

**PLEASE  
READ  
THIS**

Please note: If you would like to receive future copies of our newsletter via email, please forward your email address to [newsletter@smithpartners.co.nz](mailto:newsletter@smithpartners.co.nz)

## Inside this edition

- Trustee Duties ..... 1**
- The New REINZ Plain English Sale and Purchase Agreement ..... 2**
- Unit Titles Law Change Updated ..... 3**
- Changes to the District Court Rules ... 4**

## Partner's Corner

Two new team members have joined Smith & Partners during this quarter. Sam Barriball, a newly graduated lawyer has joined the property and commercial team and will work largely under the supervision of Greg Muller and Peter Smith. As well as being a conscientious hard working young lawyer Sam is also on the fringe of selection for the New Zealand womens cricket team and has recently returned from a season of cricket in England and both the firm and our clients should follow Sam's sporting career with interest.

Jo Mayes has joined the property and commercial team as personal assistant to Peter Smith and Kylie Taylor. Jo has come to us from a big firm legal background. She has slotted in really well and we are sure she will be a popular and highly valued team member.

With New Zealand coming gradually out of recession, and interest rates remaining low, we are noticing that our clients are getting more confident about raising mortgages and buying and selling properties. This has kept our property department busy and we would hope that activities remain steady rather than part of the boom and bust cycle starting all over again. We anticipate that the next phase will be an increase in business activity as existing business owners start to reinvest in their businesses.

It has been a long year with everybody counting their pennies and the partners are sure that all of our team and clients will be looking forward to their Christmas break so that they can enjoy time with their families and regain that holiday feeling that will make us all feel optimistic and charged ready for the New Year.

***We wish all our clients a safe and happy Christmas and a New Year that provides all that you have hoped for.***

## Trustee Duties

The duties of a trustee need not be onerous, but a failure to carry out those duties may, in a worst case scenario, result in a claim against you by a beneficiary who has suffered a loss as a result of your actions or omissions.

For those readers who have consented to act as a trustee for a friend or family member without really understanding what that role entails - the list below, while not exhaustive, sets out some of the most important trustee duties.

### The duty of efficient management

- Whether you are an original, substitute or additional trustee you must first become familiar with and abide by the terms and conditions of the Trust Deed.
- Know the extent of the assets and liabilities of the trust and make sure that these are properly held in the name of the trustees.
- Ensure that the trust is managed and administered properly and that the trustees meet to discuss and agree on issues. Do not be a rubber stamp of the settlor's wishes. Take minutes of these meetings and record all resolutions.
- Make sure that the administration costs of the trust are kept to reasonable levels.

### The duty to keep and render accounts to beneficiaries

- Make sure that a clear audit and paper trail is kept of all decisions and transactions. This will involve secure storage of the trust deed, minutes of meetings and resolutions, financial accounts, correspondence and other trust documents.
- If the beneficiaries request information, the trustees have a duty to make certain information available, such as the trust deed, financial statements and investment strategies.

### The duty to act personally

- Carry out your trustee duties personally.
- You may instruct an agent to carry out your decisions but you must make your own decisions and not be dictated to by other trustees, the settlors or beneficiaries.
- Trustee resolutions must be unanimous.

### The duty of loyalty

- Always act in the best interests of both present and future beneficiaries and be impartial between beneficiaries.
- Avoid conflicts of interest.
- Do not benefit or profit from your position as trustee unless authorised to do so.
- You must always protect the interests of the beneficiaries.

*continued on page 2*

## The New REINZ Plain English Sale and Purchase Agreement

The Real Estate Institute of New Zealand's ('REINZ') new Agreement for Sale and Purchase ("the new agreement") was introduced in July this year in an effort by REINZ to create its own form of agreement that uses clear language and appeals to the lay person. Before the introduction of the new agreement, it was standard practice to use the Auckland District Law Society ('ADLS') Agreement for Sale and Purchase ("the standard form agreement").

