

EHW

LAW NEWS



EVANS HENDERSON
WOODBRIDGE

BARRISTERS & SOLICITORS

CHRISTMAS 2023



MERRY CHRISTMAS TO OUR VALUED CLIENTS

The Partners and team at Evans Henderson Woodbridge would like to thank you for your continued support throughout 2023.

Our offices will be closed from 12 noon Friday 22nd December 2023 and will reopen 8.30am Tuesday 16 January 2024.

For any urgent enquiries during this time, please refer to our website www.ehw.co.nz for contact numbers.

We wish you a safe and relaxing Festive Season

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RELIEF AGAINST FORFEITURE – THE RIGHTS OF COMMERCIAL LESSEES



If you own a business which operates from commercial premises, it is likely that from time to time there have been disputes with your landlord or “lessor”.

Often the location is very important to a business's value, and so long-term lease security is critical. Disputes can cause both financial and emotional stress.

There are three situations where, either because of a particular dispute over the way a lease is being conducted, or where a lease renewal is denied by the lessor, we are sometimes asked by the tenant or “lessee” about their rights, or to act on their behalf. A legal remedy which can often be applied is known as relief against forfeiture.

1. Probably the most common breach of course is missing a rent payment or payments. Financial challenges, market fluctuations, or unexpected economic downturns can impede a lessee's ability to meet their rental obligations. In such cases, seeking relief against forfeiture becomes a lifeline, giving them a chance to rectify their financial situation and continue their occupancy.
2. Sometimes a breach may be claimed against the lessee where alterations to, or modifications of, the leased premises have been made without obtaining consent from the lessor. In their enthusiasm to customise the premises, lessees may, usually inadvertently, fall foul of the lease agreement. Relief against forfeiture may provide the lessee with the chance to restore the premises to their former state or negotiate a mutually acceptable arrangement with the lessor.
3. Less commonly, the actual use of the premises can cause problems, especially where there is a misuse or unlawful

activity being conducted. Relief against forfeiture may provide both breathing space and an opportunity to resolve the issue.

The other major area where relief against forfeiture can often be sought is where a lessee has failed to give timely notice of its intention to renew the lease. Under the Property Law Act 2007 the Court has a wide discretion to grant relief in such circumstances and will consider:

- Why the tenant did not give timely notice;
- Whether that default was due to an action of the lessor;
- The lessee's conduct;
- Any prejudice to the lessee or the lessor if the relief is or is not granted;
- The lessor's motivation for refusing to renew; and
- The interest of third parties.

The terms and conditions of the lease may need to be considered in any of the above situations and alternative remedies to Court action may need to be pursued first – for example mediation or arbitration. Often those dispute resolution processes will be cheaper and faster than going to Court.

CONCLUSION

From a practical point of view, we strongly recommend to our commercial lessee clients that they have a scheduling bring-up with a backup process to ensure they do not miss the date by which, under the lease, they will need to have advised the lessor of their intention to renew the lease.

Whatever the situation, if you are a commercial lessee at risk of losing your leasehold interest, give us a call and we will help if we can.

CHANGE IN GOVERNMENT AND CHANGES TO EMPLOYMENT LAWS!

So we have a new Government. The National – ACT – New Zealand First coalition have promised several employment law changes. Two of the most significant are:

Repealing the Fair Pay Agreement regime.

It is anticipated that this will stop unions and employees commencing bargaining for such agreements, and stall the applications already in the process, including those in the early childhood education, hospitality, commercial cleaners, early childhood education, and the supermarket industries.

Expanding 90-day trials to all businesses.

At present only businesses with fewer than 20 employees are able to adopt trial periods. The change will enable all businesses to end the employment of any new employee within the first 90 days of their employment.

Many employers will see this as an opportunity to have the confidence to employ people on the basis they will be able to end the employment during the first 90 days if things don't work out without getting into employment law difficulties, especially those associated with having a personal grievance raised against them. For employers wanting to get these benefits to improve their businesses, there are important things to bear in mind however:

- Employers will still have obligations on them to act in good faith and to comply with their other employment law obligations.
- We expect that the legislative changes will still require explicit provision for the trial period to be in the written agreement creating the employment relationship, and specifically acknowledged by the employee.

Whether you are an employer wanting to ensure you are compliant with the new regime or an employee needing to review a proposed employment agreement where a trial period is proposed, don't hesitate to reach out to us to help you protect your interests.



CAN TRUSTEES DELEGATE THEIR POWERS TO SOMEONE ELSE?



If you are a trustee, whether the trust is charitable, trading or a typical family trust, you should be aware of the powers and obligations you have.

