

OH, WHAT A YEAR!!!

Who would have guessed, at the beginning of 2020, what a year we would have to face with the upheaval of Covid-19 and the economic consequences that have followed. A second wave of Covid-19 and further lockdowns have not helped.

For us, Level 4 restrictions made it next to impossible to undertake most legal work. At Level 3 we were able to be back in the office although restricted in what we could do. Level 2, and particularly Level 1, enabled us to offer our full range of services but with social distancing, hand sanitiser and the wiping of all surfaces.

One casualty for us this year with Covid-19 was our intended Elder Law Issues client presentations. These had been scheduled for mid-March but were postponed. We then rescheduled them for September with the health environment looking more positive. However, the 2nd wave of Covid-19 in August resulted in our postponing the presentations again. We are now planning on holding these presentations in early Autumn 2021.

In October, Cindy Smith and Anne Todd gave a presentation on Wills and Enduring Powers of Attorney for members of the Lakeside Lions at the Te Kauwhata Golf Club.

In November, our partner Sarah Bush was a presenter at the Auckland District Law Society's Family Law Conference 2020.

Although our involvement has been more limited this year (with the Covid-19 closures) our team has still participated with our local Citizens Advice Bureau and Franklin Family Support Services clinics. We believe that we have a responsibility to assist our community and have found that our volunteering of our legal skills to these clinics is an effective way to fulfil that responsibility.

Similarly, in assisting our community, we have again given Inder Lynch Achievement Awards to senior pupils from Manurewa High School, James Cook High School, Alfriston College, Rosehill College, Papakura High School, Pukekohe High School and Tuakau College. This year's awards total \$14,000. Details of the winners can be seen on page 6 of this edition.

It is interesting looking back on our editorials. In our Summer 2019/2020 edition we said "our hope is that 2020 will be much better for all of us". That comment was a fond, but looking back an unrealistic, hope. In our Winter 2020 edition we said "it has been a challenging journey which we suspect is not yet over". With the 2nd wave of Covid-19 that comment was much more prescient. We would have preferred to be right about the first comment and wrong about the second. On balance, we dare not predict 2021.

Wishing you and your family a very Merry Christmas and a Happy New Year. Be safe

Christmas/New Year Holidays

Our offices will close for the Christmas / New Year vacation on Wednesday 23 December 2020 with a partial reopening on Wednesday 6 January 2021 and a full reopening on Monday 18 January 2021.

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RECENT FAMILY PROTECTION ACT DECISIONS



By Paul Maskell

Paul is a Partner of our firm leading our Elder Law team

In 2019, I wrote an article headed *“Obligations when making a Will”*. In particular, I focussed on the provisions of the Family Protection Act (“the Act”) – who could claim, the evidence required from the claimant and the criteria that the Court had to consider. Two recent cases are referenced here:

Adequate provision “for the proper maintenance and support” – allowance for gifts during lifetime

Section 4 of the Act provides for the Court to make a provision out of the deceased’s estate for a claimant where there has been inadequate provision in the Will for the claimant’s “proper maintenance and support”.

In an appeal to the High Court, from a Family Court decision, some adult children of the deceased (**M**) had made a claim against the estate as they received nothing in the Will. **M**’s reason for making no provision in her Will had been recorded before her death, being that those children had received gifts during her lifetime.

The High Court considered *“that proper support is a matter of judgment in the circumstances of the particular case and may take the form of lifetime gifts. It follows that inter vivos dispositions (gifts between living persons) can be taken into account when considering whether a testator (will-maker) has discharged his or her moral duty”*.

The Court further considered that it needed to undertake a proper assessment of each claimant’s financial needs when considering whether **M** had made proper provision for their maintenance and support. The Court accepted that it had to determine the adequacy of each claimant’s financial

circumstances and the ability to alleviate those circumstances by making an appropriate provision.

