SPEAKMAN LAW

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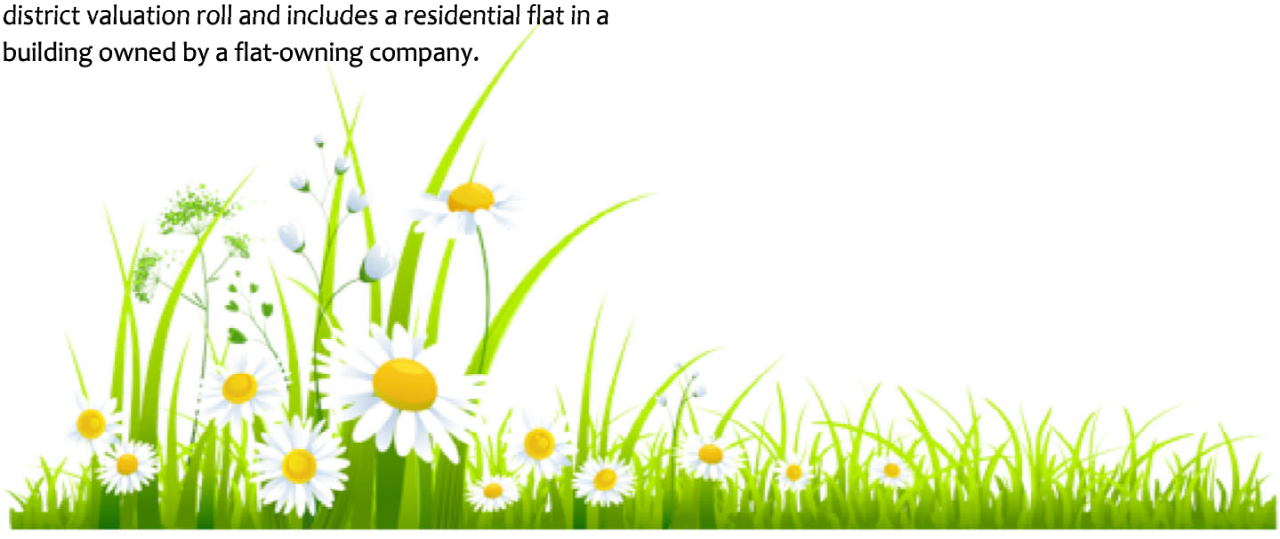
Overseas Investment in Residential Land…

From 22 October 2018, overseas persons will be unable to acquire residential land in New Zealand except with consent of the Overseas Investment Office (**OIO**). Consent of the OIO is already required for some acquisitions of New Zealand assets by overseas persons. Chief amongst these is land above a minimum area, land that includes foreshore or the seabed and land that is adjacent to or includes a historic place or Wahi Tapu (places sacred to Maori).

Greatest profile about these requirements has perhaps accompanied attempted foreign purchases of New Zealand farmland. An example was the purchase of Crafar Farms in central North Island by a Chinese company and its partnership with Landcorp to manage the farms. Notoriety spilled from that purchase with imprisonment for May Wang (and two others) for her part in a fraud in connection with the Crafar Farm bid. Subsequently, the same Chinese company sought to acquire the Lochinvar Station near Taupo and was declined.

These foreign ownership restrictions have had no application to residential land. That is now about to change.

Residential land is shortly to become "sensitive land", and subject to the same restrictions as farmland, the foreshore, seabed and the like. Residential land means land that has a property category of residential or lifestyle in, or for the purpose of, the relevant district valuation roll and includes a residential flat in a building owned by a flat-owning company.



What's inside

Briefly – Special Interest/Law

- Mainzeal directors in court facing claim against them for reckless trading. Includes Jenny Shipley being sued for more than $47m.
- CBL Insurance interim liquidation continues, whilst directors establish solvency, plan for recovery.
- Eric Watson ordered to pay Sir Owen Glenn $49.4m, who says he is determined to take Watson to the ends of the earth. Meanwhile Eric Watson's Cullen Group recently in court fighting IRD $60m claim.
- Stairway to Heaven retrial ordered over copyright claims.

Briefly – Sport

- Europe retain Ryder Cup despite 11 of US team ranking in Top 17 world rankings. Team culture? Tragic that a member of the crowd was his by a stray ball from Brooks Koepka, losing an eye
- ABs retain Rugby Championship with wins over Australia and Argentina. Recent loss to South Africa taken well but Steve Hansen rightly says it won't be if we keep losing.
- Alistair Cook retires from international cricket with century in his last test match, to book end his test career after a century in his first test. Good on him, he has been the perfect role model in a game that has needed one in recent years.

I am sometimes asked whether this includes an apartment. Yes it does.

Extension of the Overseas Investment Rules to residential land is intended to curtail speculation in New Zealand houses by foreign investors who have no intention of living in them. Undoubtedly foreign speculation has contributed to the present housing affordability issue.

Equally undoubtedly a ban on foreign speculation will go some way toward relieving housing affordability.

Under the new rules a foreign person will only be able to acquire New Zealand residential land if they demonstrate that they are committed to living in New Zealand (and they sell the land upon ceasing to occupy it) or they develop the land (again with a proviso, namely that the land is sold upon completion of the development) or they demonstrate a benefit to New Zealand (this accommodates purchase of residential land for non-residential purposes or in order to support a residential business). Examples are the purchase of residential land for developing a hotel or shopping complex.

As always there is a lot of detail in the rules when one considers utility companies, rest homes, hotels etc. Specific rules and exemptions apply to them, however, the key thrust of this article is that foreign acquisition of residential land will shortly be greatly restricted.

