

Swayne McDonald

LAWYERS

NEWSLETTER

Issue 2
May – July 2019

INSIDE THIS

EDITION

Rental property standards	1
The importance of Wills and Enduring Powers of Attorney	2
Under what circumstances should you form a Trust	3
An overview of mortgagee sales	3
Snippets	4
<i>What is the purpose of a LIM report?</i>	<i>4</i>
<i>When can you access your KiwiSaver?</i>	<i>4</i>

Rental property standards

The Residential Tenancies Act 1986 requires landlords to provide and maintain rental properties in a reasonable state of repair for the tenants.



When deciding what is a 'reasonable state of repair' one must consider the age and character of the property and how long it's likely to remain habitable and available to be lived in. It should also be noted that the Act requires landlords to provide properties in a reasonable state of cleanliness for the tenants - although it does not directly regulate the standard of rental properties. However, it does reinforce that landlords 'comply with all requirements in respect of buildings, health, and safety under any enactment so far as they apply to the premises'.

The Housing Improvement Regulations 1947 creates the minimum requirements that must be met when it comes to housing standards, and that it is local authorities and councils that are responsible for the enforcement of these regulations within their districts. The premises must comply with each of these requirements unless the dwelling complied with what would be considered an equivalent requirement of the Building Code at the time the dwelling was built.

The purpose of the Housing Improvement Regulations is to ensure that properties are warm, dry, safe and sanitary for the tenants occupying the dwelling. The regulations that are found under the Housing Improvement Regulations 1947 are: room size, function and safety, light, ventilation, drainage and dampness, overcrowding, sewerage and sanitation, and heating.

It should also be noted that each dwelling, alteration, and additional ancillary building should have building consent and code of compliance if the dwelling or alterations were made post 1993. If they were made prior to 1993 then it was common for the dwelling to only have a building permit.

Earlier this year new housing standards came into

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.

effect. These standards require that all rentals have heaters that can warm the main living rooms up to 18 degrees Celsius. Each home must also have underfloor and ceiling insulation that meet the 2008 Building Code standards, while existing ceiling insulation must have a minimum thickness of 120 millimetres.

Private landlords will need to ensure their rental properties comply with the standards within 90 days of any new tenancy commencement date from mid-2021, while Housing New Zealand and registered Community Housing Providers will have until July 2023 to comply with the new standard of housing requirements.

If the dwelling does not comply with the above Act and the Housing Improvement Regulations 1947, it should be noted that a tenant can apply to the

Tenancy Tribunal for a work order or other type of order if a landlord will not meet their responsibilities for providing a safe and healthy home.

Where the rental cannot lawfully be used for residential purposes a tenant may apply to the Tenancy Tribunal for rent to be repaid to them, because the landlord has received rent that is not lawfully recoverable under the Act. Rentals that cannot be lawfully used for residential purposes could include illegally converted garages, unconsented dwellings and commercial properties used for residential use.

If you have any questions or concerns regarding whether or not the dwelling you are renting meets the required standards and regulations, we advise you to seek professional legal advice to assist you with these queries.

The importance of Wills and Enduring Powers of Attorney

Having enduring powers of attorney (EPAs) and a will in place is important for every adult whatever their age. A will is a legal document that lets you decide how you want your property, care for your dependants (partner, children etc.) and your body to be dealt with after you die. EPAs allow you to appoint a trusted person(s) to make decisions on your behalf regarding your property and health when you are unable to do so yourself, during your lifetime.



EPAs

There are two types of EPAs. One in relation to your property (including but not limited to any houses, vehicles, bank accounts, investments and household effects) and one in relation to your personal care and welfare. Under an EPA you appoint an attorney to 'step into

your shoes' and make decisions on your behalf that are in your best interests.

Having an EPA in place for property allows your attorney to make decisions regarding your property, for example, if you are out the country. An EPA for personal care and welfare allows your attorney to ensure you and your property are looked after if you become mentally incapacitated.

Mental incapacity does not always arise due to old age. It can be caused by a car crash or other accident or medical event, and accordingly, it is important to have EPAs in place as soon as you turn 18. Your partner or spouse may be able to manage any jointly-owned assets but they cannot sign on your behalf if you are mentally incapable. If an incident like a car crash or stroke does happen and you do not have EPAs in place, your loved ones would have to apply to the Family Court to make decisions on your behalf. This is a very lengthy and costly process that may not align with your wishes, and is easily avoidable by creating EPAs.

We strongly recommend to seek legal advice for further information and to create a will and EPAs, sooner rather than later. It is also important to review your will and EPAs if your circumstances change.

Will

A well drafted will can reduce emotional and financial strain for your loved ones after you pass away. It also reduces the likelihood of family members disputing over your estate and challenging your will. Accordingly, we suggest seeking legal advice when creating a will to ensure your intentions are accurately recorded with no room for ambiguity. If your circumstances or wishes change, you can redraft your entire will or create a codicil, which is a separate binding document read together with your will.

Regardless of how much property you have, you should have a will. For example, you may have jewellery that you would like to give to a specific family member due to its sentimental value rather than monetary value.

Dying without a will is known as dying 'intestate'. This means that the Administration Act 1969 determines how your property is distributed (provided that the value of your estate is above \$15,000), which may not align with your wishes and may result in disputes over your estate. Generally, the property is distributed to a surviving spouse and family members in specified proportions. This process can be more time consuming, costly and complicated than having a valid will.

