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NEWSLETTER

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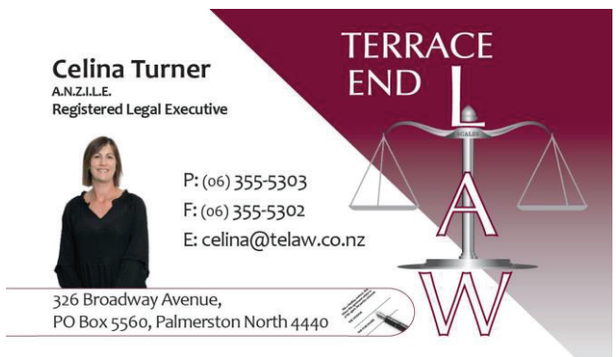

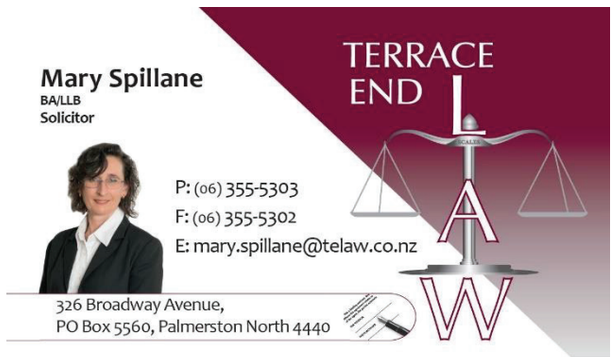

Rollover relief to the brightline rule

The brightline property rule applies to properties purchased after 1 October 2015. It looks into what period the property was acquired and when it is being sold. If the property is sold after owning it for less than ten years, you may be obliged to pay income tax.

The date that the land of the purchased property is transferred to you is the date the brightline period begins, and this date determines whether the 2, 5 or 10 year brightline period applies, which subsequently determines which rules you are subject to. The brightline period ends the day you enter into a binding sale and purchase agreement to sell the property.

The exclusions to this rule are property considered to be your main home, inherited property or if you are the executor or administrator of a deceased estate.

Roll over relief is applicable to relationship property settlements and amalgamations, with full relief for transfers on death. The recently enforced rollover relief allows for the owners of a property to change how the property is held, without triggering the brightline property rule.

This also applies to certain transfers to family trusts and transfers to or from look-through companies and partnerships, Māori authorities and as part of a settlement claim under the Treaty of Waitangi.

Rollover relief will only apply if the amount received on transfer equates to or is less than the original acquisition cost to the owner. Where a larger amount is received, no relief will be awarded, however the original owner will be taxed based on this amount if this differs to the market value of the property.

The rollover relief rules apply to property that is sold on or after 1 April 2022, regardless of whether the original date of the property being acquired was before the introduction of the brightline property rule.

It is important to note that the rollover relief does not provide an exemption to the brightline property rule. Essentially it is relief of income tax when a property is transferred, as it is ignored. In this instance, taxation is deferred until later disposal. Once the property is sold or disposed of later on, the date that the original owner acquired the property will be used as the beginning date for the brightline period, which will help determine which brightline period to apply.

Rollover relief is now in action as of 1 April 2022.

Guarantees – Discussing anti-discharge clauses

Most guarantees have an “anti-discharge” clause, these clauses are designed to prevent a guarantor from being discharged from liability and allows the creditor to vary the underlying contract without the guarantor being discharged from their obligations.

One of the most referred to authorities is the case of Holme v Brunskill. In Holme v Brunskill, the case involved the renting of a farm. The farm had sheep on it and a bond was given in relation to the number and condition of the sheep on the farm. A dispute eventuated between the farm owner and the tenant.

The dispute was resolved by the tenant giving up half of the leased land and a reduction of the rent payable, this was done without the knowledge of Mr Brunskill who was the guarantor. Mr Brunskill argued that the reduction of the land and rent was a variation of the underlying contract that discharged him.

The guarantee in this case was given for a certain number of sheep in a certain condition from the farm as it was then rented to the tenant. The actions of the owner and the tenant altered that commitment without the consent of the guarantor and the outcome of the case shows that it does not take a major alteration to discharge a guarantor but that it just has to be more than substantial.

An example of an anti-discharge clause is from the case of Dunlop New Zealand Limited v Dumbleton, it reads:

“In order to give full effect to the provision of this guarantee we hereby declare that you shall be at liberty to act as though we were the principal debtors and we hereby waive all and any of our rights as sureties (legal equitable statutory or otherwise) which may at any time be inconsistent with any of the above provisions.”

This provision ultimately waived the rights of the guarantor to be discharged. However, the ruling of Brunskill was applied and it was held that a variation of the underlying contract automatically discharged the guarantors and therefore the anti-discharge clause did not apply.

