WebbFarry Lawyers

Newsletter - Summer 2020

Latest Webb Farry News

Webb Farry is pleased to announce a new senior appointment

Tom Clout LL.B, B.MS
Senior Solicitor

- Commercial and Company
- Residential and Commercial Property
- Trust and estate planning

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We are proud to announce that Tom Clout has been promoted to Senior Solicitor. Tom's expert property knowledge is well-recognised in his thriving residential property practice. Tom's understanding of Trusts and his ability to connect this with the needs of our clients is notable. Tom is a valued member of our team in commercial and corporate deals. Tom is an avid sportsman playing cricket for Albion and made his first class debut for the Otago Volts in 2019, and plays rugby for Dunedin RFC.

Megan Bartlett, Partner

New Staff

We are pleased to welcome a couple of new people to the Webb Farry Team.

Ben Taylor has joined Litigation team as a solicitor working under the supervision of Kimberly Jarvis. After graduating from the University of Otago in 2017, Ben returned to his hometown of Hawkes Bay for his first few years of practice. Ben has a particular interest in Family Law matters, Relationship Property settlements and Contracting Out Agreements.

Outside of work, Ben is a keen sportsman, café enthusiast and enjoys spending time exploring Otago's great outdoors.

Bridey Woudberg is joining the Webb Farry team in early December as an Associate in the Commercial/Property team. After studying at Otago University, Bridey commenced her legal career with Holland Beckett in Tauranga before moving to Auckland where she has been practising for the past few years with a focus on property (both residential and commercial), trusts and estate planning as well as commercial and business structuring experience.

Bridey has family connections in Dunedin and is excited to be returning to live here permanently.

AS Gallery

We are delighted to announce that the next exhibition on display in the AS Gallery is 'Uneasy Spaces' by Emily Gordon and runs until February 2021. Please see the insert for further information.

Trust Busting – Relationship Property

By Ben Taylor

New Zealand has one of the highest numbers of Trusts in the world as a proportion of its population. The Law Commission has previously estimated that there may be anything between 300,000 to 500,000 Trusts in New Zealand with almost 15% of homes being held on Trust.

The widespread use of Trusts in New Zealand can cause issues when relationships end because, as a general rule, Trust property is not subject to division under the Property (Relationships) Act 1976 ("PRA"). Because of this, many people look to Trusts to keep their assets safe in the event of separation or death. In this article we look at whether Trusts are an effective method of asset protection in relationship property situations.

The PRA only applies to property owned by the partners to the relationship. The PRA defines an owner of property as the "beneficial" owner of property. A trustee or a settlor is not a beneficial owner of the property held on trust. Any property a partner owns in his or her role as trustee or settlor will be excluded from division under the PRA. If the beneficiaries of the Trust only have a discretionary interest in the Trust (as most beneficiaries of family Trusts do) then that interest is unlikely to be seen as relationship property. This is because the beneficiary is not guaranteed to receive anything from the Trust as it is dependent on the trustee's discretion.

Although the PRA will generally not apply to property held on discretionary Trusts, there are a number of legal avenues available to address injustice that might arise from the use of Trusts.

Sections 44 and 44C of the PRA apply when property is placed on Trust with the intention or effect of defeating the other partner's relationship property rights. In this case, the Court may order one partner to compensate the other from relationship property or their separate property, or the Court can require the trustees of the Trust to pay the affected partner compensation from the income of the Trust. The Court cannot claw back the property or capital from the Trust.

Section 182 of the Family Proceedings Act 1980 applies to "nuptial settlements" and can only be used where the parties have been married and that marriage has been dissolved. This remedy can be used where one partner's reasonable expectations of their enjoyment of the Trust are defeated because of the separation and divorce. The Court has far reaching powers to vary the Trust or settlement to reflect what each party could reasonably have expected from the Trust going forward.

The Court also has the ability to establish a Constructive Trust over the Trust property. If the Courts decide that the non-owning partner's contributions give them an interest in the property, then the Courts can give effect to this interest by declaring that the owning partner holds a portion of the value of the property on 'Constructive Trust' for the non-owner partner.

(Continues over)

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Trust Busting – Relationship Property (continued)

By Ben Taylor

The requirements are that:

1 The person claiming the Constructive Trust made direct or indirect contributions to the property;
2 They had a reasonable expectation of an interest in the property; and
3 The owner of the property should reasonably expect to yield an interest in the property to the claimant.

It is common to see Constructive Trust arguments raised in situations where the non-owner partner does significant work on the property without payment, or contributes to the property financially, and that work results in an increased value of the property in a situation where the non-owner partner reasonably expects that they will get some interest in the property as a result.

It is clear that although placing property in a Trust makes it more difficult to access in a relationship property claim, it is by no means a water-tight method of protecting assets and there are a number of legal remedies available to ensure that property is divided fairly. Commonly, Trust owned property simply creates procedural difficulties and expensive legal proceedings.

