

IN BRIEF FROM RAINEY COLLINS

SUMMER 2003-04

Welcome

to the Summer issue of our Rainey Collins newsletter "In Brief". We are committed to keeping you advised of important aspects of the law so you can avoid problems arising in your personal and business lives. We hope that the Festive Season and holidays see you refreshed and looking forward to the New Year.

We value your comments and look forward to hearing from you.

James Johnston
Chairman of Partners



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Property-Buyers Beware

A recent well-publicised case highlights the perils of entering into any Agreement for Sale and Purchase ("Purchase Agreement") of real estate without first obtaining legal advice.

The purchaser in that case was Ms S, who was the former girlfriend of a high profile All Black. Ms S entered into a Purchase Agreement to purchase a Wellington property for \$510,000.00. However, she was not able to pay either the deposit or the purchase price on the settlement date.

The vendor (Seller) then sued Ms S in the High Court to enforce the Purchase Agreement. In evidence, Ms S said that she had purchased the property on the basis that she "would receive the necessary funding from a property settlement" with her former partner. The Judge recognised that the situation was "sad and unfortunate", but she was in breach of her obligations contained in the Purchase Agreement and judgment was entered against her.

This case vividly illustrates that a Purchase Agreement is a legally binding contract. Once signed, the parties are bound by its terms and the Courts will enforce them. The purchase of residential property is usually the largest single purchase New Zealanders will make in their lives. It is essential that legal advice be obtained before signing any Purchase Agreement. Buyers should resist feeling pressured into signing such an important document, without first having it checked by a lawyer. Whilst it may be your potential dream home and you wish to beat other

potential buyers, we recommend that it is better to be safe than sorry.

In the case of Ms S, the addition of a well drafted but simple "subject to finance" clause would have allowed Ms S to walk away from the Purchase Agreement, when she was not able to secure finance. In other instances it may be appropriate to make the Purchase Agreement subject to a builder's or engineer's report, a Land Information Memorandum (LIM) or subject to the buyer's lawyer searching and approving the title.

This case demonstrates that buying and selling property is not always as straightforward as it may appear and that there can be nasty and expensive surprises for the inexperienced and unwary.

We normally charge a fixed fee for buying or selling property. Therefore, submitting the Purchase Agreement to us to scrutinise, and if necessary adding such conditions, before signing, may not increase your costs. It will however, ensure that you avoid the costly and stressful experience suffered by Ms S*.

Taki Anaru

* Ms S has now settled the case on a confidential basis



Severe Penalties for Illegal Internet and E-mail Use

Anyone downloading or opening material from the internet or from e-mails needs to take care to ensure that they are not breaking the law.

The Jamie Oliver Cookbook Hoax which hit inboxes around New Zealand serves as a useful reminder as to how technology can be used to instantaneously transmit material to a worldwide audience. It also raises a number of important legal issues.

In particular, the downloading and opening of attachments containing material which somebody knows is stolen or dishonestly obtained may constitute receiving stolen goods under the Crimes Act 1961.

If convicted the maximum penalty for receiving stolen goods is a jail term of up to seven years.

The copying and distribution of material from the internet or emails can also be a breach of copyright. Accordingly,

recipients of the Jamie Oliver Cookbook email who have printed off copies of the attachment for themselves and their friends and/or forwarded them on to others may also be in breach of copyright. The penalties for breach are severe. You could be ordered to pay damages or in cases of commercial copying, you could face fines of up to \$150,000 and/or imprisonment.

Given the massive amount of information shared by way of email and the internet, detection of offences or breach of copyright is difficult. Notwithstanding this, technology exists whereby owners of information can detect unauthorised copying or downloading of their material.

Recording companies have developed technology to identify people who make

unauthorised copies of songs belonging to their artists through the internet.

If you are not confident that what you are about to do is within the law, you are taking a risk. So the next time you think about forwarding on an attachment or copying a file, think again, you could be breaking the law.

And if you have a copy of the offending cookbook? We would suggest that you delete the email and destroy any copies that you may have retained. Whilst this may not avoid prosecution, it will show a responsible intent on your part.

Clare Maihi



The Christchurch Cycle Case. How can you avoid the same fate?

