires either a landlord or a tenant to pay money to the other. For example, a payment could be for rent arrears or refund of overpaid rent, payment for damage, cleaning, reimbursement of costs, payment of exemplary damages for legal breaches, or payment of compensation for loss of goods or loss of use through poor repair.

Work Order
The Tribunal can make an order requiring a person to remedy damage or repair the property.

Conclusion
The Salt case highlights that the relationship between landlord and tenant is not always a smooth one. It also illustrates that the eviction process can be time consuming and stressful for those involved. In the final analysis, prevention is almost always better than cure and therefore tenant selection is everything.

The End of Spousal Immunity in Court Proceedings

The Evidence Act 2006 ("the Act") makes some significant changes to the law concerning the admissibility and use of evidence in court proceedings. One major change relates to the compellability of a spouse to give evidence in criminal proceedings.

How it Was
Under the old law, the spouse of a person charged with an offence was a competent witness but there was no power for the Crown to compel that spouse to give evidence in a criminal trial without the consent of the person charged with the offence. The law afforded a further protection to spouses in any proceeding, criminal or otherwise, by protecting disclosures made during a marriage by one spouse to the other. This presented particular difficulties to the Crown when prosecuting one spouse for an offence involving the use of violence against the other spouse and/or a child of the marriage.

How it is Now
The Act removes what was previously termed "spousal immunity" or "spousal non-compellability". Instead, the Act provides that any person in any civil or criminal proceeding is an eligible witness, and may be compelled to give evidence. A Judge does not have the discretion to excuse spouses from giving evidence against each other.

One effect of this in the criminal context is that spouses who are victims of domestic violence may be compelled by the Crown to give evidence in the trial of the spouse who has been charged with an offence.

Witnesses who Lie
Where a spouse is compelled to give evidence against a spouse and that evidence either contradicts or retracts an earlier statement made by the witness spouse, there is provision for the Crown to challenge the credibility of the witness spouse by reference to the earlier statement. To avail itself of this remedy, the Crown would need to obtain a declaration that the witness spouse is a "hostile" witness. This is a mechanism retained by the Act that can assist the Crown or any other party when a witness spouse or any other witness deliberately gives false testimony under oath or affirmation.

Except for the transitional provisions that became effective on 18 July 2007, the Act took effect on 1 August 2007.

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.

© 2007

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

a) declare property to be separate or relationship property;
b) define the share each party to the agreement has in any part or all of the relationship property;
c) define shares on death;
d) provide for the calculation of the shares; and
e) 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:

a) real property (i.e. land);
b) personal property;
c) any estate or interest in any real property or personal property;
d) a debt; and
e) 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:

a) The agreement must be in writing and signed by both parties.
b) Each party to the agreement must have independent legal advice before signing the agreement.
c) The signature of each party to the agreement must be witnessed by a lawyer.
d) 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.

Updates

1. Anti-Smacking Legislation

The controversial new Crimes (Substituted Section 59) Amendment Bill (or anti-smacking legislation as it has been dubbed) was finally passed by Parliament on 16 May 2007 by 117 votes to 7. The new section 59 removes from the Crimes Act the statutory defence of "reasonable force" to correct or discipline a child.

The somewhat controversial legislation has been tempered by the recognition of some circumstances when the use of reasonable force is justified. Such circumstances include trying to prevent or minimise harm to a child, preventing a child from committing a criminal offence, preventing a child from engaging in or continuing to engage in disruptive behaviour or in the course of performing the normal daily tasks incidental to good parenting. Coupled with this is the discretion conferred upon the New Zealand Police not to prosecute a complaint against a parent where the offence is considered inconsequential.

2. "Party Pills" to be Banned

On 28 June 2007, Jim Anderton, Associate Minister of Health announced that the Cabinet had agreed to his recommendation to ban pills containing

© 2007

Benzylpiperazine (“BZP”) more commonly known as “party pills” or “dance pills”.

BZP is a stimulant that has a hallucinogenic-amphetamine effect. Until recently, pills containing BZP were classified as a Class D drug, which meant they could not be sold to people under the age of 18 years. Over 40 milllion pills were legally consumed in New Zealand up until the middle of 2007. It is reputedly a $35million-a-year industry.

New Classification

The Expert Advisory Committee on drugs has recommended to the Minister that BZP and related substances should now be classified as a Class C1 drug.

This means a ban on the manufacture, supply, sale, export or import of “party pills”. Anyone supplying, manufacturing, exporting or importing these products will be liable to a penalty of a maximum of up to eight years in prison. Those found in possession of a Class C1 drug are liable to a maximum of three months jail and/or up to a $500 fine.

The Minister has advised that the classification of party pills to Class C1 will be made through an amendment to the Misuse of Drugs Act. The legislation is to be introduced and passed into law by Christmas 2007.

3. Wills

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:

a) be together in the will maker’s presence when he or she signs; and
b) each state on the document, in the will maker’s presence, that he or she was present when the will maker signed; and
c) 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.

If you have any questions about the newsletter items, please contact us, we’re here to help

© 2007