

SELLARS & CO.

BARRISTERS & SOLICITORS

HELENSVILLE LAW OFFICE

Telephone: (09) 420-9324
Facsimile: (09) 420-9325
69 Mill Road, Helensville,
New Zealand
PO Box 126, Helensville 0840
Email: admin@helensvillelaw.co.nz



WELLSFORD LAW OFFICE

Telephone: (09) 423-8022
Facsimile: (09) 423-7997
221 Rodney Street, Wellsford
New Zealand
PO Box 8, Wellsford 0940
Email: admin@wellsfordlaw.co.nz

NEWSLETTER

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WHAT GOES ON IN A PROPERTY TRANSACTION?

Many kiwis will, during their lifetimes buy and sell property. Property transactions are not simple; nor should they be. The importance and value of a property transaction alone necessitates a degree of complexity and care.

However, the transaction and how it is completed is not well understood by the general public. It may, therefore, be useful for property owners and potential property owners to consider what the lawyers do in the background to complete a sale, purchase or refinance.

Manager

A lawyer in a standard property transaction is the key-point of contact for several parties to the transaction. The lawyers (for both sides of a sale) are the “keepers” and enforcer of the contract, the negotiator, and an advisor.

Consequently, a lawyer manages the transaction by communicating with the key participants in the transaction, including banks/lenders, Kiwi Saver scheme and fund managers, real estate agents, Government agencies, local authorities, mortgage

and insurance brokers, tenants and property managers, body corporate managers, valuers, surveyors, engineers and builders.

Informer

Behind the scenes, the lawyer obtains and collates all of the information received by the various participants to the transaction and, if required, informs the client of the critical points in each report, agreement or offer.

Key to the role as informer is to keep all participants, but crucially the client, informed of key dates and deadlines in the transaction. Missing a date or deadline can have significant financial and practical implications.

Adviser

A lawyer will advise the client on legal and other issues that arise in the transaction. Advice may include raising issues with the legal elements of the title to the land, problems with a Land Information Memorandum (“LIM”), assisting the client to exit an agreement or providing options for handling problems on the day of settlement.

In certain circumstances, the lawyer may also be asked to give advice on structures for ownership of the property, relationship property considerations and complexities around family trusts, guarantees, gifting and insurance.

Custodian and transactor

A lawyer must communicate with and meet the requirements of banks and other lenders. For instance, the lawyer must give certain assurances to lenders before they will advance money to complete the transaction. To give these assurances, the lawyer must investigate compliance with the lender's instructions and various laws. Unless such investigation is completed and the bank/lender is comfortable, the funds will not be advanced and even when funds are advanced, in most cases they will only be advanced to the lawyer, as custodian, to use in buying the property.

The lawyer must ensure that the legal title to the property, the physical ownership of the property and the funds themselves

change hands in such a way as the parties are protected. This process of settlement is carefully staged so that the funds, securities (such as mortgages) and the property change hands concurrently.

Once the lawyer has the necessary funds to complete the transaction or has received those funds following a sale, the lawyer is required to pay those funds to the correct person; be it the other lawyer, the bank/lender, secured

parties, real-estate agents or the client themselves.

Completion

Hopefully, after the lawyer plays its part, a buyer gets the land, the seller gets some money, the bank gets a mortgage and all other participants in the transaction get what they need without a hitch.

SHAREMILKING AGREEMENTS

What is Sharemilking?

For a number of years dairy industry has been an integral part of New Zealand's economy and a sharemilking arrangement provides a stepping stone for farmers looking to become farm owners themselves.

Two parties exist under a sharemilking agreement, the farm owner and the sharemilker. Essentially, the parties enter into a sharemilking agreement on the basis that the sharemilker is responsible for operating the farm on behalf of the owner, but does not own the land and in return is paid a share of the income from selling milk and anything else produced off the land (e.g. silage). As a result, the legal relationship between a sharemilker and the farm owner is that of principal and independent contractor, not employer and employee.

The key requirement for a sharemilking arrangement is that the payments are distributed between the parties in accordance with an agreed percentage share of the farm's income.

Types of Sharemilking Agreements

Sharemilking agreements may be classified as either a Variable or Lower Order Sharemilker Agreement, or Herd Owning Sharemilker Agreement (also known as a 50/50 Sharemilker Agreement).

50/50 or Herd Owning Sharemilker Agreement

The farm owner under this type of agreement provides the land, buildings and milking plant, water supply and pump and ensures that the property complies with the requirements of milk buyer (e.g. dairy company). The owner also pays for fertiliser and materials and repairs to buildings, fences, gates and weed control in addition to paying the rates, insurance and any capital costs.

