THE LAW

LOWDOWN

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paul gallagher legal

WELCOME TO OUR NEW NEWSLETTER - THE LAW LOWDOWN

We will bring you summaries of important legal cases and other law developments that we think may be of interest and/or relevance to you, what has been happening at Paul Gallagher Legal and other matters of local interest.

Please do not hesitate to contact us if you want to discuss anything here, or any other matters of concern to you.

TOP NEWS INSIDE

INCORPORATED SOCIETIES ACT CHANGES IN THE AIR – DO YOU NEED TO DO ANYTHING?

Incorporated societies law needed a face lift. The statute which largely regulates the affairs of the many thousands of incorporated societies in New Zealand was passed in 1908!

Since that time the whole sector has grown considerably. These days incorporated societies can be significant operations. The Incorporated Societies Act 1908 simply doesn't fit well with modern needs and provides little practical guidance for the people running societies in relation to operational matters.

So the Incorporated Societies Act 2022 was passed and largely comes into force in October 2023. It is intended to make incorporated societies stronger legal entities, assist with self-governance, and provide constructive options when disputes arise.

Key changes

1. Whereas the 1908 Act did not require a society have a committee, only officers, the 2022 Act requires a society to have a committee, comprising 3 or more qualified officers.
2. Officer duties are more clearly specified. They must:

- act in good faith and in what the officer believes to be in the best interests of the incorporated society.
- exercise their powers for proper purposes.
- exercise the care and diligence that a reasonable person with the same responsibilities would exercise.
- not act, or agree to the incorporated society acting, in a manner that contravenes the 2022 Act or constitution of the incorporated society.
- not agree to, cause or allow for, the activities of the incorporated society to be carried on in a manner that is likely to create a substantial risk of serious loss to creditors.
- not agree to the incorporated society incurring an obligation unless the officer believes on reasonable grounds that the incorporated society will be able to perform the obligation.

3. Some incorporated societies (to be prescribed in regulations) will need to have their financial statements audited.
4. All incorporated societies will need to have a procedure contained in their constitutions to resolve disputes.
5. Factors that will disqualify a person from being an officer of an incorporated society are specified.
6. There will be an ongoing minimum number of members, whereas the 1908 Act only requires a minimum number on incorporation.
7. An amalgamation regime is introduced, a simplified version of what is provided for companies in the Companies Act 1993.
8. Also introduced is a method for members to obtain information to facilitate better officer accountability.
9. There is provision for certain criminal offences, such as officers dishonestly using their officer position, providing false or misleading statements (knowing them to be so), fraudulently using incorporated society property and falsifying records, documents or the Incorporated Societies Register.

So what will this mean for Incorporated Societies?

- If you want to register a new Incorporated Society, then it will need to be under the new Act.
- For existing societies there is a transition period, ending in April 2026, for the re-registration of that society to be effected.

But should you get your re-registration under way now?

There is a good deal of commentary about some of the changes, with concerns around increased liability for officers – which more closely align with Directors' duties under the Companies Act 1993. As a result of these new duties and the wide definition of "officer" in the new Act, it may be wise to consider obtaining professional indemnity cover for officers. MBIE is putting together Regulations to support the new Act, and these may well contain further assistance for societies in their decision-making process around re-registration under the new Act.

There are reasons to consider re-registration before April 2026.

- A failure to re-register during this window could mean the society will cease to exist.
- The new Act requires a constitution and even if a society has one now, there are many aspects of the new Act that are likely to mean changes. The need to have a disputes process is likely to improve the operation and transparency of societies.
- A practical consideration may be that having a 2022 Act compliant and up to date society with a revised Constitution may be seen by entities dealing with the society in a favourable light. This may impact on a society's ability to raise funds and grants, especially if they are also registered charities.
- Generally re-registration will improve the administration and governance of societies.

Can we help?

Yes. We can assess your society's circumstances and review its current governance arrangements. We can then provide advice to you on how to best handle the re-registration process. While April 2026 sounds a long way off, consultation with members and reviews of processes will take time. An early review will identify what the best approach will be and reduce time stress.

FENCING – GET IT RIGHT

You can change friends but not neighbours … or so the saying goes.

