Swayne McDonald
LAWYERS

NEWSLETTER

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HOMEOWNER BEWARE!

For most homeowners in New Zealand, their home insurance has always been an unspecified 'replacement' cost based on the floor area of their home. However, following the Christchurch earthquakes, insurers are now adopting a new home insurance policy whereby all home insurance policies will be based on an 'insured sum'.

The policy change is a result of major reinsurers (the insurance companies who insure our local insurance companies) requiring greater clarity on risk and the maximum costs to rebuild the homes they insure. Many insurers claim that the changes are about providing certainty and managing affordability for homeowners, and that costs of premiums for home owners will not change.

The result is that the onus is now on homeowners to get their home valued correctly as the insured sum will be the maximum amount the insurers will cover in the event of a claim.

The Insurance Council of New Zealand and the majority of insurance companies have published information online, and provided fact sheets and valuation calculators to inform homeowners and assist them to calculate the insured sum for their home.

In order to determine the sum to be insured, homeowners must determine the cost of completely rebuilding their home. Accordingly, it is paramount for homeowners to be aware of the unique features of their home. These include:

- structural features (floor area, number and types of rooms and levels, the style and standard of construction of the home, the material used to build the home),
- exterior structures associated with the home (decking, paving, driveway, garage),
- recreational features (swimming pools, tennis courts),
- the slope of the land the home is built on and whether there are retaining walls, and

- additional special features near the home (bridges, dams, private wharfs).

The insured sum does not include the value of the land on which the home is situated, or what it would cost to buy your home. Therefore the purchase price, rates valuation, or other estimate cannot be relied upon to determine the home's value or insured sum.

In addition to calculating the value of the sum insured, each year homeowners must also determine the adequacy of the sum insured and keep their insurers updated upon renewal of their insurance policy. This is crucial for homeowners who complete renovations or changes to their home to guarantee that those works (and the possible increase in value) are covered by their insurance policy.

Obviously, this is a significant change to the duties of the insurer, and shifts the onus to the homeowner to correctly value their home and the insured sum. Homeowners need to be proactive, as many insurers have already transitioned all new home insurance policies to the 'sum insured' base, and all existing policies are likely to change at the time of renewal. One of the main consequences for homeowners, if they fail to adhere to the new policy, is that a default sum for the home will be calculated by the insurers which may not reflect its true value or the costs likely to be incurred in replacing the home.

For most people their home is their most valuable possession, consequently homeowners need to be aware of the terms of their insurance policy, and be proactive in contacting their insurer to ensure their home is adequately protected. If you have any queries regarding your home insurance policy you should contact your insurer immediately. If you have any issues regarding insurance claims, it is prudent to obtain legal advice.

LAW COMMISSION REVIEW OF THE NEWS MEDIA

While the well-publicised Leveson investigation into the "culture, practices and ethics of the press" was uncovering widespread phone hacking and other unethical and illegal practices in the UK, the New Zealand Law Commission was conducting its own review of the news media. The Law Commission recognised that having a free press is essential to providing a check on power and a functioning democracy. On the other hand, an unchecked media is also capable of distorting the democratic process through "unfair, selective and misleading reporting". Maintaining this balance was a key goal of the Law Commission's recently released review of news media regulation.

A SINGLE REGULATORY BODY

The main recommendation of the review is the establishment of a single, independent body to oversee all news media. This body would see the end of the current regime where the NZ Press Council oversees print journalism, the Broadcasting Standards Authority regulates TV and radio, and the newly formed Online Media Standards Authority looks at internet publishers. The Commission argues that the distinctions between newspapers, broadcasters and internet publishers no longer make sense. If the Commission's recommendations are accepted, a News Media Standards Authority (NMSA) would be created. Like the bodies it replaces, the NMSA would be voluntary for media organisations to join and be entirely self-regulated, with no Government involvement.