While there are a number of valid reasons why you may wish to create a Trust, it is our opinion that there is no substitute for a properly drafted Contracting Out Agreement/Relationship Property Agreement if the intention is to keep property separate going into a relationship.

Although establishing a Contracting Out Agreement can be a difficult conversation to have with your partner, it can save a great deal of time, money and argument if the relationship does come to an end, particularly if one partner brings significantly greater assets into a relationship than the other. Everybody's situation is different, so if you are thinking about putting an arrangement like this into place, then we would be happy to discuss it with you further.

Changes to building consents

Six new exemptions to the Building Act 2004 ("the Act") have been added, along with the expansion of four existing exemptions. Homeowners, builders and DIYers will now have an easier time making basic home improvements as the Act has removed the requirement of building consents for low-risk building projects such as sleep-outs, sheds and carports and porches.

These new exemptions are predicted to save homeowners up to $18 million a year and reduce the number of consents by approximately 9,000. It will mean that councils can focus on higher risk building consents which will boost the construction sector and assist with New Zealand's economic recovery from Covid-19.

The new and expanded building exemptions include those outlined below.

Single-storey detached buildings such as sleepouts, sheds and greenhouses up to 30 square metres do not require a building consent. However, kitchen and bathroom facilities in such buildings are not included in the exemption and any plumbing work will still require a building consent and electrical work will need to be carried out by a registered electrician.

Carports up to 40 square metres, ground floor awnings up to 30 square metres, ground floor verandas and porches up to 30 square metres are also exempted. These types of buildings will not require a building consent if the design has been carried out or reviewed by a Chartered Professional Engineer or if a Licensed Building Practitioner carries out or supervises the design and construction.

Permanent outdoor fireplaces or ovens built up to a maximum of 2.5 metres and with a maximum cooking surface of 1 square metre are exempted. The fireplace or oven must also be at least one metre away from any boundary or building.

Flexible water storage bladders up to 200,000 litres in capacity, which are supported on the ground, for irrigation or firefighting purposes are exempted.

Ground-mounted solar panel arrays up to 20 square metres in an urban zone can be built without the help of a professional and there is no restriction on size in rural zones.
Small bridges up to a maximum of 6 metres in length will not require consent, provided the bridges do not span over a road or rail, and the design has been carried out or reviewed by a Chartered Professional Engineer.

Single-storey pole sheds and hay barns in a rural zone with a maximum of 110 square metres will not require building consents. However, the design needs to be carried out or reviewed by a Chartered Professional Engineer and the construction needs to be carried out or supervised by a Licensed Building Practitioner.

The building work included within the exemptions will still have to meet the requirements of the Building Code as well as any other relevant legislation.

The exemptions were introduced in August of this year along with guidance information issued by the Government. You can access this information by going to www.building.govt.nz and search 'Exempt building work guidance'.

Snippet

What is a testamentary guardian?

Everyone should have a will. When making wills, those who have children should ensure that all possibilities are covered in the case of the will makers untimely death while his or her children are still minors. Hence the inclusion of a testamentary guardian clause in wills.

The clause should clearly state who the guardian or guardians are. It should also state that if there is more than one child then the preference is that those children remain living together at all times.

As both parents are the natural guardians of a child, this testamentary guardianship clause shall not become operative until the second of the parents have died. The clause should go in both parents' wills.

The guardianship issue is an often overlooked but very important provision in any wills together with the thinking around it. A big decision for parents to make, and for the testamentary guardians to accept the potential responsibility.

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The Dog Control Act 1996 explained

Dogs are one of the most common domestic pets in New Zealand. Dogs provide companionship, are used to assist people with disabilities and assist law enforcement apprehending people. A dog is a very special animal, and rightfully so, there is a specific Act, the Dog Control Act 1996, ("the Act") which is in place to empower local authorities to promote responsible dog ownership and the welfare of dogs.

The major change that is found within the Act, which was not evident in the repealed Dog Control and Hydatids Act 1982, is that there was no reference to the care, feeding or exercise of dogs. Section 5 of the Act lists the obligations of dog owners which are:

(a) To ensure that the dog is registered in accordance with this Act, and that all relevant territorial authorities are promptly notified of any change of address or ownership of the dog.
(b) To ensure that the dog is kept under control at all times.
(c) To ensure that the dog receives proper care and attention and is supplied with proper and sufficient food, water and shelter.
(d) To ensure that the dog receives adequate exercise.
(e) To take all reasonable steps to ensure that the dog does not cause a nuisance to any other person, whether by persistent and loud barking or howling or by any other means.
(f) To take all reasonable steps to ensure that the dog does not injure, endanger, intimidate, or otherwise cause distress to any person.
(g) To take all reasonable steps to ensure that the dog does not injure, endanger, or cause distress to any stock, poultry, domestic animal, or protected wildlife.
(h) To take all reasonable steps to ensure that the dog does not damage or endanger any property belonging to any other person.
(i) To comply with the requirements of this Act and of all regulations and bylaws made under this Act.

