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Inside this edition

Look before you leap - Family Trusts and the Family Protection Act 1

Mortgagee Sales – put your ducks in a row before you put pen to paper 2

Introducing ... Our new team members 2

Redundancy 3

Early release of deposit..... 3

Domestic Violence Reforms 4

Look before you leap - Family Trusts and the Family Protection Act

Family trusts are an ideal way to protect assets from various threats, including for example, claims under the Property (Relationships) Act 1976 and being eroded by rest home subsidies. However, in the recent case of X v X, the Court of Appeal has highlighted the risk of losing control over assets placed into trust and the difficulty in getting that control back once it is gone.

Section 182 of the Family Proceedings Act 1980 has been described as being a trust busting mechanism whereby the Court can go behind the provisions of a Trust Deed in situations where there has been a significant change of circumstances since the Trust Deed was entered into.

In X v X, the husband and wife settled a trust that, by the time of their separation, owned

assets worth between \$7-9 million. During the course of the relationship the couple had moved to Australia and, in order to make their trust more efficient under Australian tax law, Mr and Mrs X had resigned as both appointers and trustees of the family trust.

The trustees of a family trust have the authority to deal with the assets of a family trust. This includes the ability to sell or purchase additional trust assets, allow charges and mortgages to be registered over trust assets, as well as distributing trust assets or trust income to beneficiaries. The appointers of a trust have the authority to appoint or retire trustees.

By retiring as both trustees and appointers of their own family trust, Mr and Mrs X effectively gave control of their assets to independent third party trustees.

Following the breakdown of the relationship, Mr X applied to the Court under section 182 of the Act to have the trust assets of the family trust resettled onto three new trusts. Mr and Mrs X would each control a trust containing 25% of the assets of the former family trust. A third trust would be created with the remaining 50% of the former trust assets for the benefit of the couple's children. Despite the fact that the Trust Deed contained express provisions to allow for the former family trust to be resettled, the Court of Appeal dismissed the application by the husband.

....To be continued on page 3

Partner's Corner

Since our March newsletter the partners have noticed an increase in the work through the office which pretty much reflects a small growth in confidence on the part of our clients that the outlook for New Zealand may not be as grim as the newspapers would have us believe.

Property is the measure of wealth in New Zealand so that Kiwis never lose their confidence in property for long. Low interest rates and realistic vendors have encouraged growth in the residential property market. The commercial property market for good rented properties is as strong as ever. Business are also changing hands and people are starting to reinvest in their businesses.

We have noticed a trend of vendors both in property and business being encouraged to leave in some of their money on second mortgage so as to increase the buyer's equity. This will be an increasing trend so long as there are restrictions on credit and as lawyers we can be helpful to vendors in terms on ensuring that their interests are protected when securing money left in on transactions.

Despite the brighter outlook, unemployment will continue to increase for a period yet as businesses that are already under stress have to make some of their employees redundant because they do not have the ability to wait for the upturn to really take effect. This means that our employment lawyers are receiving many enquiries. Unemployment creates stress on marriages and relationships and so our family lawyers are also working to capacity.

There are many debts to collect out there. Lawyers are more than competitive as debt collecting professionals. Please contact us for an estimate and an opinion on the chances of collecting money that may be owed to you.

Our new solicitors, Jason Carruthers and Rishalat Khan have fitted in extremely well. We are enjoying their youth and enthusiasm and are already sure that both of them make extremely competent lawyers. Kylie Taylor is making good progress as Peter Smith's assistant lawyer and can be relied upon to do a thorough and competent job.

Remember the Kumeu/Huapai meeting room. If you are a client from Kumeu/Huapai, please do not hesitate to request that your appointments with staff be made at the meeting room at Huapai.

The partners current major project is to reconfigure our website so as to make it much more user friendly and up to date. Websites are increasingly an important part of business marketing and the science of websites now makes them a most important business tool.

If you haven't already visited our website take a look at www.smithpartners.co.nz and watch for the changes in coming months.