The organiser of the 2001 Le Race has been fined \$10,000.00 following the death of a competitor when struck by a car. Ambiguous information was given to competitors which led to confusion over whether the road was closed to other traffic. The safety plan failed to eliminate this confusion. The Judge commented that a clear statement that all sections of the road were open to other traffic would have avoided the problem.*

People organising projects need to be aware of their responsibilities and to take all practicable steps to identify and eliminate hazards. This does not mean giving up all projects. It requires a designated person to be responsible for identifying the hazards and recording the process of identifying them then working out how to eliminate the hazards as far as possible and also recording that process.

You must then inform everyone involved of what they need to know and do. Putting that in writing may avoid confusion.

The mere existence of a written plan is not enough. As the Christchurch case demonstrates the plan must actually identify and eliminate the hazards as far as possible.

The safety action plan available on our website www.rcw.co.nz may be helpful to you in recording the steps you take and in acting as a reminder of what steps are required.

The more serious the harm that is likely to result from a risk the more you have to do to try and eliminate that harm. It is important to remember that the prosecution of the Christchurch cycle race organiser did not

come under the Health and Safety in Employment legislation but rather under a criminal statute.

Take care to protect all of those involved in activities including members of the organising team, participants and onlookers. The information you provide will be crucial in allowing all those involved to also be responsible for their own safety.

Alan Knowsley

* An appeal has been lodged against the findings.



Neighbours' Trees and Fences

Trees and fences often cause problems between neighbours. Neighbour disputes can be very bitter and lead to large expense if not handled correctly. Here are answers to some of the more common ones.

Trees

My neighbour's trees are starting to block my view.

There may not be much you can do about this if your neighbour will not agree. A landowner has the right to the ordinary use and enjoyment of land as long as this does not unreasonably interfere with neighbours. As there is normally no legal right to a view, a neighbour allowing trees to block your view is probably not acting unreasonably so you would be unlikely to be able to have the trees removed or topped.

My neighbour's trees are starting to block my sun.

You might be able to have the trees trimmed because the shading, if serious, could very likely amount to an unreasonable interference with your enjoyment of your property.

I am worried that my neighbour's tree might fall onto and damage my property.

Again you are likely to be able to have it removed because it very likely amounts to what legally constitutes a nuisance.

Can I prune branches that overhang my property?

Yes, you are entitled to cut overhanging branches and roots back to the boundary. However, in some cases trees are protected under district plans so you might need to check with your Council first.

Who owns the cuttings?

Your neighbour does, and you are entitled to ask the neighbour to remove them. You are also entitled to put them back onto the neighbour's property, but if you do this you should be careful not to cause any damage.

Who pays?

You will probably have to pay for cutting back branches on your side. Where a tree actually damages your property, then the neighbour should pay for making good the damage.

What if my neighbour just cuts my trees on my property?

You can obtain compensation for the damage to the trees. This can include replacing the trees. You need to be able to prove who caused the damage.

Fences

Does my neighbour have to contribute to the cost of a new fence?

Yes in many cases they do. But if your neighbour will not agree to what you propose (and in the first instance you should always try to reach agreement), you have to follow the Fencing Act requirements. These are as follows:-

- You must give your neighbour a Fencing Notice
- This must stipulate the boundary to be fenced, the type of fence, who will build it, what it will cost and when the work will start
- The Notice must also explain that the neighbour has 21 days to object or to make any counter proposals

What if my neighbour doesn't want a new fence?

The neighbour will have to give you a Cross Notice saying why the neighbour objects. Then if agreement cannot be reached the matter will have to be dealt with by the Disputes Tribunal (if the cost is less than \$7,500.00) or the District Court.

My neighbour has damaged the fence and wants me to contribute to the cost of repairs.

You do not have to. The neighbour who caused the damage is liable.

What sort of fence can I build?

The Fencing Act sets out specimen types of fence for both urban and rural boundaries. Urban fences include post and rail fences, close boarded fences, paling fences, panel fences and masonry walls.

These are just some of the issues that can arise between neighbours. You can sort out matters with your neighbour by agreement but it pays to know what your rights are before you agree.

Nick Miles



HOT TIPS

Six Vital things you must know about the new Construction Contracts Act

Some of the old practices for subcontracts are prohibited under the new Act which came into force on 1 April 2003 and it affects almost all construction contracts.

1. Progress Payments

Unless agreed otherwise, the new Act gives contractors the right to receive monthly progress payments whether or not these are stipulated in the contract.