DEFINING THE NEWS MEDIA

A fundamental recommendation is the creation of the new legally defined term "news media". The idea is to make a distinction between regulated ("news media") and unregulated media organisations. Those that wish to be considered "news media" must sign up to a code of ethical practice, and in return will receive some major benefits.

Amongst these benefits are special privileges and exemptions such as:

- the right to attend closed court sessions and appeal suppression orders,
- the right to broadcast Parliament and be part of the Parliamentary Press Gallery,
- the ability to apply for public funding through NZ On Air for the production of news programmes,
- access to alternative dispute resolutions for defamation and privacy abuse cases, which would be cheaper and quicker than going through the courts.

The proposed NMSA would have the power to order news media to:

- take down information from a website or correct false information,
- issue a retraction and/or an apology,
- allow a person to be granted a right of reply,
- prominently publicise any adverse decision made against them, such as a breach of the code.

It is envisaged that the major media organisations, such as the TV channels, newspapers and radio networks would find the benefits awarded to the "news media" status too great to ignore. Smaller media players, particularly bloggers, who choose not to join,

would still be subject to laws regarding defamation, privacy and decency.

Unlike the Leveson report in the UK, which generated much media outrage over fears of censorship, our Law Commission's review was released with almost no comment. Reactions to the review have been generally positive with the New Zealand Herald, TVNZ former head of News Bill Ralston, and prominent blogger David Farrar all backing the proposed move to a single media watchdog. Justice Minister Hon. Judith Collins said she would examine the report closely and make a report to parliament later this year.

LEASES

The Christchurch earthquakes demonstrated the need to provide certainty around some of the issues that arose for landlords and tenants after the disaster. The sixth edition of the ADLS Deed of Lease ("the sixth edition"), released on 5 November 2012, addressed amongst other things these concerns and also included changes related to rent review processes.

There is now provision in an emergency situation for landlords to enter premises with no written notice, in order to inspect and carry out work. Such a clause could be relied on where earthquake strengthening work is required. The landlord can also require the tenant to vacate the premises to enable the works to be carried out, should this be reasonably necessary in the landlord's opinion.

Should a tenant's business use of a premises be materially disrupted as a result of the landlord entering the premises, the tenant is entitled to a reduction of a "fair proportion" of the rent and outgoings paid under the lease. In addition, the costs of such work are to be borne by the landlord, as there is no longer an "improvements rent" provision, which was the case under the previous edition.

Another issue dealt with by the sixth edition is payment of rent where premises are undamaged, but are inaccessible for the purposes of a tenant's business – for example, where premises are cordoned off. There is now allowance for a "fair proportion" reduction in rent in such circumstances. In the case that such a situation endures for the nine month default period in the lease, there is also provision for either party to cancel the lease.

A further issue that arose in the wake of the Christchurch earthquakes was the term "untenantable", and the need for clarity around its meaning. This is unfortunately not something that has been clarified in the sixth edition, and the term will continue to be the source of much debate in lease disputes.

Another key change in the sixth edition is the introduction of Consumers Price Index (CPI) rent reviews, as an alternative to, or as well as market rent reviews. Market rent reviews have at times resulted in costly disputes, so the CPI option is one that should be considered by landlords and tenants. The CPI rent review would only increase rent over time, and would not allow for decreases in rent. A commonly suggested solution is to allow for both CPI rent reviews and market rent reviews, to ensure that the rent a tenant pays does not end up out of kilter with the market rent for a lease.

The amendments to the sixth edition have sought to provide some clarity to lease agreements in relation to significant natural disasters, such as the earthquakes in Christchurch, as well as offering some options for parties to consider with regards to rent review. These will be important factors for landlords and tenants to take into consideration when entering into a commercial lease.

RELATIONSHIP PROPERTY AFTER DEATH

Part 8 of the Property (Relationships) Act 1976 ('the Act') deals with the division of property where a marriage relationship or de facto relationship ends (after 1 February 2002) because one of the parties has died.

The basic scheme of the Act for relationships ending on death is that surviving spouses or de facto partners have a choice between two options; Options A and B, outlined as follows.