The sharemilker provides the herd, tractors, bikes and implements and meets all of the farm operating costs, and supplies. The sharemilker also provides labour necessary for the operation and maintenance of the farm. Furthermore, the sharemilker also carries out all of the farm work or employs labour at their cost to do so.

Variable Order Sharemilker Agreement

Variable or lower order sharemilker agreements refer to any sharemilking arrangement where the parties



negotiate the share split from the outset. If the sharemilker provides a herd with less than 300 cows, the minimum share the sharemilker must receive is 21% or greater excluding expenses.

Under this type of agreement the farm owner has more responsibility; meeting a majority of the farm costs and outgoings as well as supplying the land, buildings, milking, plant and water supply pumps, the tractor and farm implements. In contrast, the sharemilker does not provide the herd or may only provide some of the herd. They provide the labour, meet the shed expenses and cover some of the costs such as electricity and may provide a small amount of equipment such as bikes or tractors.

Obviously, the farm owner's share will be significantly higher than the sharemilker's share; which is proportionate to the costs and resources the farm owner provides under this type of agreement.

Considerations

A farm owner considering a sharemilking agreement should be cautious that they are not providing a lease to the sharemilker; rather a license allowing the sharemilker to use the land. If the agreement creates a lease between the parties, the sharemilker may have the right of exclusive possession of the land, which could result in the owner having restricted access to their farm.

Anyone considering becoming sharemilker should be aware that they will become an independent contractor rather than an employee and as such cannot rely on the Employment Relations Act 2000 to settle disputes with the farm owner. Additionally the sharemilker will have to obtain an IRD number and become GST registered. There are a number of uncertainties and considerations to make when entering into a sharemilking agreement. Having a sturdy, easy to follow and encompassing agreement in place will remove uncertainty around the roles and responsibilities of the parties, as well as providing you with the confidence to go about your business.

THE LEGAL RESULTS OF A MARKET DECLINE

When a market is in relative good health, there is a good chance economists will be predicting a future decline. In light of the current press on New Zealand's economy, this article explores some things that can happen, in a legal sense, during a market decline.

Insolvency

A person (including corporate persons and trusts) that is insolvent, put simply, is a person that cannot pay debts as they fall due. The implications of insolvency depend on whether that person is an individual, a company, a trust or another type of entity. However, in all cases the risks to that person's property/assets are much the same.

Creditors (parties to whom the insolvent person owes money) have certain rights that crystallise upon the person's insolvency, including:

1. A right to place the person, if an individual, into bankruptcy;
2. A right to place the person, if a company into receivership or liquidation; and
3. A right to seek the return of sums paid by the person to other creditors or third parties back to that person to pay the debt (or a portion of it).

The person that is insolvent is able to take steps to delay or stop the above (and other steps) by creditors and it falls to the Courts to make orders that the above steps are carried out. However, in a market decline where capital to defend claims by creditors may be scarce it is often difficult for a person that is being pursued by creditors to stave off the inevitable.

Bankruptcy

If a natural person is adjudicated bankrupt, their assets are placed under the control of the Official Assignee. The Official Assignee is then able to use those assets to pay that person's debts. The insolvent person is restricted from certain activities and roles and the effects of the bankruptcy survive until the insolvent person applies for a discharge from bankruptcy.

In certain circumstances, sums that may have been paid or gifted by the insolvent person to creditors, related parties or third parties may be clawed back by the Official Assignee to be added to the pool of assets available to satisfy debt.

Where the insolvent person has no realisable assets and the debts are less than \$47,000, the Official Assignee may take a step short of placing the person into bankruptcy. The process involves using the "no asset procedure" in the Insolvency Act 2006 which allows the person to resolve their short term credit problems.



Receivership

Receivership is a process in which the assets of the insolvent company are placed under the control of a receiver. The receiver then uses the assets of that company and income that continues to be derived from the company's business, to pay the debts and attempt to negotiate terms with the creditors such that the company may trade out of insolvency. If the receivership is successful, an application may be made to the Court to remove the company from receivership. If the receivership is unsuccessful, the company may be placed into liquidation.

Liquidation

In liquidation, the assets of the company are sold to pay debts and the company is eventually removed from the register.