Under what circumstances should you form a Trust

There are a number of circumstances under which you should consider forming a trust. Some of the common purposes of a trust, and the structures utilised, will be discussed in this article.



A trust is managed by trustees who are appointed by the creator of the trust (called the settlor(s)). Trustees manage the assets and debts of the trust for the beneficiaries specified by the settlor(s).

There are several different types of trust structures that can be used. Your circumstances will determine which structure is most appropriate for you. Some types of trusts include:

- Single/Umbrella Trust – all assets are transferred to one trust
- Parallel/Mirror Trust – each settlor (for example a husband and wife or de facto partners) transfers assets to separate trusts for which they each hold governing powers
- Fixed Purpose Trust – provides for a specific purpose, such as the welfare of a child with special needs, for education, or for charitable purposes

Given that a trust may continue after your death (up to a maximum of 80 years), it is often seen as having certain advantages over holding only wills to deal with your assets and debts.

One purpose of a trust can be to provide for future generations. You may have a family that you wish to provide for into the future and following your death. A trust allows you to ensure any children, grandchildren or any other person you so wish, can be provided with some benefit from the assets transferred to the trust on the basis, for example, of

reaching a certain age, or attending a certain academic institute.

The distribution of assets held on trust may not be contested in the same way that gifts under a Will may be under the Family Protection Act 1955. Assets may also be protected from being caught up in

any relationship property disputes with your spouse or de facto partner, depending on the timing of the creation of the trust and the relationship specifics. This can make trusts a good way of ensuring any children you may have receive any assets you intend for them.

Another purpose of a trust can be to protect your assets from any liability you may have as a Director of a company, in providing a guarantee or security for the company. If you are considering forming or purchasing a company, then transferring your personal assets to a trust can guard them from any possible future problems with creditors.

By separating yourself from the legal ownership of your assets, they may no longer be taken into account when it comes to calculating your entitlements to certain benefits and subsidies that require asset testing, such as the Residential Care Subsidy. There is no guarantee of this however.

It is important to keep in mind that your primary purpose for establishing a trust must not be to transfer assets in order to defeat creditors or spouse's/partner's claims, avoid asset or means testing or to avoid or reduce your tax liabilities. Certain legislations prevent this, labelling the trust as a "sham" trust. However, as noted above, there are benefits that flow from having your assets held under a trust, but they must only be incidental to the main purpose for setting up your trust.

An overview of mortgagee sales

If you buy a property at a mortgagee sale, be aware that you are entering a contract that is quite different in its nature to an agreement entered into in other circumstances.

The agreement is likely to be weighed heavily in the mortgagee's favour because mortgagee sales involve factors outside of the mortgagee's control, which it will want to protect itself from. This may include a very unwilling and impecunious owner occupier who is being forced to leave their home by the mortgagee that assisted them to get there in the first place. In such circumstances the mortgagee is usually unwilling to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

It is not uncommon for purchasers to face difficulties



after settlement, such as having to evict a previous owner occupier or having to deal with damage caused to the house by the disgruntled owner. In one instance the occupier took all the chattels from the property and sold them to pay other sundry debts, leaving the purchaser out of pocket.

Other common issues for purchasers at mortgagee sales can include:

- There is less protection for purchasers, as the agreement usually does not include standard provisions. For example, the mortgagee will have removed the section in the agreement relating to the vendor's warranties and will have removed the right for the purchaser to approve

title. Often purchasers will not be able to view the property beforehand as the owner does not allow an inspection, so it will not be clear whether work has been carried out that should have required a permit.

- Purchasers may not be able to claim against the mortgagee for late settlement/possession, as there may be situations where the mortgagee is unable to evict the owner. The mortgagee does not guarantee that it will give vacant possession on the day of settlement.
- The contract signed is an unconditional contract and requires thorough due diligence prior to signing. Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.
- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee

ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer a chance to buy a cheaper property. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement.

You should seek legal advice before the auction, as well as checking the title, council records and the property in advance, if possible. There may still be some issues that arise that are out of your control as purchaser.

The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to put your ducks in a row before putting pen to paper.

Snippets

What is the purpose of a LIM report?



When purchasing a property, obtaining a Land Information Memorandum (“LIM”) report from the relevant council is strongly recommended.

A LIM report provides all the documents that a council has on records for a property. Each LIM report contains different information, as some properties may be new builds, while others are just sections or older homes etc.

Some examples of what could be found in a LIM report are:

- soil reports;
- whether resource consent and certificate code of compliance (“CCC”) have been obtained and issued;
- if there are any building works in the area currently being completed or will be in the near future;
- when and how much your rates are;
- engineers report;
- if the property is located on or near a known archaeological site;
- if the property is in a flood zone or high wind zone; and/ or
- if the property is a known leaky home or has tested positive.

When can you access your KiwiSaver?

KiwiSaver was initially created to help people save for their retirement, so the obvious answer for accessing your



KiwiSaver funds is at age 65. But under the correct circumstances, funds can be accessed earlier.

There are four circumstances under which you can access your KiwiSaver early, they are:

1. purchasing your first home;
2. moving overseas permanently;
3. significant financial hardship; or
4. serious illness.

Remember that if you have received the \$1,000.00 kickstart from the government, these funds are required to remain in your KiwiSaver until you reach retirement age.

For more information regarding the criteria which must be met to enable your KiwiSaver funds to be released early, visit the KiwiSaver.govt.nz website.

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