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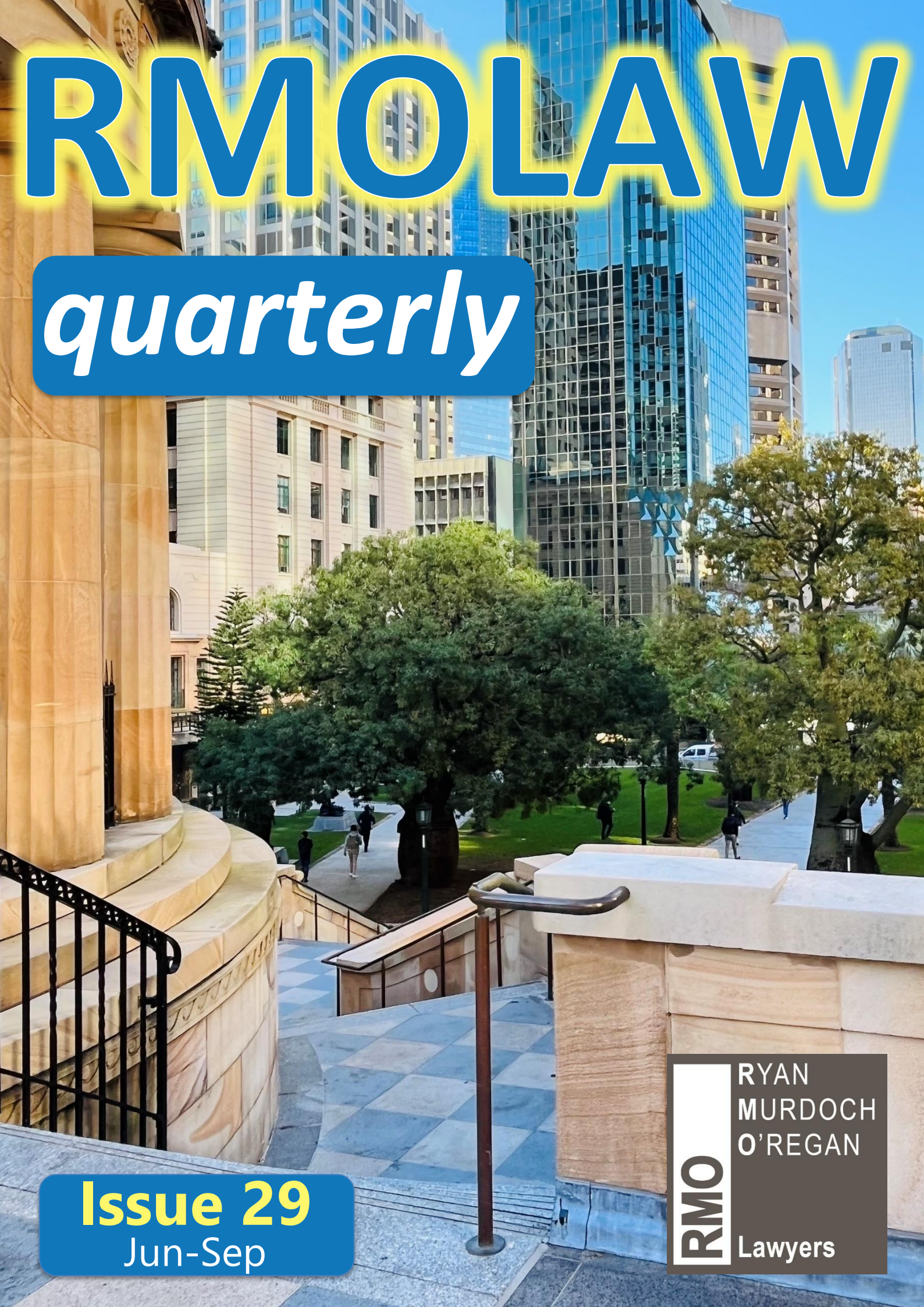

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Total Permanent Disability (TPD) and Family Law Property Settlement

Family & De Facto Law Team

This article will address the Court's approach in matrimonial property settlements where a party to a relationship is in receipt of a Total and Permanent Disability payment.