In this decision, the Court determined (from an estate worth \$791,000) that a notional share of \$79,000 per child should apply. From that notional amount the Court deducted amounts (“benefits”) that each child had previously received



during **M**’s lifetime. The Court awarded the sums of \$75,000, \$70,000, \$40,000, \$20,000 and \$15,000 respectively. The balance of the estate went to the remaining beneficiaries named in the Will.

What moral duty does a father owe his children and his grandchildren?

In another High Court case, the deceased had a significant Lotto win some 6 years before his death. He had separated from his wife many years before, had little contact with his children since that time and had no contact with his grandchildren. At the time of his death his estate was worth \$17 million. He had made a Will but left nothing for his children or grandchildren. However,

he had created a Family Trust that had, amongst its beneficiaries, his children and his grandchildren. His Will provided for the vast majority of his estate to go to his Family Trust.

The Court observed that the deceased’s *“wishes as reflected in the Will, Trust and Memorandum are to be disturbed to the least extent possible after making proper provision for the Children and Grandchildren pursuant to the Act”*. The Court identified that it is not authorised to re-write a Will. *There must be testamentary freedom relative to claims by adult children. Any Court order “had to be limited to the amount required to repair the breach of moral duty”*.

In this case the 4 children sought \$3 million each. The Court held that the deceased *“exhibited disinterest in the Children”*. The Court assessed that *“a wise and just testator in [the deceased’s] position would have made provision of \$1,250,000 for each of the Children in light of the circumstances”*.

The Court made no provision for the grandchildren. It said *“while a loving grandfather might well make some provision for his grandchildren in his Will, that does not mean he fails in his moral duty towards them if he does not do so”*. It concluded *“with each of the Children receiving \$1.25 million, their financial positions will be significantly improved and they can be expected to provide for their own children”*.

This decision effectively left about \$10 million for the Family Trust out of which the children and grandchildren could benefit as well.

Conclusions

Testamentary freedom (freedom to bequeath your assets by Will as you wish) is important but this does not override your responsibility to consider and, in appropriate cases, provide for immediate family members. The Family Protection Act is always in the background and is a consideration we always raise with clients when taking Will instructions.

HARMFUL DIGITAL COMMUNICATIONS

Cyber-bullying and harassment



By Rajiv Rao

Raj is an Associate of our firm specialising in both Criminal and Civil Law..

The Harmful Digital Communications Act 2015 (HDCA) has been in force for several years, but in our experience most people remain largely unaware of its purpose and provisions.

The HDCA criminalises the worst forms of digital bullying and harassment and also provides a relatively fast and inexpensive civil procedure for dealing with other serious or repeated harmful digital communications.

Criminal offence

Under the HDCA, it is a criminal offence to cause harm (defined as “serious emotional distress”) by posting a digital communication. Specifically, it is illegal to post a digital communication with the intention that it cause harm, where posting the communication would cause harm to an ordinary person in the position of the victim and where harm does in fact result to the victim.

For a person, the maximum penalty on conviction is two years’ imprisonment or fine of \$50,000, while the maximum

penalty for a company is a fine of \$200,000. Prosecutions are conducted by the Police in the District Court. In such cases, the Court will weigh factors such as the language used, the age and characteristics of the victim, how widely the communication circulated, and whether the communication was true or false.



Civil process

The HDCA also establishes a procedure for obtaining takedown and other associated orders from the District Court. If someone considers that

they are the victim of a harmful digital communication, they can seek an order from the court that the originator of the communication take down the material.

Associated orders can be made where appropriate, including orders that the person refrain from engaging in similar conduct, publish a correction or apology, and not encourage anyone else to engage in similar communications. In some cases, orders can be sought against hosts of content as well.

The HDCA requires that a person seeking any court orders first try to resolve the issue with Netsafe, which is an approved agency under the Act. Netsafe will try to resolve the matter on a voluntary basis by using negotiation and mediation. If they are unable to successfully resolve the matter, Netsafe will provide a written summary of their actions that must be attached to any application to the court.

