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Winter Issue

Fiona McConnochie raises issues requiring consideration if you or a family member are looking at moving to a retirement village.

Pam Coltman, Shelley Conlon and Jo Thomson discuss changes to Enduring Powers of Attorney.

Michael Cochrane informs us about GST and Land transfers.

Callum McLean advises on time limitations for leaky building homeowners.

Considering moving to a retirement village?

Fiona discusses important issues to be aware of before you make any decision.



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The attractions of retirement villages include an easier lifestyle, less house and garden maintenance, and medical support if you need it later on. However, if you are planning a move to a retirement village, it is important to ensure that you ask the right questions so that you can make an informed decision before proceeding.

The purchase of a retirement village unit is different from the purchase of freehold real estate in many respects.

Most retirement villages do not offer you a certificate of title for your unit. Your right to remain at the village is contained in an Occupation Licence or Agreement. This gives you a right to live in the unit and contains your obligations. It also contains the Village's obligations in relation to the unit, in conjunction with the Retirement Villages Act.

Generally you do not have the right to sell your unit. The Village will arrange a sale if you wish to sell or have passed away. The Village will take any capital gain on the sale.

You may be able to transfer within the Village, for example from an independent unit to a smaller serviced apartment if your needs change and you require additional care. There will be costs associated with this and you should be aware of these at the outset.

In addition to the Village taking any capital gain on the sale of the unit, there will also be a deferred management fee to be paid on sale, based upon a percentage of the purchase price when you moved in. Typically this is based on a yearly amount of 4-5% up to a maximum of 20-30%.

When the financial impact of the loss of capital gain is taken into consideration, together with the deferred

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management fee, the cost to the resident can be extremely high when compared with retaining ownership of a freehold property. These costs become higher the longer you live at the retirement village. This can mean that you would not be able to afford to leave the retirement village and buy somewhere else. It will also mean that your children's inheritance will be greatly reduced.

Retirement villages also charge a weekly fee for services such as payment of outgoings like rates and insurance. These may increase over time. They may have to be paid until the unit is sold even if it has been vacated. There may also be charges for services such as meals, cleaning or laundry.

When you leave the unit, you may have to pay substantial refurbishment costs.

Other issues that may arise include reduced privacy and noise issues from close neighbours. You may not be permitted to have your pets with you. You may have a much smaller house in which to fit all your possessions. The Village must supply you with a copy of its rules before you sign anything.

If you are buying "off the plan", there are extra risks. A village that is still being built may not ultimately have all the extra facilities you want if the developer runs short of funds or amends its plans. In all cases, you need to be confident the Village is financially viable and will continue to provide the facilities you require.

All retirement villages must consult with residents on certain matters such as increases in charges. They must also have a procedure for handling complaints and this must be included in the agreement you sign. Any disputes not resolved within the Village can be referred to an independent disputes panel.



The legal costs to move to a retirement village are usually higher than to buy a freehold property because of the complicated documentation. In addition, most retirement villages will require you to have signed Enduring Powers of Attorney in relation to Property and Personal Care

& Welfare and a current Will before you move in.

There are other options to consider before deciding if a retirement village is right for you. You could remain in your home but modify it or get home help. You could downsize to a smaller home closer to facilities. You could move to a "granny flat" near relatives or move to a cheaper area to free up funds for gardening and maintenance.

If you have signed an agreement, you have a 15 working day "cooling off period" to cancel it if you decide the unit is not right for you. You can also cancel if the unit has not been built within six months of the proposed completion date or if there are substantial breaches of the agreement by the Village.

Moving to a retirement village may be right for you but it is important to be fully informed before you proceed. Make sure that any Agreement you sign is subject to

your lawyer's approval and contact him or her at an early stage to discuss your proposed move.

If you would like to discuss this article please feel free to contact:

Fiona McConnochie at our Richmond office. ▲▲

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Enduring Powers of Attorney

Our legal executives discuss the changes we need to be aware of when preparing these documents



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From 26th September 2008 the rules governing the signing and exercising of Enduring Powers of Attorney were altered. The main points are as follows:

Only a Solicitor, Barrister, Registered Legal Executive or an authorised officer or employee of a trustee corporation can witness the Donor signing the document. The Donor is the person giving the authority to others to act on his or her behalf.

A certificate must be completed by the person witnessing the Donor's signature that the new rules have been fully explained and confirming that the witness is independent of the attorneys being appointed.

You can appoint more than one attorney. If you do, you must decide whether one of the attorneys can act on their own or whether they must all act together. If you decide on the latter then if one is unable to act no one can exercise the power. You are now also able to appoint successor attorneys to act if the appointment of your first attorney ceases. The appointment of an attorney ceases on the death of the attorney or Donor.

If you have appointed different attorneys in your Property document and your Personal

Care and Welfare document then there is a requirement for them to consult each other before making any decisions.

Your attorney must keep proper records (both financial and otherwise) of all matters they attend to on your behalf. Any attorney who fails to keep proper records may face a fine not exceeding \$1,000.