Further details and obligations can be found at section 52-60 of the Act.

Dogs are required to be registered on the dog register, which is held at the local authority. Registration fees vary between local authorities. If you fail to register your dog, at section 42 of the Act, it is found to be an offense which could amount to a fine of up to $3,000.

Section 25 of the Act explains that a local authority will disqualify a person from being an owner of a dog if that person commits three or more unrelated infringement offences within a 24 month period, or is convicted of an offence under this Act or other Acts such as the Animal Welfare Act 1999, the Conservation Act 1987 or the National Parks Act 1980. However, if the local authority is satisfied that the circumstances of the offence are not justified by disqualification, the local authority can classify the person as a probationary owner instead. A probationary owner, at council's direction, will undertake dog education programs and/or dog obedience courses. Disqualification can last up to five years.

As this is just a brief overview of the Act, it is recommended reading the Act in its entirety or contacting your local authority to provide further information if required.

What does Restraint of Trade mean?

A restraint of trade is a provision generally found in employment contracts, which prohibits an employee from working directly or indirectly with a competitor business for a specified time and within a limited geographical area, after their employment ends.

A restraint of trade can be included in other agreements such as a shareholders' agreement, where shareholders agree they will not be interested or engaged in another business similar to the business of their company while they are a shareholder and after they cease to be a shareholder for a specified time and within a limited geographical area. This article focuses on a restraint of trade in the context of employment.

Employers are increasingly striving to protect their confidential commercial information such as trade secrets, client information and product development ideas to maintain a successful business. A restraint of trade assists employers with achieving this by prohibiting employees from using such information after they leave their employment for the benefit of a competitor. However, a restraint of trade does not always provide full protection to an employer.

There are two main types of restraints: non-competition, which prevents a former employee from working in the same or similar industry as their former employer, and non-solicitation, where a former employee can work in the same industry but cannot contact their former employer's clients about their new venture.

The Courts take a prudent approach when assessing the enforceability of a restraint of trade clause and may disregard such a clause from the outset, depending on its reasonableness. Generally, restraints of trade are only enforceable if they are reasonable and not against public interest. This involves assessing the following factors; whether the:

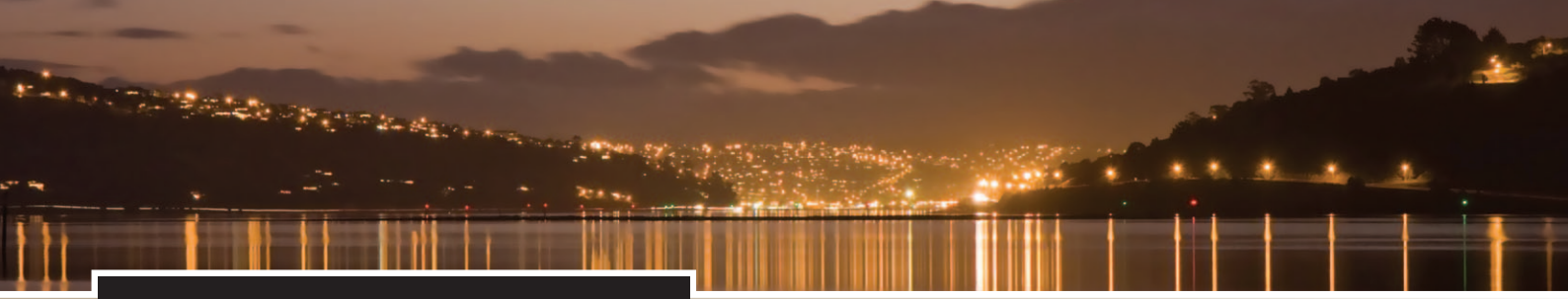
- time period and geographical limitations are reasonable for a particular industry. A time period in the range of 2 to 6 months has commonly been viewed as a reasonable period of restraint, of course this depends on the particular circumstances of each case.
- specified activities (the employee's job) may be restrained reasonably.
- former employer has an exclusive interest capable of being protected, such as a trade secret or patent.

Depending on whether the courts find a restraint reasonable, an employer may seek an injunction to stop an employee from breaching their restraint of trade, and/or damages for the loss as a result of the breach, together with penalties for breaching their employment contract.

It is suggested that restraint of trade provisions are included in employment agreements from the outset of employment negotiations. However, if an employer wishes to add a restraint of trade clause into an employment agreement after it is in place, the employer must consult the employee about this and give them the opportunity to seek independent advice together with consideration in return. Consideration can be in the form of a higher wage or specific payment from the employer to the employee for allowing the employer to enter a restraint of trade clause into the employment agreement.