Conclusions

If you are the victim of cyber-bullying or harassment, Netsafe should be your initial point of contact ([netsafe.org.nz](https://www.netsafe.org.nz)). If you consider that a crime has been committed, you can of course report it directly to the Police. If Netsafe or the Police are unable to resolve the matter to your satisfaction, we are able to assist with making applications to the District Court.

SETTLEMENT DAY – DOES THE VENDOR HAVE TO REMOVE RUBBISH FROM THE PROPERTY?

Buying a new house is a positive experience and looked forward to by all purchasers. The Vendors too are looking forward to moving on to a different location.

The actual shift is the least enjoyable aspect. It is always difficult to manage and always under time constraints. Included in the scenario is often the situation where the Vendor runs out of time and energy to completely remove all rubbish from the property as they leave. Common sense tells us all what might reasonably be left behind, but what if there is an unreasonable amount remaining? There is no legal obligation ultimately.

As a purchaser, if you notice rubbish inside and outside when you are making your decision to buy, then on making an offer to do so, put a clause in the agreement requesting that the property being left in a tidy condition and rubbish free. This clause would normally be deemed a warranty.

So, while the purchaser cannot refuse to settle because rubbish has been left, following the pre settlement inspection the purchaser may request that a compensation amount be retained (for breach of the warranty given) until the rubbish is either satisfactorily removed or those funds retained are used to do just that.

TRUSTEES' DUTIES AND LIABILITIES UNDER THE TRUSTS ACT 2019



By Julian Airey

Julian is a Partner of our firm leading our Trust Law team.

This is the third article on the new Trusts Act 2019 with the first article having appeared in the Winter edition and the second article having appeared in the Spring edition of this newsletter.

The imposition of duties on trustees is essential to the concept of a trust. Without such duties, trustees could do as they please with the trust property.

The Trusts Act 2019 ("the Act") contains various provisions relating to trustees' duties and the limitation of liability that are likely to be of great importance to trustees, both of existing trusts and those created after the Act comes into force on 30 January 2021.

Many of the duties referred to in the Act were already part of the law established over many years. However, the Act introduces the concept of mandatory duties and default duties. The Act also incorporates a range of other duties, notably in relation to the retention and disclosure of trust information to beneficiaries that have been discussed

in previous articles.

Mandatory Duties

As the name suggests, mandatory duties must be performed by the trustees and cannot be modified or excluded by the terms of the trust. Those duties require trustees to:

- Be familiar with the terms of the trust;
- Act in accordance with the terms of the trust;
- Act honestly and in good faith;
- Hold the trust property and otherwise act for the benefit of the beneficiaries in accordance with the terms of the trust;
- Exercise their powers for a proper purpose.

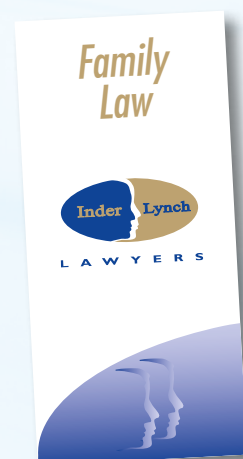
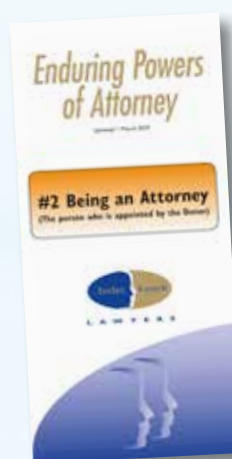
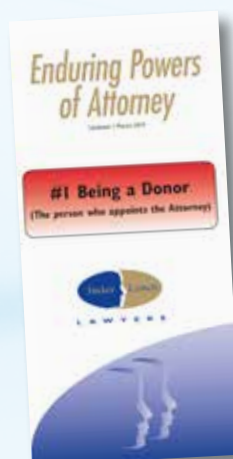
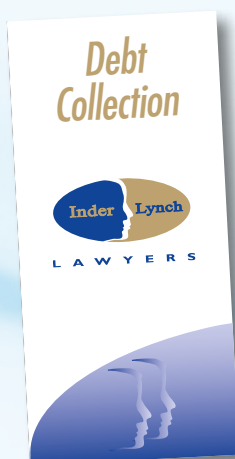
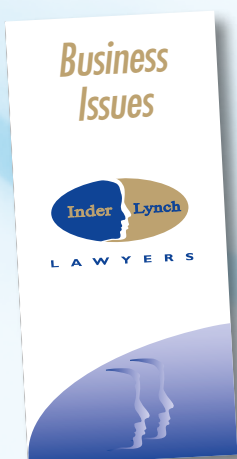
The above duties are not new and are what have been regarded as core trustee duties for many years.