A company may, before receivership or liquidation is triggered, place itself into voluntary administration to, hopefully, improve the outcome of the insolvency to the company and its creditors. However, the process is complicated and therefore still requires an administrator to be appointed and relies on the creditors' cooperation. Advice should be taken before taking steps to enter voluntary administration.

Eviction

If the insolvent person owes money to a landlord, to whom they are obligated to pay rental, the landlord may (in addition to pursuing the debt):

1. In a commercial tenancy (for instance office or warehouse space) seek an order from the Court to lock the tenant out of the premises and require the tenant to remove its property.
2. In a residential tenancy, apply to the Tenancy Tribunal to terminate the tenancy.

Both parties should take specialist advice on eviction and termination.

Mortgagee sales

Mortgagee sales are a common occurrence in a market decline. When entering into a mortgage with a lender, the borrower agrees that money against which the mortgage is secured, if they are unable to pay the interest and/or principal, the holder of the mortgage security may sell the property to pay off the loan.

Similar rights accrue to holders of other securities such as those that might apply to cars and other personal assets.

Conclusion

Anyone experiencing credit problems or finding it difficult to pay debts as they fall due should seek immediate advice so that early intervention is possible and the best outcomes can be achieved for all involved.

SNIPPETS

Building A Boundary Fence

The Fencing Act 1978 prescribes the steps that a person must take before building a fence on or near the boundary with a neighbour. It is a three step process:

1. *Send a fencing notice*

The neighbour wishing to build, replace or repair a boundary fence must notify the other neighbour(s) about the type of fence and materials to be used, the cost of the fence and the details of when the work will start and who will do it. The notice must also confirm that the neighbour(s) may object and make a proposal of its own or may refuse to accept liability (if good reasons exist to do so) for the cost of the fence.

2. *Objection*

The neighbour(s) to whom the fencing notice is given may object to any element of the proposal and may provide a counter proposal.

3. *Build a fence or negotiate*

If there is no objection (either because the neighbour does not respond or accept the proposal) within 21 days of the date of the fencing notice, the process is complete and the fence may be constructed as per the fencing notice and the costs split 50/50. However, if there is an objection, the neighbours must come to an agreement and if they cannot do so, either party may refer the matter to a mediator, adjudicator, the Disputes Tribunal or the District Court.

Net Migration

Recently, New Zealand has witnessed record high net migration. In the May 2016 year, 68,400 non-New Zealand citizens have migrated to New Zealand. Unsurprisingly, therefore, the media has been filled with reports on net migration and its effects on New Zealand's economy; in particular the coincidental rise in house prices.

Net migration is a calculation of the balance between people moving to a country for more than one year ("immigrants"), and people leaving the country ("emigrants"), over a twelve-month period. Undoubtedly, social, economic and fiscal effects result from fluctuations in migration; however the degree of benefit to a country remains a contentious matter. In respect of the housing market, recent studies have shown a strong correlation between net gain and house price inflation.

Essentially, the correlation between net migration and property values is attributed to an imbalance in supply and demand. Similar studies focused on the housing market, determined migration flow quantified at one percent of the population, is associated with an eight to twelve percent change in house prices after a year.

We appear to be experiencing that correlation in New Zealand, as in the May 2016 year, New Zealand property values grew by around thirteen percent.

Strange and Wonderful Land Covenants

Land covenants are standard in residential developments. They are essentially the rules that the owners and occupiers of land within the subdivision/development must abide by and they keep the area and properties within that residential area up to the standard hoped for by the developer and the buyers of properties in that area.

Covenants are relatively harmless and usually confirm the ordinary good neighbour rules that we all try and live by. However, strange and wonderful rules are adopted from time to time. Here are some examples:

- Rules about permitted breeds of dogs and cats and a cap on the number of dogs and cats
- Other general animal restrictions (e.g. no roosters and no more than two chickens)
- Rules about where to place trampolines and other children's toys (e.g. less than 4 metres from a roof)
- Rules to stop certain washing lines and sheds being used including restricting the colour and type
- Rules that stop residents hanging their washing within sight of the road
- Restrictions as to the planting of certain trees or hedges
- Imposition to maintain gardens and use certain contractors for servicing maintenance of gardens with neighbours/development
- Restrictions on parking including the number of vehicles, placement and colour / type of vehicle
- Rules about where to park boats and caravans (and some instances of a ban on parking these vehicles).

Please note that our offices will close
for the Christmas period at 5.00pm Thursday
22 December 2016 and will reopen on
Tuesday 10 January 2017

We wish you
a Merry Christmas
and a very happy
New Year

Bruce Wyber

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