inbrief

GLAISTER ENNOR LEGAL UPDATE FOR OUR CLIENTS

AUTUMN 2018

LEASES AND LICENCES OVER COMMON PROPERTY

A body corporate can lease or licence all or part(s) of the common property to an owner, occupier, or third party for their personal use under section 56 of the Unit Titles Act 2010 ("UTA"). The lease or licence of common property may be granted for any number of purposes, the most common being car parking, storage, signage, or outdoor seating.

The legal process for granting a lease or licence over the common property is set out in section 56 of the UTA. The same process applies whether the body corporate is granting a lease or a licence (or, in fact, selling all or part of the common property).

To grant a lease or licence over common property, the body corporate must first pass a special resolution (requiring a 75% majority). The body corporate must then complete the designated resolution process in sections 212-216 of the UTA.

The designated resolution process requires the body corporate to serve written notice of the resolution to grant a lease or licence on all owners and their registered interest holders (such as mortgagees and caveators). Every person served with a notice of designated resolution may then object to the resolution within 28 days. Once the objection period has lapsed and any objections have been resolved, the body corporate may enter into the lease or licence.

The body corporate must distribute any licence fee, rental, or other proceeds from the lease or licence of common property to unit owners in shares equivalent to their ownership interests, unless the body corporate resolves otherwise. An owner may elect to have their share of the proceeds credited to their unit to offset any current or future levies associated with that owner's unit.

Before passing a resolution under section 56, the body corporate should be clear whether the common property is to be leased or licenced, and the differences between the two. The body corporate should also be aware that the Property Law Act 2007 applies to leases and licences and imposes obligations on both parties, especially in respect of cancellation.

As a reminder, a lease is a legal interest in land and transfers to successors in title. Assignments or subletting may also be possible depending on the terms of the lease. A lessee has a legal right to exclusive possession and may sue for nuisance or trespass.

And, a licence is a lesser right than a lease. A licence creates a personal right to occupy a property for a particular purpose. It does not give any right of exclusive possession. A licence typically does not automatically transfer to successors, but is between the named licensor and named licensee only.

CONTINUED OVERLEAF

inside this issue:

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HOW ENFORCEABLE ARE THOSE ONLINE "TS & CS" WE ALL ACCEPT?

We have all done it. You might be purchasing a product online or downloading software for your computer. You come to the end of your online purchase or download, and, without a second thought, you click a box to say you accept the terms and conditions ("Ts & Cs") of the particular website without reading them first. But, just how enforceable are those Ts & Cs you just blindly accepted?

Whenever you click "I accept" to a website's Ts & Cs, you are entering into an online contract known as a "clickwrap" agreement. Alternatively, you may not have even been required to take any affirmative action to accept the Ts & Cs. A website may only provide a hyperlink to its Ts & Cs or simply just post them somewhere on the website – this is known as a "browse-wrap" agreement.

The New Zealand courts have not yet addressed the enforceability of online contracts, and although the Contract and Commercial Law Act 2017 facilitates the use of technology in commercial transactions, the Act does not state how or when an online contract is formed. This has left some uncertainty about the potential enforceability of clickwrap or browse-wrap agreements. However, two recent court cases in the United States have addressed this issue. Although these cases are not binding on New Zealand courts, they may provide some guidance on how these types of agreements will be treated in New Zealand.

Both cases involved a browse-wrap agreement. In the first case, a website had placed a hyperlink to its Ts & Cs on the bottom corner of each page of the website and right next to a button the customer had to click before completing the online purchase. The online sale in question fell through due to insufficient stock, at which point the website attempted to enforce its Ts & Cs against the would-be customer. No affirmative action, which may indicate acceptance of the terms and conditions, was required of the customer before the purchase was completed. The court ruled that the website's Ts & Cs were not enforceable because the website had not provided adequate notice of them to the customer. The court stated "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website… even close proximity of the hyperlink to relevant buttons users must click on - without more - is insufficient to give rise to constructive notice."

In the second case, the United States District Court ("Court") refused to enforce Uber's online terms of service due to the manner in which the terms were presented on Uber's smartphone app. A hyperlink to Uber's terms was provided on Uber's registration page with the words "By creating an Uber account, you agree to the terms of service" next to it. However, the hyperlink and accompanying words were considered to be "barely legible" by the Court as they were in significantly smaller font to the rest of the app. The Court held that the existence of Uber's terms were not adequately brought to the attention of the user, and, therefore, it could not be said that the user had ever agreed to them. Again, it was the lack of notice given to the user of the website's Ts and Cs which ultimately led to them being unenforceable.