Because of the significant changes to the rules attorneys are now more accountable for their actions and this should reduce the possibility of your attorney not handling your affairs properly or the possibility of abuse by your attorney in any way.

There is more emphasis on encouraging the Donor to act whenever possible and for the attorneys to assist in that regard as much as possible. There are now a number of new optional clauses in the forms that give the Donor ability to personalise the powers given in the Enduring Power of Attorney documents to their own situation.

By signing an Enduring Power of Attorney form you are not passing your decision making to any other person. While you are mentally capable this can only happen on your instructions. However once you are medically certified as mentally incapacitated your duly appointed attorney/attorneys may take over your affairs without having to apply to the Court to do this. Only persons properly qualified to do so may give a medical opinion as to your mental incapacity.

Although these alterations have led to an increase in what is required to complete an Enduring Power of Attorney the cost is not as much as your family having to apply through the Courts to manage your affairs.

If you wish to discuss the changes to legislation or appointment of an attorney under an Enduring Power of Attorney, or anything to do with an existing Power of Attorney, please telephone Pam Coltman, Richmond Office, Jo Thomson, Motueka Office or Shelley Conlon, Nelson Office for an appointment.

If you have any questions regarding this article, please contact either: Pam, Shelley or Jo at our Richmond, Nelson or Motueka offices. ▲

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GST and Land Transfers

Michael Cochrane talks about getting the timing right.



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Goods and Services Tax (GST) was introduced in New Zealand on 1 October 1986 by the Goods and Services Tax Act 1986 (the Act). The timing of the payment of GST is an important consideration when buying or selling land.

GST is payable on the “supply” of goods and services (section 8 of the Act). The Act defines when a “supply” occurs at section 9 “...a supply of goods and services shall be deemed to take place at the earlier of the time an invoice is issued by the supplier...or the time any payment is received by the supplier, in respect of that supply.” When, then, do you need to pay GST? There are three things you need to think about.

The first is to establish the basis upon which each party is registered for GST. There are three bases – Invoice, Payments, and Hybrid. We will only deal with the first two in this article. The invoice basis means you account for GST when you receive an invoice. The payments’ basis means you account for GST when you receive or pay funds. This creates timing mismatches if both parties account for GST on different bases. This becomes all the more important with land transactions, as there are often long periods between signing the agreement and settlement.

An example of an attempt to use these timing mismatches for a purchaser’s advantage is *Ch’Elle Properties (NZ) Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,442. In this case, an entrepreneur set up 114 different companies. Each company agreed to purchase a parcel of land. They simultaneously agreed to sell their land to a company called *Ch’Elle Properties (NZ) Ltd* (*Ch’Elle*) with settlement scheduled to occur 20 years in the future. *Ch’Elle* was registered for GST on an invoice basis, and therefore was able to claim around \$9,000,000.00 of GST refund immediately. The 114 companies on the other hand were registered on a payments’ basis and therefore only had to pay GST on the deposits they received from *Ch’Elle* (which turned out to be \$10.00). The balance was payable in 20 years. The Court of Appeal held that this was tax avoidance, but did say that these timing mismatches were anticipated by the legislation.

The second is related to the creation of an invoice – have you ever been issued with an invoice for your purchase of land? Up until 2007, the IRD accepted an unconditional agreement for sale and purchase as an invoice for the purposes of GST. However, in Interpretation Statement 07/02 the Office of the Chief Tax Counsel reversed 17 years’ of prior understanding on that point and now you need an actual invoice. But what if the vendor won’t issue you with an invoice and you can’t then claim your GST refund? Section 24 of the Act requires a vendor to provide a tax invoice 28 days

after written demand has been made by the purchaser. This fixes the problem, although there is still the 28 day delay. If you are relying on your GST refund to help you with the purchase price, chances are you will have stretched the time between the time the contract goes unconditional and settlement out to be longer than a month, but if you haven’t, you may have to pay out of your own pocket.

The third is if you are buying a ‘going concern’. This only occurs when both parties are GST registered and agree that the sale is a ‘going concern’ in that there is a taxable activity carrying on up to, including, and after settlement date. A good example of a going concern is the sale of a hotel. The current owner runs the hotel up until settlement date, then the new owner steps in and takes over. This scenario has benefits for both parties. The vendor doesn’t have to account to the IRD for GST on the sale, and the purchaser may get a lower price given that there is no GST incorporated into the purchase price. This type of sale is prevalent in business sales.

As you can see, timing the GST correctly can result in a handy inflow of money to help with a large purchase. When you are purchasing a property and the purchase price may or does include GST, we strongly advise you to consult your solicitor and accountant to clarify the best course of action.

If you would like to discuss this article please feel free to contact: Michael Cochrane on (03) 548 1469 at our Nelson office. ▲▲

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Leaky Homeowners Beware: The Limitation Clock Is Ticking



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Limitation periods are statutory rules that limit the time within which civil proceedings may be filed. Even if all building experts agree that a home is leaking, a claim must be brought within time. There are three main weathertightness limitation periods: three years under the Fair Trading Act 1986 (FTA), six years under the Limitation Act 1950 (LA) and ten years under the Building Acts 1991 & 2004 (BAs). Often this limitation clock continues to tick unbeknown to the homeowner.

