

NEWSLETTER

Issue 4
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Welcome to the last edition of the PMC newsletter for 2007. From all of us at Petrie Mayman Clark, Merry Christmas and Happy New Year!

Our office will be closed from 5.00pm Friday 21 December 2007, reopening at 8.30am Monday 7th January 2008.

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Our aim is to provide access to excellent and affordable legal services focused on client satisfaction.

Next time you need legal advice, call Petrie Mayman Clark.

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Internet Banking Fraud – Are You Protected?

Code of Banking Practice

If you do your banking on the Internet, then you should be aware that the risk associated with Internet banking increased as of July 2007. The New Zealand Bankers Association (of which all the main trading banks are members) has introduced a new Code of Banking Practice, which includes a section on Internet banking.

If an Internet banking user becomes the victim of fraud and has contributed to the Internet fraud by either:

- having a computer or device that does not have appropriate protective software and operating systems installed and up to date; or
- failing to take reasonable steps to ensure that the protective systems such as virus scan, firewall, anti-spyware, operating system and anti-spam software on the computer are up to date; or
- failing to follow reasonable security warnings about the appropriate processes and safeguards to follow when using Internet banking;

then the bank is not liable for any loss.

The code provides for the bank to have the right to request access to the user's computer in order to verify all reasonable steps to protect the computer had been taken. If access is denied then the user may be held liable.

The effect of the new code is that the onus to safeguard a computer has been shifted to the user although the banks retain the responsibility to inform the user of the best way to do so. The Code has been criticised for not being specific enough as to what constitutes adequate protection. However, as matters now stand, users are obliged to update their



computer security systems in accordance with their bank's recommendations. Failure to do so means that the Internet user will be liable for losses up to their overdraft limit.

The Bank is responsible for fraudulent transactions that are not caused by the user if they are promptly advised of the fraud or advised that the customer ID, password or other security information is, or may be, known to another person or that there has been unauthorised access to the banks site for Internet banking information or accounts.

Remedies

If you become involved in a dispute with your bank over liability for Internet fraud, then you should initially attempt to resolve the matter through the bank's internal complaints procedure.

If this is unsuccessful, a complaint may be made to the Banking Ombudsman, provided the amount at issue is less than \$200,000. The Banking Ombudsman in turn can refer complaints to another party such as the Insurance and Savings Ombudsman, the Privacy Commissioner or the Human Rights Commissioner. Banks are bound by recommendations made by the Banking Ombudsman.

If a claim is unsuccessful with the Banking Ombudsman, or it is for an amount exceeding \$200,000, then an application will have to be made to the Court. Either way, it would be advisable to consult your lawyer at the outset.

Greater Security Surrounding Finance Companies

In the wake of the collapse of a number of finance companies, cabinet made swift changes to the Securities Regulations 1983. The Securities Amendment Regulations 2007 ("the regulations") came into effect on 21 September 2007.

The regulations affect finance companies that continuously offer debt securities to the public and either lend money or provide financial services. The changes do not affect finance companies that are building societies, credit unions or co-operate companies.

The regulations add clauses that are deemed to be included in both existing and



future trust deeds of finance companies. Under the new clauses, finance companies have more stringent obligations in terms of reporting their financial position to trustees, regular certification of compliance with trust deeds requirements, and keeping the trustee informed of matters relevant to the trustee's duties.

The new clauses will also give the trustee the power to appoint an independent auditor to audit the financial statements of a borrowing group and the power to appoint an expert to assist the trustee in determining the true financial position of an issuer.

Conditional Agreements – Homes Buyers' \$300,000 Mistake

Background

Mr and Mrs Fleming owned a house at Beachlands, South-East of Auckland. They signed a conditional contract to buy a lifestyle block near Whangarei, owned by the trustees of the Mana Trust. One of the conditions of the contract provided that the Flemings had 90 days within which to enter into an unconditional agreement for the sale of their Beachlands property.

The Flemings failed to secure a contract for their house within the 90 day period. They therefore considered the contract with the Mana Trust to be at an end. The trustees disagreed.

In due course, the trustees found an alternative purchaser for their block. However, the purchase price was less than the amount the Flemings had agreed to pay.

The trustees successfully sued the Flemings for the difference between the contract price and the eventual sale price (approximately \$100,000) together with interest (approximately \$225,000) and costs. The interest exceeded the damages, due to the length of time before the original settlement date of the agreement and the date of judgment some two and a half years later. Furthermore, interest was calculated at the rate specified in the agreement of 14%.

The law

The agreement for sale and purchase between the trustees and the Flemings included a provision requiring the Flemings to “do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment”.

The question for the Court was whether the Flemings had tried hard enough to sell their Beachlands home. Had they done “all things which may reasonably be necessary”? Unfortunately for the Flemings, the Court found that they had not and were therefore in breach of contract.



The requirement to take reasonable steps to fulfil any condition e.g. to obtain finance or sell your house etc, is generally implied by the courts. The Court of Appeal described the clause in the Flemings’ contract as making explicit what had previously been implicit.