THE OPTIONS

Option A is the ability to apply for a division of the relationship property under the Act and Option B is not to apply for a division of the relationship property and instead rely upon the provisions of the deceased's Will.

Choosing one of the options is a formal process that must be made by completing and signing a written notice. The notice must include or be accompanied by a certificate signed by a lawyer certifying that the lawyer has explained the effect and implications of the option chosen. It also needs to be lodged with the administrator of the estate.

There are also important time limits that apply to the election of an option. Where the estate is small enough not to require a grant of administration, the choice must be made within six months of the date of death, or, if administration of the estate is granted within that period, then within six months of the grant of administration. In all other cases it is within six months of the grant of administration. The time limit is important because the administrator of the estate may distribute the estate if no election has been made within the six month period, and once distributed it cannot be undone.

If Option A is chosen there is also a time-frame for the filing of the proceedings in court.

There is one important distinction between spouses and de facto partners in regard to the choice of options. Spouses have the right to choose Option A irrespective of the duration of the relationship, whereas de facto partners have that right only if their relationship lasted for three years or more; unless the court is satisfied that there was a child of the relationship or the surviving partner made a substantial contribution to the de facto relationship, and not having Option A would result in substantial injustice.

OPTION A

Generally speaking, choosing Option A means the equal sharing regime applies and that your lawful entitlement takes priority over the terms of the Will and you do not receive what has been provided for you under the terms of the Will.

OPTION B

Under Option B the surviving spouse or partner elects not to apply for a division of the relationship property, but to inherit any provisions made in the deceased's Will or available under intestacy provisions.

Option B is the default position if the survivor does not choose Option A within the time limit as detailed above, and in the manner prescribed.

SUMMARY

The election of Option A or B may result in vastly different outcomes and therefore it is crucial that you obtain proper legal advice about this election and the time-frames that apply to this election.

SNIPPETS

PSYCHOACTIVE SUBSTANCES BILL

New Zealand is leading a change in the approach to regulation of psychoactive substances. On 4 April 2013 the Psychoactive Substances Bill ('the Bill') passed its first reading in Parliament with cross party support.

Hon. Peter Dunne advised that the Bill "reverses the onus of proof by making all psychoactive substances illegal unless the industry can prove their products are low-risk". Manufacturers and importers will need to meet strict requirements, including satisfying an expert committee that the substance is low risk before it is approved for sale. The Bill proposes to regulate the sale and packaging of products and require ongoing monitoring of their usage and side effects.

Psychoactive substances are defined broadly in the Bill as substances, mixtures, preparations, articles, devices, or things that are capable of inducing a psychoactive effect (by any means) in people who choose to use them.

Substances already governed by other legislation (e.g. supplements, herbal remedies, alcohol, tobacco, and controlled drugs) are excluded from the definition.

TRUSTEE VS EXECUTOR

When making your Will, it is likely you have appointed one or more people an Executor and Trustee; they may be friends, family members or perhaps a trusted professional. They do not however, need to be the same person.

An Executor is the person whom you appoint in your Will to administer your estate and carry into effect the provisions of your Will. They will be responsible for gathering in your assets, meeting liabilities and distributing the assets. This is largely governed by the Administration Act 1969. A number of Wills, however, do not provide for all assets to be distributed immediately. Examples include providing for young children to inherit when they reach a fixed age, or providing life interests to a partner. It is in these situations that the party holds the assets as a Trustee, and is governed by the Trustee Act 1956.

The role of Executor is often completed over a short duration, whereas a Trustee may have ongoing responsibilities for many years to come. When choosing your Executors and Trustees, consider the roles and whether in your case, a separate Trustee should be appointed for the ongoing responsibilities after the initial administration.

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

Swayne McDonald
Lawyers
Manurewa Office 09 267 2700 Botany Junction Office 09 265 2700
Postal: P O Box 75 442 Manurewa, Auckland 2243
advice@smlaw.co.nz