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■ OPENING



Our web page –
www.dawson-partners.co.nz
–contains a list of
the services we
provide and an
insight into our
team.

■ INTRODUCING A NEW
STAFF MEMBER

We would like to introduce Eva Kuo. Eva is originally from Taiwan and is fluent in Mandarin. She has been admitted as a Barrister and Solicitor since July 2008, after completing her studies at the Victoria University of Wellington. She is passionate about Family Law. Her other preferred areas of practice include family litigation, debt recovery, employment, immigration, and general civil litigation. She will also provide conveyancing services and work on family trust matters.



■ DAWSONS - SERVICES

For nearly 50 years, Dawsons have been dealing with your concerns and meeting the needs of clients, young and old. At Dawsons we are committed to providing high quality service and value for money. Here's a (non exhaustive) reminder of our services:

Business sale and purchase

Asset protection

Property Law

including sale and purchase, refinancing, subdivision and tenancies

Litigation and disputes resolution

Commercial leases

Corporate structure

Employment law

including personal grievances, dismissal and redundancy, restraint of trade and employment agreements

Family law and matrimonial property

including relationship and separation agreements, dissolution application and issues relating to children

Notary Public

Insolvency and Bankruptcy

Each newsletter we will highlight some of our services in some detail. This edition features **Asset Protection:**

■ ASSET PROTECTION

Family Trusts

There can be much debate as to whether to start a Family Trust. But what can a family trust do for you/your family? A Family Trust can be a means to:

1. Protect family and investment assets from business failures
2. Minimise the amount of tax you pay
3. Avoid claims by family members against assets on death
4. Protect against relationship property (matrimonial) or de facto/civil union property claims
5. Protect against the possible re-introduction of death duty or wealth taxes
6. Lessen the punitive features of rest home care subsidies

But by having a Family Trust, it can also restrict the amount of control over the assets transferred to the Trust and of course there can be some costs involved. LOOK BEFORE YOU LEAP - Family Trusts and The Family Protection Act

LOOK BEFORE YOU LEAP - Family Trusts and The Family Protection Act

Family trusts are an ideal way to protect assets from various threats, including for example, claims under the Property (Relationships) Act 1976 and being eroded by rest home subsidies. However, in the recent case of X v X, the Court of Appeal has highlighted the risk of losing control over assets placed into trust and the difficulty in getting that control back once it is gone.

Section 182 of the Family Proceedings Act 1980 has been described as being a trust busting mechanism whereby the Court can go behind the provisions of a Trust Deed in situations where there has been a significant change of circumstances since the Trust Deed was entered into.

In X v X, the husband and wife settled a trust that, by the time of their separation, owned assets worth between \$7-9 million. During the course of the relationship the couple had moved to Australia and, in order to make their trust more efficient under Australian tax law, Mr and Mrs X had resigned as both appointers and trustees of the family trust.

The trustees of a family trust have the authority to deal with the assets of a family trust. This includes the ability to sell or purchase additional trust assets, allow charges and mortgages to be registered over trust assets, as well as distributing trust assets or trust income to beneficiaries. The appointers of a trust have the authority to appoint or retire trustees.

By retiring as both trustees and appointers of their own family trust, Mr and Mrs X effectively gave control of their assets to independent third party trustees.

Following the breakdown of the relationship, Mr X applied to the Court under section 182 of the Act to have the trust assets of the family trust resettled onto three new trusts. Mr and Mrs X would each control a trust containing 25% of the assets of the former family trust. A third trust would be created with the remaining 50% of the former trust assets for the benefit of the couple's children. Despite the fact that the Trust Deed contained express provisions to allow for the former family trust to be resettled, the Court of Appeal dismissed the application by the husband.

One effect of this decision is to limit the applicability of section 182 of the Family Proceedings Act and make it more difficult for the Court to intervene in trusts that have been set up for a legitimate purpose.