The standard form agreement has been in use for over 20 years, is tried and tested, and very familiar to both real estate agents and conveyancing professionals. Consequently, there has been extensive discussion and critique of the new agreement.

### Commentators have pointed out that:

- Much of the language in the new agreement is subjective, resulting in the potential for differences in interpretation, leading to a risk of uncertainty between the vendor and purchaser.
- Some terms are not properly defined, which may lead to differences in interpretation.
- The new agreement identifies too many terms as being "essential terms" whereas some are procedural rather than essential in nature. If a party refuses to comply with an essential term the other party may elect to refuse to complete settlement.
- Disputes must be referred for mediation, however, the new agreement does not set out the mediation process to be followed.

A significant difference from the standard form agreement is the way in which the standard conditions (i.e. title approval, LIM, builder's report and tenancy) in the new agreement are dealt with. The party approving the condition ("the approver" which normally will be the purchaser) must not unreasonably withhold approval of a condition. If the approvers withhold their approval they must give notice to the other party that the condition is not satisfied, the reasons why it is not satisfied and what is required to rectify the problems. The other party then has five working days to either agree to rectify the problem or they may elect to cancel the agreement. During this five working day period the approver cannot cancel the agreement.

### Trustee Duties continued...

In all things, a trustee's standard of care is measured against that of an ordinary prudent business person managing the affairs of others. Of course a higher standard is required if the trustee is a professional person such as a lawyer or accountant. The management of trusts often come under scrutiny and all of the benefits of having a trust may be lost if the trust records and procedures do not meet the required standard. It is therefore important to keep a clear audit and paper trail and to bear the above trustee duties in mind. It is also important to insist that you, as a trustee, are kept up to date with all of the trust's affairs.



### Some positive changes that the new agreement has introduced include the following:

- Layout - the font size is larger, the agreement is well spaced out and sentences are limited to 26 words.
- A new approach to GST, which requires knowledge of whether the seller is on a payments basis or invoice basis.
- Warnings throughout the new agreement which are useful for readers to alert their attention to a possible problem.
- The addition of a building report condition to the standard conditions to alert purchasers that such a report may be wise to obtain.

Overall, most commentators believe the new agreement will lead to uncertainty for both the vendor and purchaser, an increased number of disputes and a resulting increase in legal costs. It is therefore strongly recommended that both vendors and purchasers seek legal advice before signing any new agreement for sale and purchase.

At Smith and Partners we strongly suggest our clients continue to use the tried and tested ADLS Agreement for Sale and Purchase. If required we are able to prepare the agreement on this form for you. Should you wish for us to do so please contact our property team.

## Unit Titles Law Change Updated

The Unit Titles Bill ('the Bill') was introduced to Parliament on 5 March 2009 and if passed into law will repeal and replace the Unit Titles Act 1972 ('the Act'). The Act governs multi-unit developments such as apartment blocks, townhouses, and office buildings. The Act was not designed to deal with the complex, large scale developments of the present day and the Bill goes a long way to revamp the badly outdated legislation.

One major change to the Act will be the specific disclosure requirements for vendors and developers of unit title properties. Vendors especially will need to be aware of the proposed disclosure requirements as it is mandatory for them to provide disclosure statements to a purchaser on the following occasions:

- before a Sale and Purchase Agreement is signed
- 5 working days before settlement
- at any time before settlement if the purchaser requests

Vendors need to be aware that if a disclosure statement is not provided to the purchaser within the specified timeframe then the purchaser may be able to defer settlement or even elect to cancel the contract. Vendors will also need to be careful to provide purchasers with accurate information as purchasers will be entitled to rely (in a legal sense) on that information.

Developers will be required to provide the body corporate with disclosure statements dealing with the construction systems of the buildings and their compliance with the Building Act.

Another major change is the move from the need for a unanimous resolution of the members of the body corporate to a 75% majority. The purpose for this change was to prevent voting on important matters from being blocked by one unit owner.