At the outset, it is important to understand that assets and liabilities will not simply be divided equally in the event of separation. There are many and varied factors taken into account in the overall assessment which will differ for each couple and their circumstances. Those factors include financial contributions at the outset of the relationship, financial, non-financial and homemaker and parent contributions during the relationship, and future needs factors such as responsibility for the care of children or others, income, and health.

TPD payments fall into the category of a financial contributions during the relationship, or post separation depending on when the sum was received, and the income and health factor of a parties' future need.

TPD payments are categorised as "property" or a "financial resource" for family law purposes. Which approach the Court's adopt depends largely on when the sum was received.

Couples entering into negotiations for property settlement need to therefore consider the following:

1. Was the payment received during the relationship?

The Courts are likely to consider the sum as part of the asset pool, albeit in a "separate pool" to the rest of the couples' joint and several assets and liabilities. In contrast, if the payment was received post separation, the Court is instead likely to not consider the sum part of the parties' asset pool for, even in a separate pool, but instead a financial resource.

In the matter of *Beckett v Beckett* the father suffered a Total and Permanent Disability and received a claim of $880,878. The father's claim arose as a result of a psychiatric injury that occurred as a result of his employment.

Judge Altobelli found that *"the funds in questions were clearly intended to compensate the Father for his future economic loss in circumstances where the medical evidence suggests he will not work again. To suggest, in those circumstances, that [the wife's] contribution to this fund is no different, for example, to her contribution to the acquisition of the former matrimonial home, is plainly incorrect.*

The Court created a separate pool to deal with the TPD funds called the TPD Pool.

TPD payments are categorised as "property" or a "financial resource" for family law purposes.

Counsel for the mother submitted that considerable hardship experienced by the mother as a result of the Father's conduct, being a manifestation of his psychiatric injury, was self-evident in the material. She deposes at length to what both she, and the children, experienced in their lives as a result of the psychiatric injury that the father suffered.

Judge Altobelli continues, *"Moreover, in the same way as a spouse is deemed to contribute to the superannuation entitlements of his or her spouse during cohabitation (in the normal course) it is contended that the same should apply so far as the TPD benefits received… The Court accepts therefore that the Mother did make an indirect contribution to the TPD fund. To give her contribution too much weight, conversely, undermines the fundamental purpose of the TPD fund, which is to compensate him for his economic loss. Indeed, to give the mother too great an adjustment based on her indirect contribution would merely increase the s75(2) considerations in the Father's favour."*

The Court therefore calculated the mother's contribution to the TPD fund at 15%.

2. Was the payment received after separation?

In *Irving v Parkes* [2015] FCCA 3049 the wife received a TPD payment totalling $620,000 and it is her uncontroverted evidence their purpose was to compensate her for the loss of future earnings. The payments having been made more than 12 months after separation, Judge Small *"did not consider them to be part of the parties' assets for the purpose of these proceedings."* Instead, a financial resource.

A financial resource is not a sum that can be split to the other spouse when effecting a settlement, however, it will be taken into account in calculating the division of the remaining property. The financial resource impacts upon the division of the remaining assets as the party with the resource has financial support available to them for their future needs. Other examples of a financial resource include an overseas pension such as the United Kingdom retirement pension or the United States 401k retirement scheme, as well as anticipated inheritances where the person is deceased but their estate not yet administered, and long service leave.

3. Did the other spouse indirectly contribute to the TPD payment?

The Courts have taken into account indirect contributions by the other spouse when assessing entitlement to a TPD payment. This includes contribution towards premiums from joint or matrimonial funds, support or encouragement in setting up the policy, and personal and health support of the

recipient following their injury or illness which triggered the payment. This includes personal care requirements, a heavier burden on parenting children, facilitating medications and medical appointments, and even being subjected to forms of domestic violence perpetrated by the recipient which may have been brought on by their illness or injury rendering the duties and contributions by the spouse even more arduous. While these factors are relevant, they are taken into account in a minor way, and will not be considered an equal contribution to the payment.

In the matter of *Martell v Allard* [2012] FAMCAFAM 326 the parties shared a 20 years marriage. 3 years prior to separation the wife received $295,000 representing the proceeds of her TPD policy. As is the case with TPD policies, this sum was to compensate her for future economic loss given her inability to return to the work force. However, the contention of the husband was his contribution to the payment in their joint payment of the premiums and mutual agreement that the policy be taken out in the first place. The husband's contribution was not considered significant.