Default Duties

Default duties are duties that will apply

to trustees, unless they are expressly modified or excluded by the terms of the trust. The default duties require trustees:

- To act with reasonable care and skill, having regard to any special knowledge or experience that the trustee has or claims to have or, in the case of professional trustees, in accordance with the reasonable standards to be expected of a person having that professional expertise.
- To invest prudently, and in the case of professional trustees, in accordance of the standards reasonably expected of a person of having such expertise.
- Not to exercise the power of a trustee directly or indirectly for their own benefit.
- To actively and regularly consider whether or not they should be exercising their powers under the trust deed.
- Not to commit trustees to a future exercise or non-exercise of their discretion.
- To avoid conflicts of interest.
- To act impartially.
- Not to make a profit from their trusteeship.



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Generally speaking, trustees have never been able to be indemnified for failing to administer the trust honestly and in good faith for the benefit of the beneficiaries. They can, however, be indemnified for breaches of trust arising from their own negligence, wilful misconduct and, at least until the Act comes into force, gross negligence. However, the Act makes it clear that trust deeds must not limit trustees' liability or provide an indemnity in relation to the trustees' own dishonesty, wilful misconduct or gross negligence. Any terms of a trust deed that purport to limit or exclude such liability will be invalid under the Act.

Conclusions

The role of a trustee has always come with significant responsibilities and potential personal liability for trustees if their duties are not properly understood and discharged. Those who are currently trustees of trusts or proposing to take on the role of a trustee, whether for a trust that they are themselves establishing or otherwise, should seek advice from us to ensure that the trust deed is drafted in such a manner that provides the appropriate degree of protection for the trustee in the circumstances of the particular trust. Secondly, it is important that trustees be aware of their responsibilities, potential liabilities and how appropriately to manage them.

- To act for no reward.
- To act unanimously.

Modification or Exclusion of Default Duties

Any of the default duties can be modified or excluded entirely by the terms of the trust deed. In the case of most family trusts, it will be necessary to modify the default duties to at least some extent. This is because those establishing family trusts often intend to be trustees and also among the categories of discretionary beneficiaries of the trust. Therefore, they will need to modify the duty not to benefit from the trust. Failure to do so would mean that they could not benefit from the trust.