Mortgagee Sales - put your ducks in a row before you put pen to paper



If you buy a property at a mortgagee sale, be aware that you are entering a contract that is quite different in its nature to an agreement entered into in other circumstances. The agreement is likely to be weighed heavily in the mortgagee's favour as mortgagee sales involve factors outside of the mortgagee's control, which it will want to protect itself from. This may include a very unwilling and impecunious owner occupier who is being forced to leave

their home by the mortgagee which assisted them to get there in the first place. In such circumstances the mortgagee is usually unwilling to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

It is not uncommon for purchasers to face difficulties after settlement, such as having to evict a previous owner occupier or having to deal with damage caused to the house by the disgruntled owner. In one instance the occupier took all the chattels from the property and sold them to pay other sundry debts, leaving the purchaser out of pocket.

Other common issues for purchasers at mortgagee sales can include:

- There is less protection for purchasers as the agreement usually does not include standard provisions. For example, the mortgagee will have removed the section in the agreement relating to the vendor's warranties and will have removed the right for the purchaser to approve title. Often purchasers will not be able to view the property beforehand as the owner does not allow an inspection, so it will not be clear whether work has been carried out that should have required a permit.
- Purchasers may not be able to claim against the mortgagee for late settlement/possession as there may be situations where the mortgagee is unable to evict the owner. The mortgagee does not guarantee that it will give vacant possession on the day of settlement.
- Once the contract is signed it is unconditional and so requires thorough due diligence prior to signing. Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.
- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer an opportunity to buy a property at a reduced cost. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement. You should seek legal advice before the auction, as well as checking the title, council records and the property in advance, if possible. However, there may still be some issues that arise that are out of your control as purchaser.

The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to put your ducks in a row before putting pen to paper.

Introducing... Our new team members!



Jason Carruthers joined Smith & Partners in April 2009 as a law clerk in the Litigation team. Jason has a Bachelor of Laws (LLB)

and Bachelor of Commerce (BCom, Finance Major) from Otago University. Jason was admitted to the bar in June 2009 and has now been prompted to Solicitor.

Jason will be engaged in Civil Litigation, Arbitration, Debt Recovery, Bankruptcy, Winding Up Proceedings and General Commercial work including drafting and opinion work on Commercial Contracts. In the Litigation Team, Jason works closely with Partners Greg Muller and Peter Smith and Solicitor Ilsaad Razak. Jason is committed to personal service and will seek to provide and assist our clients in creating options, achieving realistic goals, and offering guidance to assist decision-making within the commercial litigation team.



Rishalat Khan joined Smith & Partners in April 2009 as a solicitor. Rishalat has a Bachelor of Laws (LLB) and Bachelor of Arts

(BA, political studies and sociology) from the University of Auckland. Rishalat was admitted to the bar in 2008.

Rishalat will work closely with partner Wade Hansen in the commercial team, namely in commercial, property and trusts law. Rishalat also has an interest in employment law and will assist Rebecca Teirney's team where required. Rishalat is looking forward to adapting the skills she has already learnt in a city firm in refugee and immigration law and civil litigation for the variety of work the commercial team at Smith and Partners undertakes every day.

Redundancy

With the world in the grip of a recession, New Zealand is facing challenging economic times. Employers are experiencing the economic squeeze and one of the solutions they are likely to turn to is restructuring and/or redundancy. Unless employers deal with these situations carefully and comply with the legal requirements they may end up facing additional costs in the form of personal grievances raised. Legal advice at the outset may save time, stress and money. Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must follow a fair process. It is in the process that employers often come unstuck.

As a guideline employers must be able to show:

- the redundancy was based on genuine commercial reasons
- the provisions of the employment agreement have been followed
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all the circumstances.

Genuine commercial reasons for redundancy

Genuine commercial reasons for redundancy may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing. Where redundancy occurs as a result of restructuring, the employer must make sure that any new positions formed are not substantially similar to the position being made redundant. A position that has a different title, but the same duties, will most likely be substantially similar.