It is important to seek timely legal advice from an experienced family law practitioner if you are experiencing or expect to experience a separation.

Contact Us

To speak to one of our experienced family lawyers about call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

Estate Planning – Do I Need A Will?

Do I need a Will? This is a question often asked by clients when considering their estate planning issues. The question is better put like this: - **Who will sort out my estate, and who will get the benefit of all those things (money, real estate, property) I have accumulated throughout my life?**

Rarely is it a good idea or beneficial to delay making a will until the end when it may be too late or to not have a will at all.

So what happens to an estate when someone dies 'intestate' (without having a will) and why is it important to make a will?

The following are some relevant issues relating to what happens to an estate if there is no will and then comments in contrast of why having a will is important.

Without a Will

- The person who administers the estate (the administrator) will be determined in order of priority by the rules of court. The resulting appointment may be someone who for various reasons may not

be appropriate or who does not have a good relationship with the rest of the family.

- A bank or financial institution will in most, if not all, cases require an application to be made to the Supreme Court for Letters of Administration (the appointment of an administrator of the estate). This will be required even for small amounts of money held by a bank. Often the cost of obtaining a Grant of Letters of Administration may exceed the amount of money held in a small estate and sometimes the more cost effective option is for the bank to keep the money and not make an application for a grant of letters of administration.

- The 'Intestacy Rules' found in the *Succession Act Qld* determine who the beneficiaries will be. Examples of this are as follows:

  (a) If the deceased was in a de facto relationship at the date of their death but they are still married (never divorced), the two spouses will share the estate equally.

  (b) If the spouses had children to the deceased, the spouse/s will only inherit the contents of the house and $150,000. If there are two spouses, this amount is divided equally. The spouses then share the balance of the estate with the deceased's children in the shares determined by the intestacy rules.

  (c) Under the intestacy rules step-children of the deceased are not entitled to a share of the estate.

The effect of an intestacy is that the deceased loses the ability to bequeath the estate according to their preferences and wishes. This means that

- a spouse may not receive all of their partner's estate;
- a married but separated spouse may receive a share of the estate;
- a beneficiary may be someone who is estranged from the deceased and who the deceased would not wish to receive a benefit ; or
- someone with whom the deceased did have a good relationship, for example, a step-child or a friend, is excluded as a beneficiary.

<u>With a Will</u>

- Your administrator will be the person/s you nominate as your executor.

- A bank or financial institution will often release small amounts of money because there is a will without requiring Probate (proof that the will is valid). Probate may be required by banks but usually where they are holding a significant amount of money in the deceased's account.

- The Will determines who the beneficiaries will be and their entitlements because they are named as beneficiaries.

A will has the following important features:

1. There is **certainty of distribution** to the persons who are nominated in the will as beneficiaries.

2. The ability to name **trusted executors** to ensure the estate is properly administered.

3. It allows for **estranged family members to be excluded** from the estate and for an explanation to be given of the reasons for doing so.

4. **Specific items can be gifted** directly to persons named to receive those gifts

5. The will can **create various testamentary trusts** which allow for the distributions by the trustees in accordance with the wishes of the person making their will.

6. The **ability to control and direct distributions**. This would be beneficial if a beneficiary has a disability, mental health or drug issue and there is a need to protect that person's share of the estate or the share from being dissipated inappropriately.

7. The will can provide for the **application of tax on various assets**.

8. A will can **nominate an alternative beneficiary** if one of the named beneficiaries should die before the deceased person.

9. The will can **create other interests in property** such as:

    - **'Life interests in real property'**. A right for a beneficiary to live in the family home during their lifetime and then for the home to be transferred to other named beneficiaries.

    - **'Mutual wills'** where the maker of the will agrees with their spouse or partner that they will not change the terms of their will in the future.

    - The way in **which debts are treated or forgiven.**

10. **The will can also deal with the personal interests** of the deceased including:
    - his/her **final resting place;**
    - **organ donation;** and
    - **guardianship of and financial provision for children.**

There is no doubt that the benefits provided by having a will far outweigh the absence of a will. Making a will is one of the most important strategies in planning

for the future and in providing for the needs of your family and their future. If operating a business a succession plan and Will ensures that your business has a way forward upon the death of the owner or director.

