



OCCUPATION RIGHT AGREEMENTS – AN UPDATE

The purpose of this information sheet is to briefly outline matters that a client should contemplate when considering entering into an Occupation Right Agreement, in particular when considering funding the purchase via a trust.

Background

New Zealand has a large aging population that is increasing each year. In 2021, 15% of New Zealand's population were over 65. This is anticipated to increase to 24% of the population by 2053 and to 28% by 2073.

Occupation Right Agreements are attractive to the aging population as they provide security in terms of having a place to retire, there is no responsibility for upkeep or maintenance of premises, they provide a sense of community, the facilities are often of a high standard and healthcare is readily available.

What is it and what does the resident get?

An Occupation Right Agreement gives the resident a right to occupy a chosen unit for their lifetime. The right is exclusive to the resident only. The Occupation Right Agreement also provides the resident with a right to use the community facilities.

Important documentation

The Retirement Village should provide to the intending resident's solicitor:

1. Letter from Retirement Village or their legal representative;
2. Application for Occupation Right Agreement;
3. Occupation Right Agreement;
4. Disclosure Statement;
5. Settlement Statement and relevant Settlement Requirements; and
6. The Retirement Village's Code of Practice.

Solicitor's obligations

The instructed solicitor must thoroughly review all documentation received by the Retirement Village or their legal representative. Pursuant to Section 27 of the Retirement Villages Act 2003, the instructed solicitor must ensure that the intending resident obtains independent legal advice prior to entering in to the Occupation Right Agreement. The advising solicitor must explain the terms of the Agreement in plain English and must use language that is appropriate to the age of the resident. The instructed solicitor must also provide a certification that the general effect of the Agreement has been explained to the resident.

Effect of Introduction of Trusts Act 2019

The Trustees of a trust are bound by the Trust Deed and have obligations and responsibilities to the trust and its beneficiaries. If an intending resident wishes to fund all or part of their purchase of an Occupation Right Agreement via a trust, this

can be done in a number of different ways, including, but not limited to a distribution, a loan, or a loan and a distribution together.

Whilst these options are available, the trustees must consider their default duties under the Trusts Act 2019 prior to making distributions and/or loans from the trust, including the General Duty of Care and the Duty to Invest Prudently. The trustees must consider the implications of making loans and/or distributions from the trust and must also consider what is in the best interests of the beneficiaries of the trust.

Example: trust distributions for purchase of Occupation Right Agreement

A distribution to the intending resident of the value of the purchase price of the Occupation Right Agreement may be made. This will deplete the assets of the trust and may affect the ability for the resident to apply for a Residential Care Subsidy in the future.

Example: trust loan for purchase of Occupation Right Agreement

A loan to the intending resident of the value of the purchase price of the Occupation Right Agreement may be made. Because of the Deferred Management Fee deduction, the entire loan will not be able to be repaid and this will deplete the assets of the trust.

Example: trust loan coupled with distribution for purchase of Occupation Right Agreement

A loan to the intending resident of the value of the purchase price less the deferred management fee may be made. This may be coupled with a distribution to the resident of the value of the deferred management fee. In this situation, the loan will be repaid, but the value of the deferred management fee will not be and this will deplete the assets of the trust.

How can Foy & Halse help you?

Foy & Halse have acted for many clients purchasing Occupation Right Agreements. Our specialists are familiar with the current legislation and market standards and can assist you in expertly advising on the terms and implications of Occupation Right Agreements.

If you would like to talk to someone, please email Elise Rogers at elise@foyhalse.co.nz or call us on 09 638 7151.