The following are just some of the factors that will be relevant:

- substantial changes to duties
- change in level of seniority
- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff

Process

Having passed the 'genuine reason for redundancy' hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment
- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions
- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation
- advising the employee of their right to representation and offering support, and
- where possible, providing counselling, career, financial and retraining advice. Whether the process has been fair will depend on all the circumstances of the case.

Employers should note that the National Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and also those already receiving the maximum accommodation supplement, along with help with securing new employment. A redundancy tax credit is also available that makes taxing redundancy payments fairer when the redundancy payment has pushed the employee into a higher tax bracket as a result of receiving a lump sum redundancy payment.

Early release of deposit

If you are a purchaser of a property, have paid the deposit on the unconditional date, and are subsequently asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the stakeholder (usually a real estate agent) is required to hold it for 10 days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house. The agent can do so, provided the purchaser agrees. Be wary of agreeing to the release, because the transaction might not settle. If the transaction does not settle and the vendor has already spent the deposit, you as the purchaser have no security and your deposit is gone.

We suggest the inclusion of a clause into the Agreement for Sale and Purchase before the Agreement is signed that the balance of deposit monies will be held in the vendor's solicitor's trust account until settlement as a means of protecting deposit monies paid.

Continued from page 1..... One effect of this decision is to limit the applicability of section 182 of the Family Proceedings Act and make it more difficult for the Court to intervene in trusts that have been set up for a legitimate purpose.

The case highlights that when considering placing assets in a family trust, or dealing with family trust assets, it is crucial to take great care to consider the legal and practical implications of the decisions that you are making. Mr and Mrs X would have had fewer problems if they had retained the ability to control the trust, either by acting as trustees or, at the very least, by retaining the power of appointment.

Domestic Violence Reforms

New Zealand continues to have relatively high rates of domestic violence compared with other OECD countries despite having comprehensive legislation aimed at protecting women, men and children from violence in the home. For instance, in 2007/2008 family violence accounted for approximately 39% of homicides, 42% of kidnappings and abductions, 44% of grievous assaults and 64% of serious assaults.

These shocking results may reflect an increase in violence from previous years, but could also reflect more public reporting of violence as a result of the domestic violence awareness campaign, "It's Not O.K.". Regardless, the figures are alarming and prompted an investigation into the effectiveness of current domestic violence legislation.

Although the current legislation was not actually found to be defective, it required strengthening in order to better protect victims of domestic violence. The result is the Domestic Violence Reform Bill 2008, which was introduced to Parliament on 30 September 2008. The Bill is currently awaiting its first reading.

To summarise the Bill, the key areas of reform include:

- *enhancing the ability of police to take more immediate action to protect victims of domestic violence.* This is particularly the case during callouts to incidents in the home. The introduction of the 'safety order' will allow police to remove the alleged violent party from the home for a period up to 72 hours, allowing time for the victim to take any steps necessary to ensure their safety, such as applying for a protection order. Furthermore, where police suspect that someone has committed a breach of a protection order, they will have the ability to arrest them without having to obtain a warrant.
- *amending the manner in which applications for temporary protection orders are dealt with.* Specifically, the Court will be required to give prompt written reasons if it decides to decline a without-notice application for a temporary protection order. This will allow an applicant who perhaps fears repercussions, to discontinue the application before it is served on, and therefore comes to the notice of, the other party.
- *the provision of better information and programmes for both victims and perpetrators of domestic violence.* It is proposed that every person under a protection order, including children, receive an offer from the Court to attend an information session about how to make use of the protection order and what other programmes and assistance are available to them. It is also proposed that the range of programmes be extended. There appears to be no provision in the Bill for the availability of programmes for victims or perpetrators before matters escalate to the point where the making of a protection order is necessary.
- *amending the Sentencing Act 2002,* by requiring the Court sentencing a person convicted of domestic violence, to consider making a protection order on behalf of the victim. The Court must be satisfied that an order is 'necessary' – as is currently the case under the Domestic Violence Act 1995. The victim must also consent to the making of a protection order.
- *amending the Care of Children Act 2004* to better protect children from all forms of violence, by ensuring the definition of violence is the same in both the Domestic Violence Act and the Care of Children Act.

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