Please consider making a will to ensure your intentions and expectations are fulfilled after your death.

We trust that this information has given the reader some insight into the treatment of estates whether with or without a will and why it is essential to have a valid will which brings about the certainty required by the deceased and fulfils the expectations of named beneficiaries when dealing with a deceased's estate.

Please contact one of our offices should you wish to discuss the issues raised in this article or make an appointment with one of our Wills and Estates Team Members. Our team members will provide you with our **Will pack / Questionnaire** so that you can consider the needs of your estate and have the necessary information readily available for your appointment.

Contact Us

To speak to one of our experienced wills & estate lawyers about estate planning, call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

Responding To An Application for A Protection Order

Tayler Bowdren
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Being served with an application for a Protection Order can be quite overwhelming. It can be difficult to know how you wish to respond to that application without knowing exactly what the Court will be looking at.

For an application for a Protection Order to be successful, the applicant must prove the following three elements to the Court:

1. That there is a relevant relationship;
2. That an act of domestic violence has occurred;
3. That an order is necessary or desirable.

To explain that in further detail:

1. A relevant relationship includes a de facto relationship, family relationship or marriage.
2. To prove that an act of domestic violence has occurred, the applicant will have to prove that there has been:
    a. Physical violence; or

   b. Emotional or psychological abuse; or
   c. Economical abuse; or
   d. Threats; or
   e. Coercion; or
   f. Controlling or dominating behaviour that causes the applicant fear for their safety or wellbeing.
3. For an order to be "necessary or desirable", the Court must be satisfied that the applicant is considered to be vulnerable and that it is likely that the respondent would commit an act of domestic violence in the future.

When considering how you would like to proceed, there are 4 options that are available to you, these are to:

1. Seek withdrawal of the application;
2. Give an undertaking to not commit domestic violence;
3. Consent to a final order, without admissions; or
4. Oppose the application and proceed to trial where a Magistrate will determine the matter.

Negotiating for the Application to be withdrawn

You can engage a solicitor to write to the applicant outlining your position. The applicant may then realise that the above elements cannot be satisfied and may consider withdrawing the application to bring about an earlier resolution to the matter.

Undertakings

You can engage a solicitor to write to the applicant and offer an undertaking. An undertaking is a promise that you will be of good behaviour and not commit domestic violence, and any other promise that may be negotiated. If an undertaking is breached; the ramifications are less severe than breaching a Protection Order and there are no automatic criminal ramifications to breaching an undertaking.

Consenting to an order without admissions

You, or a solicitor acting on your behalf, can consent to an order without admissions. This essentially means that you do not admit or agree with the allegations contained within the application before the Court, but that you agree to an order being made.

This order is not something that will appear on your criminal history or on the public record. Therefore, it may not be necessary to disclose it for the purpose of travel or employment however, you will need to look at the individual circumstances in which you are being asked. Once an order is made against you it is important that you don't breach the conditions, to do so would then be a criminal offence. The first offence of breaching an order has a maximum penalty of 3 years imprisonment, any subsequent breaches have a maximum penalty of up to 5 years imprisonment.

The standard length of an order is 5 years, however, it is possible to negotiate for a shorter time frame. The Court may be minded to grant a shorter period if it can be successfully argued that the shorter

timeframe would still adequately provide for the safety, protection and wellbeing of the applicant. This would be beneficial as it would reduce the time frame in which you could potentially breach the order.

If you are engaged in Family Law proceedings, or will be in the future, this option can be beneficial as the Family Court cannot draw an inference arising from the order, as there has been no finding of fact by the court. A finding of fact is only made if an application for a Protection Order is contested, proceeds to trial and the Magistrate decides to grant an order.

Trial

The final option would be to proceed to a trial. The matter is listed for a hearing and both the respondent and aggrieved will be required to attend in person and be subjected to cross-examination.