Both cases highlight the fact that the basic requirements for a contract (for example "acceptance") are not diminished just because the contract is formed online. However, neither case shed any light on what may constitute adequate notice of a website's Ts & Cs.

Although both browse-wrap agreements were unenforceable in the United States cases, each agreement, whether browse-wrap or clickwrap, will be assessed on a case-by-case basis. Enforceability will be determined by whether the basic elements of contract formation are present, including whether a party has been given sufficient notice of the Ts & Cs. As the United States' courts have shown, it will be hard to enforce an online contract when one party has not been given a proper opportunity to read and consider the Ts & Cs of the contract before accepting it.

It may be argued that clickwrap agreements are more likely to have the requisite notice because a user is required to take some form of positive action indicating acceptance of the Ts & Cs. However, it will still very much be a case-by-case determination. We suggest best practice is to treat each type of online agreement you enter into as binding and to ensure you have read and understood all online terms and conditions before continuing any further in an online transaction.

Please note that the Fair trading Act 1986 was not discussed in this article and that the unfair contract terms provisions in that Act may also affect the enforceability of online contracts. /

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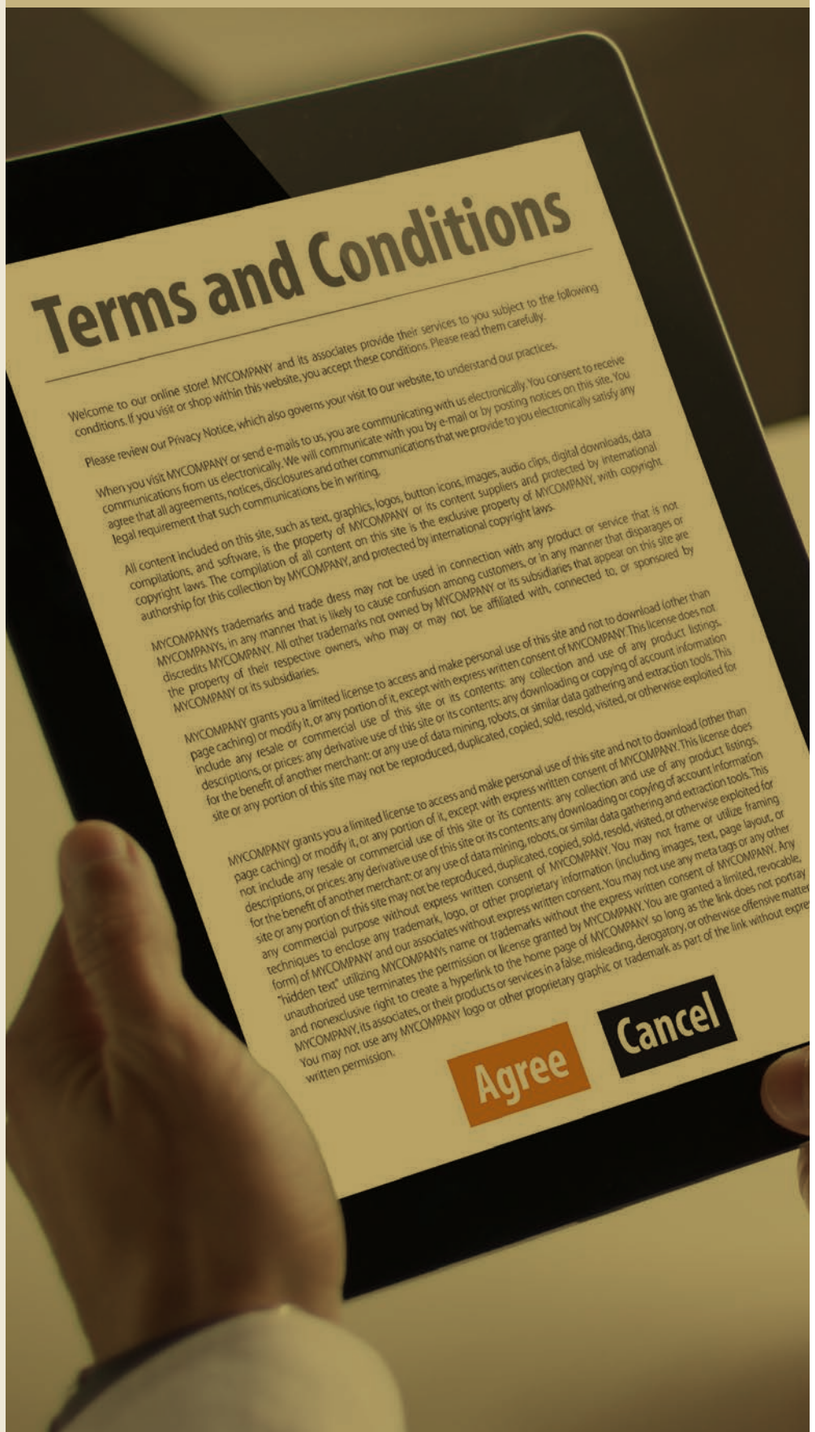