This means that in most conditional contracts to buy and sell property there is an express or implied obligation to take all reasonable steps necessary to satisfy any conditions. Without such a requirement, a party could use a condition to avoid their contractual obligations simply by taking no steps to satisfy the condition and allowing the contract to lapse. This would effectively undermine the certainty of the contract for the other party.

The problem

The Court found that the Flemings had behaved unreasonably when they adopted an unconventional approach to marketing their house by using covert strategies. This involved minimal marketing and, although there were discussions with real estate agents, there was no formal listing.

The main reason the Flemings adopted the low profile marketing approach was concern about the effect the sale of their house might have on their local lawn mowing business.

However, when the Judge weighed up the importance of protecting the lawn mowing business against the obligation to attempt to sell their house, he concluded that there was an obligation on the Flemings to take a much more proactive approach to achieving a sale of their house.

Conclusion

If you sign a conditional contract to buy a residential property, you need to be aware that you must be proactive and do all things reasonably necessary to ensure the conditions are fulfilled within the permitted time frame.

There is no set formula as to what is reasonable. It will depend on the circumstances of each contract. However, to avoid the problems faced by the Flemings, you should discuss the steps you are proposing to take to satisfy the conditions with your lawyer at an early stage.

Claims against a Deceased Estate

The Family Protection Act 1955 (“the Act”) enables persons to make a claim against the estate of a family member whom they believe should have made provision for them in their Will by virtue of the family connection, but have not done so.

Who can claim?

The persons who may bring a claim under the Act are as follows:

- The spouse or civil union partner of the deceased.
- A defacto partner provided he or she was living in a defacto relationship with the deceased at the date of his or her death.
- The children of the deceased.
- The grandchildren of the deceased.

- The stepchildren of the deceased who were being maintained either partly or wholly by the deceased immediately prior to his or her death.
- The parents of the deceased.

When can a claim be made?

A claim can be brought under the Act within 12 months from the date of the grant in New Zealand of administration in the estate. The only exception to this is where an application is brought on behalf of a child or a person who does not have mental capacity in which case the application may be brought two years from the date of grant of administration.

Claims are most commonly brought by children who for one reason or another, have not been provided for under their parent’s Will. In some instances, provision may have been made for them but the share which

they receive is disproportionate to the share received by other beneficiaries.

Frequently, an application will be brought because of economic need. However, there have been instances where adult children have brought a claim even though they were wealthy in their own right. The basis of the claim is that their parent had a moral duty to provide for them by virtue of their filial relationship.

How do the Courts treat claims?

In considering claims under the Act, the Court will consider not just the economic needs of the applicant but the overall merits of the claim having regard to the applicant's circumstances at the date of death of the deceased, relations between the deceased and the applicant as well as the size of the deceased's estate.

In considering applications under the Act, the Court must have regard to the moral duty of the deceased towards the applicant.

Family protection claims are essentially a balancing act between the wishes of the deceased and the needs of the applicant coupled with the consideration of the deceased's moral duty towards her or his family.

Conclusion

Family protection claims can be very costly and usually the costs are borne by the estate. If you make a Will and decide to exclude children or other family members who would otherwise be entitled to, or would expect to benefit from your estate, you should state the reason clearly, in your Will. This can be of considerable help to the Court in determining how best to settle a claim under the Act and could also help to minimise the associated legal costs. If you do wish to exclude one or more family member from your Will, consult your lawyer first so that you fully understand the implications of not doing so.

Anti Spam Law

The computer age has introduced many new words into the English language and the word "spam" is a good example. It describes the unsolicited emails that appear with monotonous regularity on our computer screens promoting an endless range of products and services.

The Unsolicited Electronic Messages Act 2007, which came into effect on 5 September 2007, seeks to put a stop to spam.

The matters covered by the Act include the following:

- The Act applies to all commercial emails that have a New Zealand link.
- The sending of unsolicited emails is prohibited unless the sender is clearly identified and can be readily contacted.
- The information contained in the email must be "reasonably likely" to be valid for not less than 30 days after the message is sent.
- The sender must genuinely believe the recipient has consented to receiving the email and the onus of proving that is on the sender.
- The email must include an "unsubscribe" facility.

Failure to comply with these requirements can result in a fine of up to \$200,000 in respect of an individual and \$500,000 in respect of an organisation.

The Act does distinguish between express, inferred or deemed consent. Express consent is self explanatory.

An inferred consent is one that can reasonably be inferred from the conduct and the business or other relationships of the persons concerned.

Deemed consent is where the recipient has conspicuously published their email address in a business or official capacity and the publication of the address is not accompanied by a statement which says it does not wish to receive unsolicited emails. Furthermore, the message sent is relevant to the business of the recipient.

The Act only applies to emails sent within New Zealand or which have a New Zealand link so it remains to be seen how much impact it will have on the volume of unsolicited emails received from overseas.



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