The common property of unit titles will now be owned by the body corporate. Presently common property is owned by the unit owners as tenants in common. It is proposed however that unit owners should still have a beneficial interest in the common property.

The body corporate will be required to make a long-term maintenance plan which must include expected maintenance requirements for the following 10 years, an estimate of costs involved with those maintenance works, and the basis for levying the costs from the unit owners.



The Act is very inflexible regarding unit entitlements which determine voting rights and how much unit owners contribute towards body corporate costs. The Bill seeks to address this by separating unit entitlements into two elements:

- **ownership interest** – which is determined by the value of the unit
- **utility interest** – which is determined by the extent to which the unit owner uses the shared facilities and services

Another major change is the way in which disputes under the Act are dealt with. Under the Bill any disputes will be referred in the first instance to mediation and then adjudication through the Tenancy Tribunal. Disputes were previously resolved solely through the courts.

As apartments and townhouses become a preferred style of living in the modern world, having knowledge of unit owners' rights and obligations under the Act is necessary. After the Bill is passed, all existing unit titles and bodies corporate will have 15 months to bring themselves in line with the provisions of the new Act.



## Changes to the District Court Rules



District Court proceedings are often a drawn out and expensive process for all parties involved. The parties are required to file claims, notices of defence and sometimes counterclaims before the matter is heard. In some cases this process can take months or even years with the parties incurring significant

costs. Many potential litigants are deterred by the cost and decide that the process is not worth the effort.

Parliament's radical new changes to the District Court Rules ('the Rules') are an effort to streamline the proceedings, reduce the volume of paper filed in Court and reduce the cost of filing fees. The new rules completely revamp the District Court process by focusing on the speedy and inexpensive determination of proceedings. Emphasis is now placed on reaching negotiated settlements at an early stage.

**The new Rules came into force on 1<sup>st</sup> November 2009.**

**The main changes include the following:**

- new court forms which are designed for non-lawyers to understand
- online access to court forms
- online examples of court forms to guide non-lawyers when drafting their own documents
- strict deadlines for filing documents to speed up the court process
- access to shorter trials
- pre-hearing matters are removed
- parties only have to provide copies of documents they plan to rely on in the proceedings

At present there is a significant disparity between the maximum amount of a dispute able to be determined by the Disputes Tribunal and the level which practitioners perceive to be the minimum amount of a dispute that is economically viable to be resolved at the District Court. The new Rules seek to close this gap.

The Rules will provide more of a focus on the dispute itself rather than legal procedure. This will make it easier for non-lawyers to understand and engage in the process. Pre-hearing matters that are often used by parties to draw out the process will be removed. Parties will have to comply with strict timeframes which will lead to more predictable timetabling for hearings.

The pre-hearing process of discovery is all but eliminated. This has historically been an expensive and time consuming process whereby parties must produce for inspection all documents that relate to the proceedings. This included documents that were adverse to the parties' case. The parties will only have to produce documents that they plan to rely on.

The focus of the new Rules is for parties to exchange their evidence and arguments at an early stage and reach a settlement with minimal intervention from the court. Before a hearing, parties will be required to attend judicial settlement conferences. These will last for 90 minutes, presided over by a Judge and will focus on mediation of the issue. If settlement is not reached during the conference then a trial will be allocated according to the complexity, size and value of the dispute.

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting on this information.

If you have any questions about the newsletter items, please contact us, we're here to help. If you would like to receive this Newsletter electronically, please forward your email details to: [newsletter@smithpartners.co.nz](mailto:newsletter@smithpartners.co.nz).



We will be closing our office for the Christmas/New Year period at **5 pm** on **Wednesday, 23<sup>rd</sup> December 2009.**

We will re-open with skeleton staff on **Tuesday, 5<sup>th</sup> January 2010.**

*We wish you a safe  
and happy festive season.*