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NEWSLETTER

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Mortgagee Sales

If you buy a property at a mortgagee sale, be aware that you are entering a contract that is quite different in its nature to an agreement entered into in other circumstances.

The will be weighed heavily in the mortgagee's favour. There may be a very unwilling and impecunious owner/occupier who is being forced to leave their home by the mortgagee. In such circumstances the mortgagee is usually unwilling to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

Other common issues for purchasers at mortgagee sales can include:

- There is less protection for purchasers as the agreement usually does not include standard provisions. For example, the mortgagee will have removed the section in the agreement relating to the vendor's warranties and will have removed the right for the purchaser to approve title.
- Once the contract is signed it is unconditional and so requires thorough due diligence prior to signing.

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Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.



- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer an opportunity to buy a property at a reduced cost. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement. You should seek legal advice before the auction, as well as checking the title, council records and the property in advance, if possible. However, there may still be some issues that arise that are out of your control as purchaser.

The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to have care before putting pen to paper.

To all Lyon O'Neale Arnold's Wonder Women

If you are interested in coming along to a friendly function provided by the firm to

- **meet** other women
- **share** ideas and information
- **enjoy** a glass of wine and catch up
- **hear** from our speaker, Deb Bell

then please contact Melanie Fahey on 928 4431 or melanie@lyon-oneale.co.nz and she will send you details.

Redundancy

Employers considering restructuring and/or redundancy must deal with these situations carefully and comply with the legal requirements or they may end up facing additional costs in the form of personal grievances raised. Legal advice at the outset may save time, stress and money.

Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must follow a fair process. It is in the process that employers often come unstuck.

As a guideline employers must be able to show:

- the redundancy was based on genuine commercial reasons
- the provisions of the employment agreement have been followed
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all the circumstances.

Genuine commercial reasons for redundancy

These may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing. Where redundancy occurs as a result of restructuring, the employer must make sure that any new positions formed are not substantially similar to the position being made redundant. The following are just some of the factors that will be relevant:



- substantial changes to duties
- change in level of seniority

- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff

Process

Having passed the 'genuine reason for redundancy' hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment
- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions
- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation
- advising the employee of their right to representation and offering support, and
- where possible, providing counselling, career, financial and retraining advice.

Whether the process has been fair will depend on all the circumstances of the case.

Employers should note that the National Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and also those already receiving the maximum accommodation supplement, along with help with securing new employment. A redundancy tax credit is also available that makes taxing redundancy payments fairer when the redundancy payment has pushed the employee into a higher tax bracket as a result of receiving a lump sum redundancy payment.

Family Trusts - Family Protection Act

Family trusts are an ideal way to protect assets from various threats, including for example, claims under the Property (Relationships) Act 1976 and being eroded by rest home subsidies. However, in the recent case of X v X, the Court of Appeal has highlighted the risk of losing control over assets placed into trust and the difficulty in getting that control back once it is gone.

Section 182 of the Family Proceedings Act 1980 has been described as being a trust busting mechanism whereby the Court can go behind the provisions of a Trust Deed in situations where there has been a significant change of circumstances since the Trust Deed was entered into.

In X v X, the husband and wife settled a trust that, by the time of their separation, owned assets worth between \$7-9 million. During the course of the relationship the couple had moved to Australia and, in

order to make their trust more efficient under Australian tax law, Mr and Mrs X had resigned as both appointers and trustees of the family trust.

The trustees of a family trust have the authority to deal with the assets of a family trust. This includes the ability to sell or purchase additional trust assets, allow charges and mortgages to be registered over trust assets, as well as distributing trust assets or trust income to beneficiaries. The appointers of a trust have the authority to appoint or retire trustees.

By retiring as both trustees and appointers of their own family trust, Mr and Mrs X effectively gave control of their assets to independent third party trustees.

Following the breakdown of the relationship, Mr X applied to the Court under section 182 of the Act to have the trust assets of the family trust resettled onto three new trusts. Mr and Mrs X would each control a

trust containing 25% of the assets of the former family trust. A third trust would be created with the remaining 50% of the former trust assets for the benefit of the couple's children. Despite the fact that the Trust Deed contained express provisions to allow for the former family trust to be resettled, the Court of Appeal dismissed the application by the husband.

One effect of this decision is to limit the applicability of section 182 of the Family Proceedings Act and make it more difficult for the Court to intervene in trusts that have been set up for a legitimate purpose.

The case highlights that when considering placing assets in a family trust, or dealing with family trust assets, it is crucial to take great care to consider the legal and practical implications of the decisions that you

are making. Mr and Mrs X would have had fewer problems if they had retained the ability to control the trust, either by acting as trustees or, at the very least, by retaining the power of appointment which is what this firm would have recommended.

Lyon O'Neale Arnold
Prepaid Funeral Accounts

Many people want to put aside funds for a prepaid funeral but don't want to prepay with a funeral company. We can now help. We can hold your funeral funds on your behalf in our trust account. This arrangement satisfies WINZ requirements for rest home subsidies and asset testing.
 Talk to us to find out more...

Cambodia Charitable Trust

One year old

The Trust became one year old as at April 2009. In its first year the trust raised over \$60,000 through the sales of product and donations. This money has been spent in Cambodia directly on projects focusing on the relief of poverty.

Developing Education

1. The Trust supports 6 Schools based in Takeo and Kampot providing teaching materials, school uniforms, stationery, bicycles, library materials and subsidising teacher salaries. This support reaches over 3000 children and directly benefits their education.



2. The trust has provided library books for two schools in the Ratanakiri Province and is wanting to help the schools in that district further as soon a financial support can be arranged. 70% of the people living in this province are illiterate.