So it's all the more important to try to maintain friendly - or at least cordial - relations with your neighbours. When it comes to boundary fences, these relationships can come under additional pressure, so it's important to do things well and to understand what your rights and responsibilities are in the event of dispute.

The starting position is that you and your neighbour can simply agree on how to handle building a new fence or changing an existing one. We encourage you to try this first as it will almost certainly save costs, and also avoid unnecessary friction. If you can agree, then this needs to be recorded formally.

The agreement should include;

- What structures or flora are to be removed, how and by whom;
- Clear details of the new fence to be erected, including its dimensions, materials and exact location;
- Who is responsible for each step; and
- How the costs are to be split.

The agreement should also be signed by all the owners of both properties.

WHAT HAPPENS IF YOU DON'T DO THIS?

If you just box on with a new fence, without securing such an agreement - for whatever reason - then you run the risk of, at the very least, having to bear the costs of the fence alone.

In order to secure the statutory authority for the sharing of the costs of a new fence you need to follow the Notice provisions of the Fencing Act 1978. Notice must be given to your neighbour advising:

- That fencing work is to be done.
- That you would like your neighbour to contribute to the cost, (either equally or in what percentage or amount).
- Specifics of the boundary or line of the fence for the fencing work.
- Details of the proposed fencing work and the materials to be used.

The notice should set out the consequences of failing to comply with the notice.

Your neighbour then has 21 days to respond. If they don't reply to the notice, you may go ahead with the fencing work as detailed in the notice, provided you have served the notice properly. In this situation you should also complete the work in a timely manner.

If your neighbour doesn't agree with what you have proposed, they may serve a cross-notice on you, which should outline their counterproposal regarding the fencing work. If you don't reply to such a notice, you may be deemed to have accepted your neighbour's counterproposal.

DO THE COSTS HAVE TO BE SPLIT EQUALLY?

No. Either party could require a different sharing regime, for example one party might do the actual work themselves, thus requiring a lower percentage of the costs. The default position under the Fencing Act 1978 is that your neighbour will be responsible for half the costs for the construction of an "adequate" fence. The legislation defines this as "a fence that, as to its nature, condition, and state of repair, is reasonably satisfactory for the purpose that it serves or is intended to serve". So if the specification of the proposed fence is more than merely adequate, one party may need to pay the "difference".

CONCLUSION

Always try to come to an agreement in advance of any work on the boundary of your property with your neighbours. Always document any agreement over the construction of a fence and if you cannot get agreement then you need to follow the requirements of the Fencing Act 1978.

KNOW YOUR OBLIGATIONS BEFORE SIGNING UP TO A CONDITIONAL HOUSE PURCHASE

AN EXAMPLE OF THE CRITICAL IMPORTANCE OF PURCHASERS UNDERSTANDING THEIR OBLIGATIONS UNDER CONDITIONAL SALE AND PURCHASE AGREEMENTS IS THE STRACK V GREY CASE. (STRACK V GREY [2019] NZCA 432)

WHAT HAPPENED

Essentially Grey, an Otago businessman who owned a property in Mosgiel, wanted to buy the Strack's property in Dunedin.

Grey wanted to put in an unconditional offer, but his Westpac bank manager, Ross, told him he shouldn't assume he would get a loan for the full amount he intended to offer ($1.2m - essentially bridging finance to be secured over both properties until Grey sold Mosgiel).

So, Grey made an offer conditional on obtaining a satisfactory building inspector's report and finance. The Stracks accepted the offer.

Soon after, Grey became concerned about the property's retrofitted insulation and through his own research, "went off" the property. Although Grey took his builder to the property, no written report was made at that time.

On Grey's instructions, Grey's solicitor then advised the Stracks lawyers that the agreement was at an end for failure of the builder's report condition.

Grey also told Ross that the agreement was at an end, so there was no need for Ross to prepare a finance application as part of Westpac's usual procedures.

The Stracks sought to convince Grey that the insulation wasn't a problem but were unsuccessful and eventually re-sold the property at a figure $150,000 less that the conditional agreement with Grey.