The case highlights that when considering placing assets in a family trust, or dealing with family trust assets, it is crucial to take great care to consider the legal and practical implications of the decisions that you are making. Mr and Mrs X would have had fewer problems if they had retained the ability to control the trust, either by acting as trustees or, at the very least, by retaining the power of appointment.



If you have any questions regarding the above please give us a call or email us or if you like to read more information on the above please visit our website - www.dawson-partners.co.nz

■ FEATURE ARTICLES

Your Signature is Needed

Your signature is now required on the standard "Client Engagement Letter" before we start any new legal work for you.



All lawyers now have a legal requirement to obtain that "Client Engagement Letter" wherever possible.

Our "Client Engagement Letter" (and related paperwork) can be

viewed on our website.

Your signature is also needed (and with current photo ID) for any land/conveyancing transactions.

The Land Transfer Office has demanded current photo ID, to lessen the chance for fraud, in the now all electronic land registration system.

Enduring Powers of Attorney

On 26 September 2008, the Act governing powers of attorney was amended. In brief, the Act has made powers of attorney documents more secure meaning they are less able to be abused by attorneys to whom power to act on a donor's behalf is given.

Among other things, the signature of the donor must be witnessed by a lawyer, qualifying legal executive, or an officer of a trustee corporation. The witness to the donor's signature must certify that he/she is independent of the Attorney.

Therefore, in the common situation where a husband and wife wish to appoint each other as attorneys, advice from two qualifying witnesses such as a lawyer/qualifying legal executive/officer of a trustee corporation is a necessity. Both parties should see their witness independently of the other.

The independent advice requirement will be the major effect of this amendment and is one of the measures that aim to ensure powers of attorney achieve what they set out to achieve.

Mortgagee Sales – put your ducks in a row before you put pen to paper



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 as 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 which 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.

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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.
- Once the contract is signed it is unconditional and so 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 an opportunity to buy a property at a reduced cost. 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. However, 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.

Early Release Of Deposit

If you are a purchaser of a property, have paid the deposit on the unconditional date, and are subsequently asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the stakeholder (usually a real estate agent) is required to hold it for 10 days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house. The agent can do so, provided the purchaser agrees. Be wary of agreeing to the release, because the transaction might not settle. If the transaction does not settle and the vendor has already spent the deposit, you as the purchaser have no security and your deposit is gone.

Retention of the deposit until settlement by the stakeholder has merit, especially where there is a mortgage on the title. If there is a mortgage, be aware that the deposit might be needed to settle the vendor's mortgage debt, and if released early and spent in other ways by the vendor, then the vendor might not be able to discharge the mortgage.

The key is to consider the issues carefully before agreeing to the early release of the deposit, particularly where the title is encumbered.

CONSUMER GUARANTEES ACT – AN OVERVIEW

The Consumer Guarantees Act 1993 (the Act) does exactly what its name suggests; it sets out statutory guarantees that goods and services must meet. However, although it covers a broad range of day-to-day transactions, the Act does not apply to every sale and purchase.

There are two central requirements of the Act. Firstly, that the goods and services must have been sold or provided by someone "in trade", such as a shop selling goods or a person whose work involves them providing a service. Secondly, the protection only applies to someone who is a 'consumer'. The Act provides that a 'consumer' is someone who acquires goods or services that are ordinarily acquired for personal, domestic, or household use or consumption. The definition focuses on what is being purchased, rather than on who is purchasing it. Examples of things covered by the Act would include the purchase of goods such as clothes, a DVD player, a car and groceries, or services such as car repairs, house painting, a haircut or accountancy services.

Because the guarantees are statutory, they apply whether or not they are mentioned in any contract that relates to the supply of the goods and services. However, it is important to know that a supplier can exclude the guarantees if the goods or services are bought for business use. For example, if you buy an ordinary household dishwasher for use in the office, the supplier may expressly contract out of the guarantees.

The Act also does not cover goods or services that are ordinarily bought for commercial use, such as farming equipment or a printing press. Nor does it cover items bought privately, such as from a garage sale or a school fair.