The Courts have since confirmed in further case law that the general principles of contractual construction apply to guarantees and that a variation of the underlying contract has the effect of discharging a guarantee unless it is patently obvious that the guarantor has not been prejudiced.

What solutions are available and how might anti-discharge clauses work? There are suggestions that notifying guarantors and obtaining written consent to proposed amendments that are to be made might help avoid disputes arising, even where the amendments appear to fall within the ambit of the anti-discharge clause.

It is evident through case law that the drafting of principal debtor clauses has given the Court some latitude to construe them in favour of the guarantor.

Therefore, in order to make an anti-discharge clause work, the drafting of these clauses is likely to become more sophisticated and comprehensive over time.

A review of cross-lease issues

It is said that a cross-lease is one of the most complicated forms of property ownership. A cross-lease title creates two or more legal estates having multiple owners who all have a separate lease for the house or flat with an undivided share in ownership of the entire land/site.

The lease of the property can also include and specify exclusive use areas for each house or flat, and with 216,000 cross-leases in New Zealand, owners, prospective buyers and lawyers are most commonly facing the issue of consent.

When making alternations and/or additions to a property, unlike most property ownerships where resource and council consent is all that is required, cross-leases have historically required that all other cross-lease owners must consent to such works.

In more recent times, alteration and/or addition clauses usually only require that consent is to be obtained by the other cross-lease property owners when the works are deemed to be structural.
What is a structural alteration or addition? Whilst this is unclear, you should always have consideration to what affect your alteration or addition will have on your cross-lease neighbour and how your proposed structural alteration may affect their enjoyment of their property.

In the case of Ferguson v Walsh, the Court set out a list of different types of alterations and advised whether they would require consent or not. It was held that cosmetic changes do not require consent.

Other alterations such as loadbearing walls that impact the strength and support of the building, or changes affecting the exterior shape or structure, or that impact the use and enjoyment of the neighbouring cross-lease properties, require consent. The lease agreement wording will ultimately determine whether or not consent is required. Where consent is required, section 224 of the Property Law Act states that consent cannot be unreasonably withheld, however, it is noted that where a neighbouring cross-lease owner is potentially negatively impacted, they may have grounds to notify that consent is withheld.

Where consent has not been obtained, injunctions can be sought to put a stop to the alterations/additions to the property.

If works have been taken out on the property and alterations/additions have been made to the external dimensions at the property that are not shown on the flat plan, this then creates a "defect" in the title which can be expensive to rectify.

To avoid issues arising from cross-lease property ownership, it is important to seek legal advice and have the flat plan and lease agreement reviewed to ensure that all rights and obligations as cross-lease property owner are understood.

Understanding what obligations and restrictions are in place in accordance with the lease agreement will minimize the risk of disputes.

However, where disputes do arise, clause 26 of the ADLS Memorandum 2018/4343 requires that disputes are to be referred on.

Power of attorney medical certificates

In recent years the medical condition of a donor under a power of attorney has become increasingly important and therefore documented.

Medical certifications as to mental capability are of particular importance both for property attorneys and personal care and welfare ones.

A certificate around mental capacity triggers the use of both enduring powers of attorneys which have been either put in place in a timely manner, or ordered by a court through the process covering the absence of such relevant documents.

Doctors are most particular, as you would expect, when they put their assessments of the donors in writing. They know that there will be a loss of independence for their patient should the mental capabilities become impaired.

The grey area for all the professionals involved is the earlier stages of the mental incapacity for any reason. The family begin to notice the changes, but it does take some time before the power of attorney document can be unconditionally used by the appointed attorneys.

It is important to check with your donor's lawyer as to whether the medical certificates enable the attorney to commence attorneyship duties.

To obtain clarity, the wording of the medical certificates should be reviewed carefully to ensure the full parameters of the legislation are complied with while confirming inequivalently.

Easements

Land Information New Zealand ("LINZ") controls the holding of certificates of title in respect of each piece of land in New Zealand.

There are additional rights and privileges that may be registered in document form against any individual title and these must be cleared with LINZ when they confirm the terms and conditions allowable by the registered proprietors on such titles.

In many instances rights over the titles by other parties are either lodged by councils whose services are to be secured or adjoining owners who are entitled to rights in certain circumstances over the land.

These documents recording such additional rights are called encumbrances. One of the best-known encumbrances is the 'right of way easement'. A new offshoot is the 'maintenance easement'. This option does not have a general range of terms and conditions, but grants more limited and focused specific rights that may be reasonably sought to enable adjoining properties to link more appropriately for both the adjoining registered owners.

An example of how this document might work is if two properties needed a structure between them, like a mirror to enable safe traffic flows. A very specific helpful maintenance easement is able to be locked in for the benefit of each piece of land.

Your lawyer can help frame these documents while checking their suitability.

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