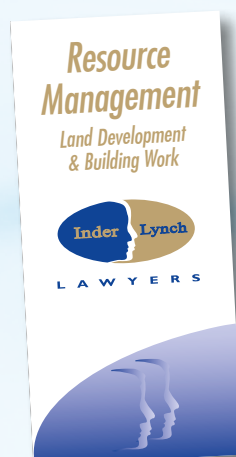
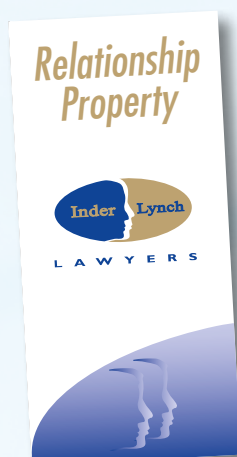
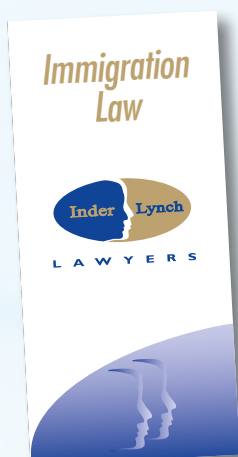
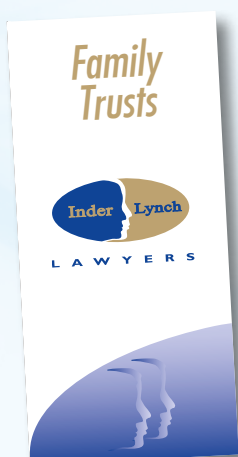
In cases where it is intended that a professional trustee be involved in the trust, the duty to act for no reward

will likely need to be excluded if the professional trustee is expected to take on the role of trustee.

Furthermore, many settlors establishing trusts may not want their trustees to incur personal liability simply because they make an honest mistake or a judgement call that proves to be incorrect.

Limitation of Liability and Indemnity of Trustees

As a general rule, trustees are personally liable for the consequences of their own breach of trust. Therefore, it is common to include clauses limiting trustees' liability and indemnifying them out of the trust fund for any losses that they suffer as a result of their trusteeship. Without such provisions, few trustees, particularly professional trustees, would be willing to undertake the role.



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BUSINESS LAW UPDATE

BEING A RESIDENTIAL LANDLORD HAS BECOME MORE CHALLENGING

REVISITING THE RESIDENTIAL TENANCIES ACT



By Carmel Hood

Carmel is a Consultant of our firm specialising in both Property Law and Business Law

The law around residential tenancies has seen some significant changes in recent times, first in July 2019 with the Healthy Homes Standards and then in August 2020 with an overhaul of the residential tenancies legislation.

There are now more obligations on Landlords and harsher penalties for non-compliance.

Healthy Homes Standards

The requirement for a Landlord to comply with the Healthy Homes Standards became part of the Residential Tenancies Act on 1 July 2019. The standards require Landlords to meet new rules in relation to heating, insulation, ventilation, moisture ingress and drainage, and draught stopping.

The key obligations of a Landlord under the healthy homes legislation are:

- » To provide a compliance statement in any new or renewed Tenancy Agreements from 1 December 2020 (this deadline was extended from 1 July 2020 due to issues with the ability to comply due to Covid-19 restrictions). The compliance statement is an addition to Tenancy Agreements that provides specific information about how a property meets the healthy homes standards.
- » From 1 July 2021, to ensure that their rental property complies with the healthy homes standards within 90 days of any new tenancy.
- » From 1 July 2024, to ensure that all rental homes (whether under a new

or existing tenancy) comply with the healthy home standards.

Major changes to the Residential Tenancies Act

The Residential Tenancies Act was passed in the 1980's and has, in 2020 had its first major overhaul. Probably the two key changes to the law are restrictions on rental increases and the end of a Landlord's ability to terminate a tenancy without cause. The changes are being phased in.



The major change that took effect from 12 August 2020 is that rent increases are limited to once every 12 months. This is a change from once every 180 days (6 months).

The key changes that take effect from 11 February 2021 are:

- » Landlords will not be able to end a periodic tenancy without cause. Prior to 11 February 2021 a Landlord can end a tenancy by providing 90 days' notice. A Landlord can still end a tenancy due to the owner, their family or employee moving in. However, the notice period will increase to 63 days (previously 42

days). A Landlord can also still end a tenancy if the property is being sold, or extensive alterations, demolition or conversion is being done. However, the notice period for this has increased to 90 days, (previously 42 days). This is an important consideration if looking to sell your rental property.