LEASES AND LICENCES OVER COMMON PROPERTY

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From an administrative point of view, we recommend that leases and licences are recorded in writing and signed by the parties, and that copies held by the body corporate together with the original resolution and designated resolution certificate. Where the lease or licence relates to a specific part of the common property, we recommend that the area be shown on a plan attached to the lease or licence document to avoid confusion or future uncertainty about the extent of the leased or licenced area.

Glaister Ennor has recently worked with bodies corporate to establish common property leases to accommodate facilities for a building manager and car parking spaces for unit occupiers, and licences to occupy airspace. /

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AIRBNB

TRAVELLERS AND TOURISTS LOOKING FOR AN ALTERNATIVE TO HOTELS AND MOTELS AT HIGH SEASON TIMES WHEN DEMAND IS GREAT MAY BE DRAWN TO THE ONLINE PLATFORM OF AIRBNB TO RENT A HOUSE OR A ROOM FROM PRIVATE HOME OWNERS.

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While there is an opportunity to earn extra income, an owner of property looking to rent out their property as an Airbnb should also consider the myriad of issues that may arise, which includes insurance, tax, and legal implications.

Insurance

Property owners should make their insurers aware that the property is being used to accommodate temporary visitors. In some cases, Airbnb rentals could be treated differently by the insurer and, therefore, may mean more expensive premiums and higher levels of excess for cover.

GST

Whilst GST does not apply to residential rent, providing short-term rental accommodation via Airbnb is subject to GST. There are, however, thresholds that apply depending on the rental income derived, and rules about the expenses that may be claimed. A significant issue to address is whether GST becomes payable on the sale of the property in the future.

Council Consents

If temporary visitor accommodation is a permitted activity under the Council zoning for the property, an owner might be able to rent out their property as an Airbnb. Depending on the zoning, other owners may need to apply for resource consent and comply with Building Act requirements.

Legal issues

There are not many reported cases involving Airbnb in New Zealand. A recent Tenancy Tribunal case ruled on the subletting of a property in Wellington. The tenants had moved out of the property and, without the landlord's knowledge, had sublet the property to seven different groups via Airbnb. The tenant was found to be in breach of the Residential Tenancies Act and their tenancy agreement. The tenancy agreement had specifically provided that the tenant was not to assign or sublet the tenancy without the landlord's written consent.

If a property is an apartment that falls under the Unit Titles Act, owners will be subject to body corporate rules. The body corporate may have rules that state owners wanting to let their apartment out as an Airbnb are to first seek the consent of the body corporate.

However, it could be argued that a body corporate cannot unreasonably withhold its consent or enforce rules that seek to prohibit such use. This is because leasing property out even on a short term basis is residential use, which is generally permitted under law. Until tested in the courts, it remains inconclusive whether body corporate rules restricting Airbnb use could be enforced.

There are other kinds of properties subject to occupation licence agreements; for example, properties held in company shares that may prohibit such use in their rules or constitution.

One of the few cases heard in Australia involved residents of a waterfront complex in Melbourne, who were unsuccessful in challenging owners from renting out their apartments via Airbnb. The court held that the strata rules for the complex could not displace the role of a town planner who is governed by planning laws which control the use of buildings.

While owners might feel they have the right to rent out their property as they see fit, it is important to take proper advice about the implications that arise from such renting or subletting property via Airbnb. /

For any questions on property matters please contact Gaynor McLean, Partner.

EVENING OUT THE PLAYING FIELD.