There are a range of guarantees set out in the Act. Essentially they require goods to be of acceptable quality. This means they must be fit for their normal purpose, free from minor defects, safe and durable. For example, a hairdryer must blow hot air, not stop working intermittently because it overheats after a few minutes use, and keep functioning for a reasonable time after you buy it.

Similar guarantees exist for services, including the service being provided with reasonable care and skill, within a reasonable time (unless you agree to a specific time), for a reasonable price (unless you agree to a specific price), and fit for the purpose you bought it for. For example, the Act will be breached if you hire someone to paint your small house and they haven't finished the job two months after starting it, or they use the wrong type of paint, or charge you twice as much as painters normally charge for painting a house like yours.

If the fault can be fixed or repaired, you must give the supplier the opportunity to fix the problem. They don't have to refund your money if they repair the problem, or provide a replacement item. If they do not fix the problem within a reasonable time you may take steps to fix it yourself and claim the cost of doing so from the supplier.

THE EARLY BIRD CATCHES THE WORM — TIME LIMITS IN CIVIL CLAIMS

Imagine that 2008 was just not your year. It began with the discovery that your home, bought four years ago, is a leaky home and needs major repairs that will cost over \$200,000.

A short time later your widowed mother died, leaving her entire estate, worth several million dollars, to your siblings because of a recent falling out with you — and that after years of living with you and your family. Then, two months ago, you lost your job because you stood up to your manager, who is a workplace bully. The final straw came when your plasma TV died last night during a test match, after having intermittent problems since you bought it 18 months ago.

You decide it is time to right some wrongs and go to see your lawyer. One of the issues that will be raised with you is limitation periods, which are time limits within which certain claims must be brought. Some of the limitation periods that might apply in the present scenario include the following.

You believe that the real estate agent who sold you the house misled you and you

would like to bring a claim under the Fair Trading Act 1986. However, your claim under that Act might be barred because applications under the Fair Trading Act must ordinarily be made within three years of the date of the event.

You then consider bringing a claim through the Weathertight Homes Resolution Service against the architect, the developer, the builder, the roofing company and the council that issued the code compliance certificate. Unfortunately, the house is 11 years old and section 393 of the Building Act 2004 prevents claims being brought 10 years or more after the date the work was carried out.

You may have better luck bringing a claim against your mother's estate pursuant to the Family Protection Act 1955 (or on the basis of a testamentary promise, if you had been led to believe that you would inherit some of the estate). The general rule for bringing such claims is that they must be filed within 12 months of the date that administration or probate is granted. However, in certain circumstances you need to be even quicker, because the estate may be distributed after six months. What about your case for unfair job dismissal? If you wish to bring a personal grievance pursuant to the Employment Relations Act 2000 against your employer, it must be submitted to the employer within 90 days from the date you were dismissed. Surely the Consumer Guarantees Act 1993 won't let you down. However the Act provides that you must reject goods "within a reasonable time" and what is reasonable will depend upon the type of goods and how they were used. You might not be entitled to compensation if it turns out that the minor problems you have been having for 18 months should have been fixed and would have prevented the TV from stopping altogether.

These are only a handful of examples of the limitation periods that apply to a vast array of legal situations. While some of the limitation periods can be extended by a court, the examples highlight that it may be crucial to seek legal advice as soon as possible. Most claims must be brought within a certain time, or the opportunity to obtain a remedy will be lost.

■ CLOSING

We have made every effort to bring our client mailing list as up to date as possible. However if you find the details we have are incorrect, or if you find you are receiving more than one of these newsletters per household, please telephone our receptionist, quoting the client number (found on the envelope on the right hand side opposite your name and address) and bring us up to date. If you would rather not receive our newsletter please also advise our receptionist and we will remove you from our mailing list.

Alternatively, you can also email us quoting your client number to lawhelp@dawson-partners.co.nz or go to our "Client Update" section found on our web site: www.dawson-partners.co.nz.

DAWSONS

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