The 75% Shareholding Threshold…

Majority shareholders gain a huge advantage where their shareholding reaches the 75% threshold. At that level, the majority shareholder may largely dictate terms to minority shareholders as they see fit upon the company. Minority shareholders are protected only by the major transaction provisions in section 129 of the Companies Act and by the oppressive conduct/unfair prejudice provisions in section 174 (hand in hand with the former of these is minority buyout rights and these come into play more often than you might think).

What then might a majority shareholder do to force through a transaction where their shareholding is below 75%. A recent Supreme Court decision rather deliciously highlights the issue.

The case involved a single 70% shareholder wishing to proceed with sale of the company's only asset. To do so, 75% approval of shareholders was required, which they did not have. The minority shareholders (with 30% of the shares) stonewalled the sale.

The majority shareholders were consequently hamstrung. This neatly demonstrates an unfairness in our company law that allows a minority shareholder to hold the majority shareholder to ransom. What are the avenues open to the majority shareholder here?

One answer is to take advantage of the unfair prejudice rules in the Companies Act. That is what the majority shareholder did here, arguing that the minority's action in blocking the asset sale was unfairly prejudicial to the majority shareholder.

The case is significant because at its heart is the idea that the exercise of protection afforded to a minority shareholder (the express right to oppose a majority transaction) might be unfair. On that score, the Supreme court most definitely determined that this might indeed be unfair.

That will be so where there are "particular circumstances that mean the minority shareholder is breaching a duty owed to the company or to another shareholder or an understanding among shareholders as to the ongoing conduct of the affairs of the company".

This will be a very narrow set of circumstances as it is generally understood that a shareholder may vote its shares according to its own self-interest. A better step in these circumstances is to either appoint a receiver (if that right exists) or to apply to the Court for an order to wind up the company (in which case the asset would have been sold by the liquidator in the course of liquidation).

Remedies available to a majority shareholder who is hamstrung by a minority do exist. Using those remedies is not straight forward and require satisfying the Court about them. Far better if you can retain a 75% shareholding!

Closely Held Companies – Shareholding Arrangements…

Two questions that are repeatedly put to me are: first, should I own shares in a trust and secondly, is it possible to have 2 different classes of shares (one conferring voting rights and the other conferring dividend rights)?

Trust ownership of companies is common and in most cases will work well. It will result in dividends paid by the company being received by the trust (and not directly by the individuals behind the trust). That will offer flexibility as to who (amongst the trust beneficiaries) ultimately receives the dividend.

It will also result in proceeds from sale of the shares being received by the trust. This offers the same flexibility to the individuals behind the trust as to who (amongst the beneficiaries) is to receive the proceeds. Again, there is usually great advantage in having that degree of optionality.

Where ownership of a company is held in a trust there are some matters to look out for though. First, if the company is a look through company (**LTC**) then eligibility for look through status is linked to the number of beneficiaries to whom distributions are made. If made to more than 5 persons (husband and wife are treated as one) then LTC eligibility is lost. Secondly, exercise of shareholder voting rights will be at the behest of the trustees. They may or may not exercise those rights as you (the settlor) intend. Thirdly, director and trustee responsibilities have great propensity to become blurred. Where they are, there is potential for the validity of the trust to be challenged. To preclude that it is essential that the person's actions in his or her capacity as director are distinguished from those in his or her shareholder trustee capacity.

Turning to the second question that is often put to me, different classes are indeed possible (and notably restrictions against that which historically applied to loss attributing qualifying companies, do not apply to LTCs). One class of share is often issued to an individual, conferring on him or her voting rights, but no dividend rights. A second class of share is often issued to a trust established by that individual, conferring on the trust dividend rights. In this way, the individual retains day to day active control of the company whilst the value in the company is preserved for the trust. It is straight forward to achieve this. The company must have a constitution that provides for different classes of shares and the company must pass the necessary resolutions to issue the shares accordingly.

Some rules that need to be remembered are those in section 52 of the Companies Act that deal with distributions by companies. By that section dividends must not be discriminatory. This means that directors must not authorise a dividend in respect of some but not all the shares in a class or that is of a greater value per share in respect of some shares of a class than it is in respect of other shares of that class.

As always the devil is in the detail, give me a call if you need assistance here.

Transparency of Ownership: Companies and Limited Partnerships…

Presently there is no requirement to notify the Companies Office of the beneficial owners of shares in a NZ company or of limited partnership interests in a limited partnership (**LP**). Consequently, where shares are held in trust, it is the names of the trustees who appear on Companies Office records. There is no requirement at all to identify the beneficiaries of the trust, even where there is a bare trust/nominee arrangement.

This may soon change. The Ministry of Business, Innovation and Employment is presently consulting on proposals in these respects. Their preferred option is to require companies and limited partnerships to identify their beneficial owners and keep accurate and up-to-date information about their beneficial owners and to provide that information to the Register of Companies, with the information to be made publicly available on the Companies and Limited Partnership Registers. This begs the question who is a beneficial owner but that is detail beyond the scope of this article. Watch this space for developments.

Trusts – Rights of Beneficiaries…

The new Trusts Bill will, once passed, dramatically enhance the rights of beneficiaries to a trust.

The Bill is presently making its way through Parliament; I would expect it to come into law some time next year (it is currently at Select Committee stage).

Once enacted, trustees will need to provide beneficiaries with certain information about the trust, principally the trust deed, details of the trustees and financial information about the trust, including its assets and liabilities. In addition, trustees duties will become codified, in the same way as directors duties are codified in the Companies Act 1993. This extends to identifying best practice for trustees and clear consequences for breach. Trustees who are uncomfortable with the set of expectations that will

accompany these changes should seriously consider their continuation as a trustee.

Our Website…

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