It is important to understand the implications of a restraint of trade clause as both an employer and employee. The key is to find the balance between protecting your business while ensuring the restraint is reasonable and accordingly, enforceable.

It is advisable to get in touch with your lawyer to discuss restraints of trade either at the outset, during or the end of employment, whether you are an employer or employee.



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Employment changes in regards to working from home

The global spread of COVID-19 and subsequent lockdown in New Zealand changed the way that many organisations conducted business. Employers and employees needed to work together to slow the spread of COVID-19 and keep each other safe. This meant that normal employment obligations to act in good faith were more important than ever.

The implications of COVID-19 and working arrangements meant that if businesses were required to close during the lockdown, they needed to consult with their employees in good faith in order to reach an agreement in the way the workplace would carry on remotely. In addition, employers needed to adopt a more flexible approach to work hours and productivity and implement stricter policies around staff staying at home when they are sick.

Employers and employees may have wanted flexible ways of working during this time (for example, staggering start times). Parties should have discussed these matters and agreed to arrangements in good faith. These changes may have been temporary or permanent and the length of time for this change must have been recorded in the employment agreement variation. Any changes had to be recorded in writing and signed by both parties, and the parties given reasonable time to consider the proposal.

During the COVID-19 period, there may have been circumstances where consultation on changes could reasonably have been shortened if the employer genuinely needed to make rapid adjustments to cope with their circumstances. Shortened processes must still occur in good faith and provide opportunity for workers to seek advice.

As we are now in the COVID-19 recovery phase, normal consultation processes should be followed for any workplace changes proposed during the COVID-19 recovery period. This includes normal consultation timeframes and provision of information.

New Zealanders are notorious for the 'she'll be right' approach when it comes to being sick, however this is no longer appropriate in the post COVID-19 climate. The slightest of runny noses are now considered more seriously and employees are generally told to stay at home, in order to keep the rest of the workplace safe from illness.

It is likely that more New Zealanders will split their time between working from home and from the office in the wake of the pandemic. Where a day away from work was once considered a burden, it is as simple as logging in remotely and continuing to work from home now. COVID-19 has forced New Zealand into the future and it is likely that it will never be the same again.

Christmas

As with previous years Webb Farry is proud to have make a donation to the Dunedin Family Works Foodbank Appeal to try and make a small difference in the lives of those they help. We also take this opportunity to confirm our hours over the Christmas period.

The Dunedin office will re-open at 8.30am on Wednesday, 6 January 2021 and the Mosgiel office at 8.30am on Monday, 11 January 2021.

For urgent enquires during our close down period, please refer to our website **www.webbfarry.co.nz** for mobile phone contact details.

We thank you for your support during 2020 and wish you a safe and relaxing holiday season.

Webb Farry's particular expertise in change and restructuring processes, includes negotiating employment agreements and employment-related litigation.

"In an ever challenging business environment – where restructurings and rising compliance costs are commonplace – our team is clear-headed, pragmatic and focused on your commercial objectives."

David Ehlers LL.B, B.Com (Acc)
Partner

Who's Who at Webb Farry...

Partners: David Ehlers, LL.B, B.Com
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Ben Taylor LL.B
Tineke Jannink, LL.B, B.A
Simon Eton LL.B, B.A
Rachel Stedman LL.B

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Jenette Ramsay

Practice Manager: Tracy Stevenson

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AS

ALTERNATIVE SPACE GALLERY

www.asgallery.wordpress.com

Doll's Eye on the Bed, charcoal and pastel on paper, 67.5 s 43cm, 2020.

EMILY GORDON

UNEASY SPACES 29.10.20 - 10.02.21

Uneasy Spaces are created in the medium of drawing, specifically with charcoal on paper, in which they explore the atmosphere of unease. Unease sits in a unique emotional space, it appears less drastic and gripping than the more overt ideas of fear or horror, yet I assert that it is equally as powerful a sensation. Unease adds the element of the unknown and obscurity, as its sensation can appear for no apparent reason. It is this unknown element that is central to it power as a sense or feeling.

The works focus on the domestic space of the home. This depicted home has been transformed from a warm and comforting space which we would usually expect from a home to a moody, uneasy and uncanny space, becoming what is referred to as the unhomely.

The charcoal work presented uses various aspects to create this sense of unease, the dense uses of black and obscurity give a sense of the space being encroached on, and details of the space being hidden. This obscurity takes place in two forms; the first being the 'trace' in which the charcoal is smudged by hands, fingers and erasers making a mass of charcoal similar to that of a fog which hides parts of the space, suggesting that there is danger obscured there. The second is that of the close-up in which the representation becomes ambiguous leaning toward the non-representational and gives an undeniable sense of the unknown. For these spaces to be truly uneasy some form of obscurity and the unknown is nessesary.