COURT PROCESS

The Stracks sued Grey for the $150,000 claiming that Grey was not entitled to cancel the agreement.

The claim finished up in the Court of Appeal in a win for the Stracks on the basis that Grey had not fulfilled his obligations under the conditional agreement – failing to commission the building inspector's report and not doing everything he reasonably could have to secure finance. The Court noted that lending criteria for financial institutions are capable of being known at any time, and that enquiry beyond just an existing banking arrangement should not be a barrier in seeking to fulfil a finance condition.

CONCLUSION

As in this case, the vast majority of agreements for residential property dealings are documented using the ADLS Agreement for Sale and Purchase of Real Estate. Strack v Grey and other cases establish that while a conditional purchaser will have comfort that if conditions are not fulfilled to their satisfaction and that then they can avoid going through with the agreement,

nevertheless purchasers need to understand that;

- they are obliged to follow the terms of the conditions; and
- in seeking finance, they may need to consider other channels than their own bank, including potentially seeing if vendors are prepared to leave some money in.

Here Grey didn't obtain the report, nor did he push ahead with seeking the Westpac finance or other potential channels. Grey had not shown that he would have been unable to secure the finance necessary to complete the purchase.

Some readers may be surprised by this decision, especially the finance condition potentially extending beyond immediate finance sources to include other lenders and even the vendors. Although this case is a few years old we really think it's important for purchasers to understand their obligations under conditions. Also this case has, to our knowledge, not been challenged as to its findings.

Accordingly, we strongly recommend to all our clients that they contact us before committing to a property purchase and to understand their obligations in respect of conditions attached to agreements.

UP TO DATE WILLS?

We think it's always important to ensure that these are current. However human nature being what it is, sometimes changes in family or personal circumstances fly below the radar.

The ease with which people move round the world now, coupled with the threat posed by such global events as the Coronavirus and heightened international tensions mean that it is more important than ever for everyone to ensure their personal affairs are in order.

Contact us to discuss your circumstances and if you need to update your situation, we will be able to assist very quickly, including allowing you to complete details via an online form on our website at a time that suits you to minimise disruption to your busy life.

Our Online Will form is available here
https://lawfirm.co.nz/online-wills/

CHANGE TO TRUSTEE TAX RATE – IS A TRUST STILL USEFUL?

The Government announced a proposed increase of the trustee tax rate (from 33% to 39%) in Budget 2023.

This change, due to take effect from 1 April 2024, would set the rate at which trustee income is taxed at the same as the top individual tax rate.

The intention here is to prevent taxpayers from achieving a 6% tax saving by holding income within a Trust, rather than distribution of the income to beneficiaries who are on the top (39%) tax rate.

These kinds of changes to tax rates are often triggers for reviews of asset planning structures. This particular change may cause some trustees to review the continuing usefulness of their Trust.

We thought it would be helpful therefore to go over some of the reasons why Trusts may continue to be useful. Indeed these reasons may apply to both existing Trusts as well as to situations where a new Trust is being considered.

These reasons include:

- Income splitting: This purpose will remain relevant following the proposed trustee tax rate increase. It will still be possible in many cases to distribute income to beneficiaries who are on a lower tax rate (e.g. 33%, 30%, 17.5% or even 10.5%) tax rate.
- Setting aside for specific purposes: Trusts can be used to set aside assets and derived income for a specific purpose, such as a child's education. The trustees, not the beneficiary, will have control over the assets.
- Protection of specific assets: A trust may also provide a way to protect specific assets, such as a family batch, for passing down to future generations.
- Creditor protection: Assets held in a Family Trust may be protected from claims by personal creditors of the beneficiaries. This protection can be compromised however in certain circumstances including a failure to properly administer the Trust, or if there was an intention to defeat creditors in the Trust's initial settlement.

- Protecting property against estate claims: Trusts can be used to protect against estate claims after death. Conversely, assets held in your own name can potentially be subject to claims by family members under the Family Protection Act 1955.

Changes to the Trusts legislation have imposed stricter requirements on Trustees in the ongoing administration of Trusts. We will outline these in our next Newsletter.

Feel free to contact anyone at our office if you want to follow up this article in any way.

GET IN TOUCH

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