The Magistrate will hear and consider the evidence and must be convinced of the aforementioned 3 elements. Proceeding to trial can be a risk and the outcome can depend on how all parties present as witnesses. Essentially, unless there is documentation that can be produced as evidence or a witness to any acts of domestic violence, it is a 'he said, she said' matter.

Have you been served with an application for a Protection Order?

We are available at any of our local offices or by telephone or video-conference.

Get the best representation and book a Criminal & Traffic Law Consultation for $149.

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Speak to our expert lawyers on 1800 999 529, email mail@rmolaw.com.auor visit rmolaw.com.au.

Call Option Agreements – A Buyer's Perspective

Property & Business Team

A Call Option Agreement ("Agreement") is when a proposed Buyer ("Grantee"), instead of entering directly into a Contract of Sale with the proposed Seller ("Grantor"), they enter into an agreement for a nominal fee whereby the Grantor grants the Grantee a right to call upon the Grantor to enter into a Contract of Sale at any time during the option period. The nominal fee is quite important as transfer duty is assessed on the fee. It is common to see option fees in the amount of $1.00.

The Contract of Sale ("Contract") is annexed to the Agreement to note the negotiated terms of the Contract such as the purchase price, deposit amount,

additional conditions etc. Once the Agreement is entered into, the terms of the Agreement and the Contract cannot be changed unless agreed between the parties. The Grantor will then hold the property exclusively for the Grantee until such time when the Call Option period expires. This interest in the property can be secured by a consent caveat which will prevent the Grantor from selling the property to another party and will only be removed if the Grantee exercises the option to purchase or when the Call Option period expires.

A Call Option Agreement ("Agreement") is when a proposed Buyer ("Grantee"), instead of entering directly into a Contract of Sale with the proposed Seller ("Grantor"), they enter into an agreement for a nominal fee whereby the Grantor grants the Grantee a right to call upon the Grantor to enter into a Contract of Sale at any time during the option period.

Such an Agreement has many benefits for a Grantee, e.g. where the Grantee requires time to conduct due diligence and/or obtain development approval on the property.

Alternatively perhaps the Grantee is a builder who would like to build on the property with the intention to find a third party buyer who is interested in purchasing a house and land package. If the intention is to find a third party buyer then provided there is a nominee clause, it will allow the Grantee to avoid paying any transfer duty (provided the option fee is nominal). Another major benefit is if the property market is at a high, then the Grantee be able to lock the Grantor in with the proposed purchase price at the time of the Agreement, and perhaps after all conditions are satisfied, the market value of the property may have increased a lot more. However, please note this can also be a detriment to the Grantee, as if the property market crashes after having locked in a proposed purchase price, then when the Grantee exercises the option to purchase, they will be paying a purchase price higher perhaps than what the market value is at the time. Should the Grantee have the intention to exercise the option, but requires time to establish a purchasing entity for the purpose of this purchase, then the time under the option period can allow for this to occur.

The Call Option period depends on what is negotiated between parties but it can be for a period of 12 months or more (or sometimes less) depending on what parties are trying to achieve. As an example, it could be that from the date of the Agreement, the due diligence condition and/or development approval conditions would be due within 6 months and upon satisfaction of such conditions the Call Option period would then begin

and expire 3 months later. If the Grantee does not exercise the option to purchase by the deadline then the Agreement would be at an end, and any fee paid may be forfeited or it could be refunded, depending on what was negotiated.

When the time comes and the Call Option is exercised, it is important that there is strict compliance with how it is to be exercised which should be reflected in the Option Agreement. It has been found by the courts previously that if the option is not validly exercised and the option period lapses then the Grantor may retain the funds paid by the Grantee and the Agreement will be at an end.

How We Can Help

We have the legal experience and knowledge to explain the risks and negotiate your Call Option Agreement and Contract prior to signing, to ensure there are no hidden surprises waiting for you down the track and that you are well informed before proceeding.

Contact Us

To speak to one of our experienced property lawyers about your Call Option Agreement and Contract to purchase, call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

Unable To Settle On Time?

Duncan Murdoch
Director
Conveyancing

Quite often property contracts will stipulate a settlement date of 30 days from the contract date. This can be a tight time frame to adhere to and a buyer (or seller) may have difficulty in fulfilling this obligation.