2. Pay When Paid Clauses

Progress payments may not now be subject to a condition that these are only payable if and when the head contractor is paid. "Pay when paid" and "pay if paid" clauses are no longer permitted, and if included in a contract are now invalid.

3. Claims For Payment

Payment claims may be served on the owner or head contractor at the end of each month unless the contract specifies a different period. The payer must then within 20 working days pay either the amount claimed, or such other amount as:

- the payer sets out in a Payment Schedule (which must explain the reasons for any difference between the claimed amount and the schedule amount). If the payer does neither the contractor may:-
- give notice of intention to suspend work, and/or
- recover the money due as a debt.

4. Suspension Of Work

Contractors are now legally entitled to suspend work if they have not been paid. Any provision in a contract attempting to prohibit this action is invalid.

5. Charging Orders

A contractor can now apply for a Charging Order against a construction site owned by the employer under a construction contract or an "associated person" to the employer.

6. Disputes Resolution

A new disputes resolution procedure called "adjudication" is established by the Act. This is intended to offer a quick and cheap method of settling differences between the parties, as an alternative to arbitration or court proceedings.

Although a number of these new provisions do not apply to residential contracts, they will affect contractors and sub-contractors throughout the building industry.

Nick Miles

The End of Custody and Access

There will be no more "custody" and "access" when the Care of Children Bill is passed. The Bill replaces these terms with "parenting orders" which allow for "contact" and "day to day care".



The change in terminology reflects the way that the Courts generally approach disputes over care arrangements for children. Adults are currently regarded as having "responsibilities" and "duties" towards children rather than "rights" over them. The old terms of "custody" and "access" are thought to place too strong an emphasis on what is "owed" to adults in terms of the roles they play in the lives of children.

The Bill is currently before the Justice and Electoral Select Committee who have received submissions and will report back to the House on 31 December 2003.

Mark Lillico

Schools Must Follow Proper Processes When Suspending or Expelling

Don't get the process wrong or the consequences for the student and school can be serious.

A student and their parents are entitled to know what the allegations are in enough detail to be able to respond to them. They are also entitled to be heard in response. The school must properly and fairly investigate the matter. Natural justice in the process must be followed.

In a recent example a mother received a phone call from her son's secondary school Principal stating he had been suspended until an investigation of theft of a camera had been undertaken.

The mother waited for three weeks for the Principal to advise what part of the investigation she and her son were to participate in. In frustration, she called the Principal who advised her that the investigation had been conducted, her son had been found guilty of theft and that he was now expelled.

The son and his parents sought an appointment with the Principal to discuss the reason for the suspension-then expulsion but the Principal refused to see them.

Understandably, the mother and father are angry that the school suspended their son, investigated the allegations of theft and expelled their son without giving them an opportunity to;

- Hear the details of the allegations.
- Provide any explanation and answer the allegations.
- Be part of the investigation process
- Meet with the Board to discuss outcomes.

Where a student is suspended or expelled, the Act* requires the Principal to follow general principles of fairness and reasonableness that would involve the parents of the student. These principles provide a right to attend a meeting with the Principal to discuss the allegations, be part of any investigative process and be given an opportunity to explain the circumstances. There is also a right to attend the Board meeting where the Principal's written report will be considered and speak on their child's behalf. The parents may be represented if they wish.

Dealing with such issues can be difficult for all involved (school, parents and student). Don't make things worse by getting the process wrong.

Hemi Te Nahu

*Education Act 1989 s13



Broken Up? Don't Miss the Claim Deadline

If you fail to file your relationship property claim before the deadline you will miss out.

Sorting out the division of your property can sometimes get put on hold after a relationship breaks down.

You may have good reasons for delaying dealing with the property such as:

- More pressing issues to work out such as negotiating the best care arrangements for children

- Needing to deal with the feelings and frustrations after separation before facing the property issues

But you need to be aware that there are time limits to applying to the Court to resolve relationship property issues.

If you need to apply to the Family Court to decide how your property should be divided the following time limits apply:

- An application must be made within 12 months of the date an order dissolving a marriage takes effect

- An application must be made within three years of a de facto relationship ending

After a relationship ends many people resolve the division of property by negotiation and then get their lawyers to draft an agreement for all to sign. You must make sure that an agreement is signed well before the above time limits run out.

Shelley Stevenson



RAINEY COLLINS LAWYERS

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