Most people aren't all that interested in reading cases about trust law, but there are some valuable lessons to be learned from situations where things go wrong. Take for example the case of the Clement Family Trust. It clearly shows the difficulties that can arise when sibling beneficiaries cannot agree on how to give effect to the arrangements made by their parents for the protection of the wealth they strived to accumulate over their lifetimes.

The facts are relatively straight forward. The parents owned a very large farm in Hunua comprised of three titles. There were three children, one of whom worked on the farm without any payment from his parents but he did receive a parcel of land in recognition. Another son moved onto the farm and occupied a farmhouse, to which he made considerable improvements. In recognition of that and the fact that he also worked on the farm for no reward, land was given to that son as well. The daughter, who did not work on the farm, had a house given to her on a much smaller parcel of land.

The parents then decided to set up a trust for the balance of the land they held in their own names. The intention in setting up the trust was to ensure that the land stayed within the family and passed to the sons with the daughter to receive equal provision through other assets. Most importantly, the parents made it very clear when setting up the trust that because there had been previous unequal gifts of land to the three siblings, when it came time to distribute the trust assets, a re-balancing act would be undertaken. The parents signed a memorandum of wishes to the trustees to set out what they wished to happen with the assets. It changed over time as circumstances changed, mainly because as the investable assets decreased in value, further provisions had to be made for the daughter.

Relationships between the siblings deteriorated, which is not uncommon in situations such as this. After the death of both parents, lengthy legal proceedings began and new independent trustees were appointed. The siblings simply could not agree on a way forward, and despite being asked for submissions by the new trustees, a consensus as to what should happen could not be reached. The trustees came up with a decision to sell the property in the trust and divide the proceeds equally between the parties (each of them would have an option to buy). What the trustees didn't do though, and what was the subject of the court proceedings, was to take into account the previous gifts of land made by the parents. The trustees' argument was that they could only deal with the trust assets they had under their control and split those.

CONTINUED OVERLEAF...

BUILDING OWNERS AND OCCUPIERS - ASBESTOS MANAGEMENT OBLIGATIONS / PART 2

This article is a follow on from the article by the same name in our Spring edition, in which we outlined the requirements of the Health and Safety at Work (Asbestos) Regulations 2016 ("Asbestos Regulations") and specifically the obligations that come into force on 4 April 2018. A copy can be found here.

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To recap briefly, the Asbestos Regulations set out how to manage asbestos risks. Complying with the Asbestos Regulations is mandatory, and there are hefty penalties for failing to do so.

Landlords, managers, and tenants will have duties to discharge as PCBUs (a person conducting a business or undertaking) pursuant to the Asbestos Regulations and the Health and Safety at Work Act 2015 ("HSW Act"). Identifying asbestos will help those people in the workplace who do not need to work in asbestos-containing areas to avoid exposure to asbestos. People working in these areas will know what to expect and what precautions to take to keep safe.

The Asbestos Regulations require that if a workplace's PCBU knows, or ought to reasonably know, there is a risk of exposure to respirable asbestos fibres in their workplace, it must make sure, so far as is reasonably practicable, that all asbestos or asbestos containing materials ("ACM") in the workplace relating to the risk is identified. Obtaining a survey is the first step towards compliance. A survey will identify asbestos or ACM in the workplace and will assist in managing asbestos exposure risks for the employees, contractors, and visitors at the premises. If there is or there is likely to be asbestos, an asbestos management plan and asbestos register are also required.

A workplace often has more than one PCBU such as a landlord or tenant. In practice, most workplaces do have multiple PCBUs. Obligations vary, but are shared. Pursuant to the HSW Act, all PCBUs must, so far as is practicable, consult, co-operate with, and co-ordinate activities with one another to make sure they meet their legal duties.

This duty to co-operate and co-ordinate has not necessarily been whole-heartedly adopted in practice. Instead, we see landlords and tenants seeking to position themselves in a way that minimises their own costs and seeks to allocate obligations. Nonetheless in terms of the HSW Act and the Asbestos Regulations, you cannot contract out of PCBU obligations; even if a PCBU with an overlapping duty is not co-operating.

Going forwards, when you are looking at purchasing a property, we recommend due diligence investigations include ascertaining what survey or management plan has been put in place.

When leasing a property, you will want to carefully consider the lease obligations to determine whether the survey is a landlord or tenant cost or whether it should be shared. Keep in mind that while you cannot contract out of the requirement to discharge your obligations to identify and manage asbestos in the workplace, you can, of course, allocate costs via a contract or lease.