Contracts in Queensland provide that time is of the essence. This means that the deadlines for the fulfilment of conditions must be adhered to strictly. If this does not happen then a party (we will use the buyer for the purposes of this article) will be in breach of the contract.

If a buyer is in breach of the contract then the seller may:-

- Affirm the contract and sue the buyer for damages and/or specific performance (i.e. compel the buyer to complete the contract); or
- Terminate the contract, keep the deposit and sue the buyer for damages

Until recently, if a buyer could not settle on a given day then the buyer would have to request an extension of time from the seller. The seller did not have to grant that extension and so the buyer was at the mercy of the seller.

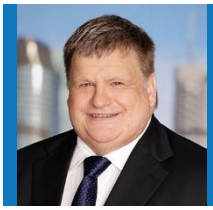
The standard REIQ contract was changed recently following a situation where a young couple had their contract terminated and lost their deposit because

their bank was unable to settle on the nominated settlement date. As a result of that change either party may extend the settlement date by up to 5 business days from the scheduled settlement date. This would have saved the young couple form going through the experience of having their contract terminated and losing their deposit.

Contact Us

To speak to one of our experienced conveyancers about your sale or purchase, call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

Retaining Walls



Peter Kronberg
Senior Associate
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Following on from our last article about dividing fence disputes, we will now explain what you need to know about retaining walls, especially where they are on or near your dividing fence line. We informed you in our last article that a retaining wall is not classified as a fence, and that the *Neighbourhood Disputes (Dividing Fences and Trees) Act* 2011 (NDA) did not apply. Therefore, when a dispute arises in relation to a retaining wall, who is responsible and what course of action can be taken?

Unlike issues relating to dividing fences and trees where the rights and obligations of neighbours are clearly outlined in the NDA, disputes relating to retaining walls are determined through the use of case law. Therefore, to determine who is responsible for maintaining, repairing or replacing the retaining wall depends on the circumstances of each case.

Who is responsible?

A retaining wall generally benefits one neighbour more than the other and therefore, are not a matter of joint responsibility between neighbours. The responsibility for maintenance of the retaining wall falls with the owner whose land benefits from the retaining wall. This determination can be achieved by considering the purpose for the retaining wall or why the retaining wall was built in the first place. For example:

- If the wall was built to allow the property owner on the higher side to level out their land then it can be said that they are responsible for the retaining wall.

- If the wall was built to allow the lower property to engage in building works or something to that effect, then it can be said that the retaining wall is the responsibility of the property owner on the lower side.

- It can be deemed that both parties are responsible for the repair and maintenance of the retaining wall when both parties receive an equal benefit from the retaining wall.

There are limited circumstances when a retaining wall may be deemed to fall under the jurisdiction of the NDA. This arises when a fence is build atop a retaining wall and the repair of the fence is dependent upon the repair of the retaining wall. In addition, section 52(2) of the NDA outlines that, a land owner is responsible for ensuring that a tree on their land does not cause serious damage to another person's land or any property on their land, or cause substantial or ongoing and unreasonable interference with a person's use and enjoyment of their land. In that case, under the NDA, you are able to apply for an order from Queensland Civil and Administrative Appeals Tribunal (QCAT) concerning the removal or cutting back of the offending tree or trees.

A retaining wall generally benefits one neighbour more than the other and therefore, are not a matter of joint responsibility between neighbours. The responsibility for maintenance of the retaining wall falls with the owner whose land benefits from the retaining wall.

Furthermore, when neighbouring trees from an adjoining property cause damage your property, or unreasonably and substantially interfere with your right to use and enjoyment of your land, the landowner with the interfering trees is liable for compensation under the legal claim called a private nuisance.

What to do when a dispute arises

If neighbours are unable to determine or agree on who is responsible for, or who benefits from the retaining wall, often a geological engineer or surveyor will be required to make this determination.

If a determination by a geological engineer or surveyor deems that you or your neighbour are responsible for maintaining, repairing or replacing the retaining wall and you or your neighbour dispute this, then you may need to contact a legal professional to assess your options.

Contact Us

To speak to one of our experienced commercial litigation lawyers about neighbouring fence or retaining wall dispute, call 1800 999 529, email mail@rmolaw.com.au or visit rmolaw.com.au.

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