3. The Trust would like to find sponsors prepared to take on responsibility for funding a designated school. This would entail being responsible for funding school uniforms, library books for that school and stationery. This would cost in the vicinity of \$4000 per annum to provide these for a year depending on the size of the school. The Trust will still administer the payments and receive the reports from Cambodia, and will forward the reports to the person who is providing the funding. Please let us know if you would be interested or feel you can find a group of people to take this on. This enables the Trust to support more schools



and gives the donor a direct relationship with a school which they can develop.

4. The Takeo Teachers Training College received 120 teacher packs for the new graduate teachers. The new teachers graduate each January and the Trust wishes to support them each year this way. This support reaches 120 classrooms.

Childrens Health

1. The Trust provides financial support for Dr Beat Richner's Children's Hospitals in Phnom Penh and Siem Reap. We have some DVD's available to lend out which show the work being undertaken by this Doctor. Please let us know if you would like to borrow a copy. It is really interesting.

2. The Trust would like to extend its support in the area of children's health by arranging a transport system to get children from remote villages to the hospitals for immunisations or check ups which will be arranged as soon as funds are available.

Governance -legal rights

1. The Trust has paid for 20 Cambodian lawyers to join Law Asia and 10 lawyers from Cambodia to attend the Law Asia conference in Vietnam this November. This will help educate those lawyers in the fields of human rights and housing rights and will enable them to share their story with lawyers working throughout Asia Pacific in these fields.

2. The Trust intends to provide sponsorship to students wishing to complete law degrees in Cambodia as soon as it has sufficient funds.

Social Development

1. The Trust has made micro-enterprise loans for the establishment of small businesses.

2. One of the loans made by the Trust enabled the purchase of sewing machines and the Trust purchases school



uniforms for the Kampot province from the business that has been established. The owner of the sewing machines is now teaching young girls to sew as a step towards them being able to find employment.

3. The Trust imported Fair Trade products providing employment in Cambodia. We are currently working with the producers to develop products which will be more attractive to New Zealand customers. Please let us know if you are prepared to take some products to your workplace to sell or to show friends

4. In December 2008 Creative Tauranga allowed the Trust to hold a Cambodian market at its premises in Willow Street, showcasing the product and artwork imported from Cambodia. They have offered us their premises for another market, including some new products, from 10 to 21 September 2009. We plan on having an exciting gala opening night Friday 11th September. Please note your Calendar

Leaky Homes

During the 1990s a considerable number of houses were built using methods that haven't withstood the weather conditions in New Zealand. Because of the problems involving design, and installation of materials, these houses leak when it rains. In some cases the materials themselves were used inappropriately.

Obviously no-one wants to own a leaky home and it is understandable that someone who is in this position may experience a strong sense of denial. Unfortunately this sense of denial will not assist to address the problem.

If leaking problems are ignored a number of things may happen. Firstly, the extent of the damage caused by any leaking will increase meaning the amount of any remedial work required to fix the problem will also be increased. Secondly, leaking problems can have an effect on the health of those who are living in the house. Exposure to moulds and bacteria caused by damp areas can cause allergenic and/or very serious toxic reactions. And last but certainly not least, is the effect that leaving a problem undiagnosed will have on the owners ability to make a claim.

The time limit imposed by the Building Act 2004 and the Limitations Act 1950, means that a problem left may fall outside the period in which a claim for damages may be bought. A claim must be lodged within ten (10) years immediately following the initial construction or alteration of the house. In some circumstances, this time limit is reduced to six (6) years from the time that the owner knows or should have known of the problem.

Of course, it is not only owners that need to be aware of the leaking home problem. Purchasers should also be careful to fully investigate to possibility that they may be buying a leaking home. There are a number of avenues that one might explore when doing pre purchase investigations. We are happy to assist in this process should anyone elect further investigation.

It is for the reasons stated above that it is better to investigate the nature and extent of any problems as soon as possible.

Some Key factors when assessing whether your house may be at risk

1. Exterior insulation and finishing systems will generally comprise of a layer of polystyrene insulation over-coated with acrylic plaster. If

your house has a finishing system such as this, you may be at risk.

2. Homes built with overhanging eaves are at less risk than homes with small or no eaves.
3. A house that has more than one story or is constructed as multi-unit is at more risk than a single story home.
4. The location of the house is also a very important factor when assessing the risk factor. Homes that are built in exposed wind zones or that are frequently subject to prevailing rain will be more at risk than those that are constructed in sheltered locations.
5. Houses that are built on hill sides or at the end of long sloping driveways may be subject to catchment waters. If sufficient drainage and anti capillary allowances are not catered for then the house may be at risk.
6. Taking all of the above into consideration, the year of construction can also help identify houses with a higher risk of leaking problems. Take a look at the table below to see where your home fits into the risk matrix.

Before 1987	Low Risk	Time Barred
1987 - 1998	High Risk	Time Barred
1999 - 2004	Very High Risk	Possible Claim Active
After 2004	Low Risk	Possible Claim Active

Physical Clues

As well as looking at the general risks above, there may also be other clues that will indicate a leaking problem.

These may include the following:

- Staining or mould growth
- Damp or rotting floor coverings
- Swelling of wooden trims
- Water puddles
- Unexplained corrosion
- Damp smells

Lyon O'Neale Arnold

Blair Kiddle has built a practice within the firm in dealing with both claimants and respondents in defective construction claims, and devotes a large amount of time to this type of work.

If you or any friends have any issues or would like to address this common problem any further, please feel free to contact Blair for further advice on 928 4422.

If you have any questions about the newsletter items, please contact us, we are here to help.