- » Other grounds for termination by a Landlord including for non-payment of rent or certain breaches of the Tenancy Agreement will still apply, on application by the Landlord to the Tenancy Tribunal.
- » All fixed-term Tenancy Agreements will convert to periodic tenancies at the end of the fixed-term unless the parties agree otherwise, or the Tenant gives a 28-day notice, or the Landlord gives notice in accordance with the allowed termination grounds for periodic tenancies.
- » Tenants can ask to make minor changes to the property and Landlords must not decline if the change is "minor". Minor changes include changes that have low risk of material damage and do not require a building consent. Landlords must respond to a Tenant's request to make a change within 21 days.
- » Landlords must keep records of all works that are carried out at the property that required a building consent, electrical or gas fitting certificate of compliance or involve sanitary plumbing work.
- » Rental properties cannot be advertised without a rental price listed, and Landlords cannot invite or encourage Tenants to pay more than the advertised rent amount.
- » Tenants can request to install fibre broadband, and Landlords must agree if it can be installed at no cost to them, unless specific exemptions apply.
- » All requests to assign a tenancy must be

Continued on Page 8

- considered. Landlords cannot unreasonably decline a request for assignment. If a Residential Tenancy Agreement prohibits assignment, it is of no effect. However, a Landlord may agree with the Tenant to end their fixed term tenancy rather than assign it.
- » Not providing a Tenancy Agreement in writing will be an unlawful act and Landlords will need to retain and provide new types of information including the healthy homes standards compliance statement.
 - » The Regulator (the Ministry of Business, Innovation and Employment) will have new measures to act against parties who are not meeting their obligations. The Regulator can now issue infringement notices of up to \$3000.00. The civil and criminal penalties have increased as well, for example if a Landlord acts to terminate a tenancy without grounds they can be fined up to \$6,500.00. There are also pecuniary penalties for serious breaches of up to \$50,000.00.

The key changes that take effect from 11 August 2021 recognise situations where speedy termination is reasonable:

- » Tenants who experience family violence (and provide evidence of the family violence) will be able to withdraw from a fixed-term or periodic tenancy by giving two days' notice (rather than 21 days' notice for a periodic tenancy).
- » A Landlord will be able to issue a 14-day notice to terminate the tenancy if the Tenant has assaulted the Landlord, the owner, a member of their family, or the Landlord's agent, and the Police have laid a charge against the Tenant in respect of the assault.

The changes to residential tenancies legislation are significant and **Landlords will need to ensure that they are up to date with the changes and are meeting their obligations**, or face action from the Regulator or the Tenancy Tribunal and potentially be faced with infringement notices, fines or penalties.

Our property team can help with buying or selling your rental property and any other property issues you may have.

BREACH OF CONTRACT AND THE RIGHT TO CANCEL – WHAT IS AN ESSENTIAL TERM?

There has been recent High Court consideration of Section 37 Contract and Commercial Law Act regarding a party's entitlement to cancel a contract *"if induced into it by a misrepresentation" or "if a term of the contract is or will be breached"*.

D sought recovery of a deposit paid for a purchase of an early childhood education centre (ECE) after cancellation by D of an agreement for sale and purchase. The Developer agreed to build the ECE on a property and agreed that the ECE would be leased to KNZ. Subsequently the Developer assigned the lease to an operator other than KNZ, without D's consent. D cancelled the agreement.

The Court found that the threshold in Section 37 had been reached in this case as the Court was satisfied that for D, KNZ was the intended Lessee (not another operator) and that the parties had agreed that the named Lessee was an essential term. This view was supported by email exchanges between the parties even though the Agreement did not specify the provision to be an essential term.

The Court was satisfied that D would probably have declined to enter into the Agreement unless it had been agreed that the lease clause and the identification of KNZ as the Lessee were essential. The Court held that D was entitled to cancel the contract and have a refund of the \$466,000.00 deposit paid plus interest.

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