The lease terms may assist in ascertaining where costs should fall. For example, a lease, where the tenant owns just wall coverings and fit-out, may logically mean the landlord pays for the compliance. However, given the obligations are for the benefit of employees, contractors, and visitors, if the landlord did not discharge their obligations, the tenant will still be considered a PCBU with responsibilities and should, therefore, still undertake the identification and management process itself.

What Materials are still likely to contain Asbestos or ACM?

Buildings constructed, altered, or refurbished from around 1940 until the mid-1980s are quite likely to contain ACMs.

Until the mid-1980s, asbestos was often used as a fire retardant and insulation. Examples are:

- insulating board
- friction linings
- fire doors
- gas or electric heaters
- fuse boxes
- gaskets
- lagging around pipes
- sprayed insulation
- brake linings

Buildings constructed after 1 January 2000 are less likely to contain asbestos, and we have seen various industry professionals draw a "line in the sand" at this year in terms of asbestos risk. That being said, ACMs have been utilised in construction post 2000. This is because while it became illegal to import blue and brown asbestos into the country in its raw form from 1984, it only became illegal to import ACMs into New Zealand on 1 October 2016. These ACMs are often still used until supplies ran out.

We recommend all PCBUs begin the compliance process now as there are limited professionals and time available before the requirements come into force. We are happy to put you in touch with industry experts if required. We also recommend that purchasers include a review of current asbestos survey and management plans in their due diligence investigations. With leases, consider delineation of costs' responsibility in the deed of lease to ascertain where these should fall. The older the building, the more expensive these are likely to be. Where there are multiple PCBUs, keep in mind that while the collaborative approach is preferable, ultimately, compliance with these obligations should be discharged first. And when engaging with building contractors, be certain to specify "no ACMs" as a key term of your contract. /

EVENING OUT THE PLAYING FIELD. (CONT...)

The Court found that the trustees could have taken into account those previous gifts made by the parents. In fact, the Court concluded that the trustees should have taken those previous gifts into account when making a decision; so, their original decision was therefore set aside. While not wanting to make a decision for the trustees, the Court effectively told the trustees to reconsider taking into account the intentions of the parents and gave some guidance as to how a distribution of the assets might be made.

Even though the Court sent the trustees back to reconsider their decision, this case clearly shows how effective a trust with independent trustees can be when there is conflict between family members. The trustees, in this instance, were looking to ensure that each of the three siblings were treated equally as was their parents wish. They used their independence to make a decision despite each beneficiary claiming they were entitled to more than the others. Assuming the trustees reconsidered their decision in line with the Court's suggestion, this shows the flexibility that trusts can have in ensuring that they not only protect you from third party claims, but they can be structured so trustees are able to pick and choose which assets go to which beneficiary.

So what are the other practical lessons that can be taken from this?

While setting up the structure in the most effective manner and using an independent trustee, in our view, is vital, so is communication with the various parties to the trust, to be clear as to what the intention is in setting it up. Clearly, creating expectations can go a long way to ensuring that individuals have an awareness of what their likely "share" is going to be, and so too can understanding the rationale behind decisions made by the trustees. The beneficiaries, in this case, have allowed the deep grievances between each other to tear apart their family relationship even further, which potentially could have been overcome by making sure from the outset it is very clear as to why the trust is being established and what the intentions are when it comes time to distribute its assets. /

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SARAH DAVIS RESIGNS FROM GLAISTER ENNOR.

It is with regret that we announce Sarah Davis has resigned from Glaister Ennor on 28th February as she, and her family, take the exciting step of relocating to England where her husband is now part of the Ben Ainsley Racing Team.

Sarah has been a significant member of our Glaister Ennor team and will be missed by staff and clients alike. She is a highly regarded lawyer in the corporate, commercial and health and safety areas.

However partners, Mike Roberton and Mark Hopkinson also from our Corporate and Commercial team will continue to take care of Sarah's clients and ensure a smooth transition, whilst meeting our clients' wishes.

Please contact Mike Roberton, Mark Hopkinson or Ah Song Sunwoo to discuss any future needs or requirements. Alternatively, please ring Sarah's secretary Masha who will ensure that you are referred to the most appropriate team member to assist you. All contact details are provided.

The partners of Glaister Ennor thank Sarah for her years of service to Glaister Ennor and wish her and her family the very best for the future. /

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