Claims for misleading or deceptive conduct under the FTA must be brought within three years from the date on which the loss or damage was discovered or ought reasonably to have been discovered. The FTA can be a useful means of pursuing pre-purchase inspectors or developers against whom a negligence claim might not succeed. A successful example is the Weathertight Homes Resolution Service (WHRS) partial determination **Auckland CC (as Assignee) v Russell (2005)**.

Many Sale & Purchase Agreements include a vendor warranty that the house has been built in accordance with the BAs (clause 6.2(5) of most ADLS/REINZ editions). A claim for breaching this warranty must be

brought within six years under s.4 of the LA.

Negligence claims must also be brought within six years. Time begins to run against a leaky home owner:

"... when the cracks become so bad, or the defects so obvious, that any reasonable home owner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs".
Invercargill CC v Hamlin (PC) (1996).

"It is not necessary, in order for time to start running, to be able to pinpoint with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was underway! That would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then accrued. That has not and never has been the law".
Puller v The Secretary for Education (CA) (2007)

In **Future Holdings Family Trust v Argon Construction (2008)**, a Weathertight Homes Tribunal (WHT) claim, the Claimants instructed an expert who prepared reports in Jan and Feb 1997. On 28 May 2004 the Claimants applied for an Assessor's Report at the WHRS, which stopped the limitation clock. The Tribunal Member was satisfied that the extent of the damage identified by the 1997 reports confirmed that the Claimant's home had significant

defects, and had suffered a loss in market value, over six years before they applied to the WHRS. After applying the "**Hamlin**" test mentioned above, the negligence claims against the Respondents were struck out.

If a construction party is found liable to claimants it then has up to six years from the date of judgement to claim contribution.

Under s.91(2) and/or s.393(2) of the BAs all civil proceedings arising from building construction must be filed within ten years from the date of the last building work/omission or the code compliance certificate (CCC) being issued.

Until recently a claim for contribution would not have been time barred by the ten year limitation period on the rationale that it was a new claim under s.17(1)(c) of the Law Reform Act 1936; see **Cromwell Plumbing v De Geest (HC) (1995)**. The practical effect of this is that the ten year limitation period would begin to run from the end of the last party's involvement, usually the council issuing a CCC.

Dustin v WHRS (HC) (2006), involved an application for the judicial review of a WHT decision. The High Court applied **Cromwell**, as the WHT was legally bound by this decision. However, the Judge indicated that the ten year limitation period should be an absolute bar to claims for contribution. This reasoning in **Dustin** has been recently followed in: **Carter Holt Harvey v Genesis Power (HC) (2008)** and **Davidson v Banks (HC) (2009)**.

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In **Davidson** the High Court held:

“The relevant tort is negligence for breach of duty of care in connection with the construction of the house at 55 Cliff Rd. The connection between that tort and the building work could not be closer. S 17(1)(c) merely empowers the Court to apportion damages for liability that already exists independently of the section”

Although these three decisions have not specifically overruled **Cromwell**, it is likely that their rationale will be followed in the future. If a claim is filed in the District or High Court, time will continue to run for Defendants who have not yet been joined, for any claims by Defendants against third parties; and for any contribution claims between Defendants. So, now more than ever, not only is it important that home owners act quickly on

discovering water ingress; but defendants and/or third parties must act quickly in their claims for contribution.

However the WHT is a different beast. Under s.37 of the Weathertight Homes Resolution Services Act 2006 (“**WHRSA**”) the claimants’ application for an Assessor’s report has the same effect, for limitation purposes, as filing proceedings in Court, see **Kells v ACC** (HC) (2008). The limitation clock stops against potential respondents and WHT proceedings can be pursued at a later date. In **Kells** the High Court held:

“That the relevant limitation period for the filing of claims under the Weathertight Homes Act is 10 years, and that the filing of a claim stops time running as against all parties. In other words, as long as the claim was filed within the 10-year period, further parties can be joined at a later date without limitation concerns”.

When Claimants apply to the WHRSA the limitation clock stops; however time will continue to run for Respondents’ contribution claims against each other. By the time WHT proceedings are initiated these contribution claims may be out of time.

For homeowners who suspect that they have purchased a leaky building, the limitation clock is constantly ticking. Applying for an Assessor’s report at the WHRS, and pursuing this claim at the WHT, stops the limitation clock. This is advantageous as it buys time to identify defects and damage, carry out remedial work, and compile a litigation claim as effectively as possible; and in limitation terms, time could be money.

For specialist assistance and advice, contact Callum McLean, Solicitor (03) 548 1469 Nelson ▲▲

Introducing... Callum McLean



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Callum completed study at Auckland University in 2005 and began practice with an Auckland litigation firm which specialised in ‘leaky building’ claims. This provided Callum with an opportunity of working in a number of smaller cities around New Zealand, including Nelson.



Would you prefer to receive our newsletter via e-mail?

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