Many trusts hold significant assets and, for their trustees, require time and effort in making decisions. Where that is the case, not surprisingly, we are quite often asked by a trustee if they can pass on their trusteeship to someone else, where it might be perhaps temporarily difficult or inconvenient for them to carry out their obligations.

Courts, over hundreds of years, and legislation in support of trust law, have reinforced the basic principle that the role of a trustee is personal to the particular individual and cannot just be passed on or delegated. In this article we address one of the key exceptions to this principle and the requirements and restrictions under which it can legally apply.

Under the Trusts Act 2019 (section 70), a trustee may delegate any or all of their powers and functions under the trust to a qualified person by power of attorney. The delegation must be effected by a formal deed signed by both the trustee and the delegate, and independently witnessed.

The section prescribes that the power to delegate may only be exercised where necessary because of the occurrence of one of the following circumstances:

The trustee is;

- absent from New Zealand; or
- temporarily unable to be contacted; or
- temporarily physically incapacitated; or
- temporarily does not have capacity to perform the functions of a trustee.

Section 70 goes on to reinforce the temporary nature of the delegation - so this is limited to the shorter of either;

- the duration of the above circumstances; and
- 12 months.

The delegation can be extended if the circumstances continue beyond that time, but this again must be actioned formally.

A trustee may delegate their powers to a sole co-trustee but only where that sole co-trustee is a body corporate (including a trustee corporation) that is authorised under the Trusts Act 2019 to act as executor or administrator of a deceased person's estate. This means a trustee could not delegate their powers to a person who is a sole co-trustee.

These limits reflect the fact that trustees cannot delegate their duties or powers, except where absolutely necessary in the circumstances. A power of attorney can be used to delegate or hand over the duties of the trustee to another person, but this power may only be used in very particular circumstances, and for a limited period.

CONCLUSION

Trustees have very limited ability to delegate their duties or powers, including the temporary circumstances outlined in section 70 of the Trusts Act.

If as a trustee you wish to delegate your powers and responsibilities, or if you want to resign as a trustee, we recommend you consult with us to ensure these actions are properly carried out, and your interests are protected.

CHANGES TO THE RETIREMENT VILLAGES ACT IN THE WIND



The Retirement Villages Act 2003, a crucial legal framework for retirement village governance, is undergoing a very thorough review after two decades of service. With the retirement village sector and elderly population expanding significantly, the need to ensure the legislation remains relevant and effective is important.

WHY REVIEW?

The Ministry of Housing and Urban Development initiated the review to seek a better balance between safeguarding residents' interests and promoting innovation within the sector. The discussion paper, available for reading here <https://consult.hud.govt.nz/>, outlines proposed changes addressing various aspects of retirement village living.

WHAT'S IN THE REVIEW?

One major focus is enhancing transparency before moving into a retirement village. The review recommends rewriting documents, such as the occupation right agreement (ORA) and disclosure statement, to make them more understandable. Feedback is being sought on facilitating complaints about misleading statements during the sale process and addressing inconsistencies between the ORA and the disclosure statement.

Proposed changes also target day-to-day living in retirement villages. There are suggestions to make operators responsible for the repair or replacement of fixtures that come with the unit. Additionally, the review promotes the establishment of an independent complaints and dispute resolution scheme, potentially providing free advocacy support to ease the complaint process.

Regarding the transition into care, the review encourages operators to provide clearer and more comprehensive information about residential care services and associated financial implications. The paper suggests detailing the availability of suitable rooms for on-site care and specifying costs, including potential second deferred management fees for those moving from a unit to a care suite.

The discussion paper delves into the conclusion of occupation right agreements (ORA), exploring various options such as requiring operators to repay the capital within a fixed period or allowing them to share the capital gain with residents. The paper also addresses concerns about operators charging weekly fees for vacant units indefinitely, proposing a limit of four weeks after the unit has been vacated.

In a nod to cultural considerations, the review acknowledges the predominantly Pākehā demographic of retirement villages and seeks information on the experiences and aspirations of Māori and Pasifika regarding retirement village living. The paper also considers widening the definition of retirement villages to encompass a broader range of occupancy arrangements.

The review also looks into insurance coverage for retirement villages, addressing concerns about potential gaps if an entire village is damaged or destroyed. The proposal suggests that operators maintain insurance policies sufficient to cover all residents' capital sums.

As the consultation period concludes, advice will be provided to the relevant minister, and the community awaits potential legislative changes resulting from this extensive review.

CONCLUSION

There are some significant changes in the wind. We will update the position in future editions of our newsletter.

In the meantime, if you or a loved one are considering a move to a Retirement Village talk to your lawyer as early in the process as you can.

We have considerable experience in this field, including in-depth knowledge of the Villages in our catchment area.

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