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NEWSLETTER

Issue 3
Spring 2009

Welcome to Issue 3 of the PMC newsletter for 2009.

It is great that Spring has finally arrived with the added bonus of daylight saving allowing us more time to enjoy the outdoors. More importantly the All Blacks didn't end up with the wooden spoon in the Tri Nations!

On a staff note, Angela McGrath is on maternity leave, and we are pleased to announce the safe arrival of her baby boy. We wish Angela and her husband Steve all the best.

Happy reading!

Inside this edition

- ***Every Rose has its Thorn***
- ***Cross Lease Ownership***
- ***The Hague Convention***

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Every Rose has its Thorn

New Zealand's highest appellate court, the Supreme Court, has recently delivered its decision in *Rose v Rose*. The case is about the classification of property. The Property (Relationships) Act 1976 ('the Act') defines relationship property and separate property. Relationship property is the pool of common property and at separation it is to be divided equally, unless there are extraordinary circumstances that would make equal sharing repugnant to justice. However, *Rose v Rose* exemplifies how there are also pathways whereby separate property becomes relationship property.



Relationship Property

Relationship property as defined in the Act includes:

- the family home – whether acquired before or during the relationship
- family chattels – whether acquired before or during the relationship
- all property jointly owned
- property owned immediately before the relationship began, if it was acquired in contemplation of the relationship and it was intended for the common use or the common benefit of the partners
- all property acquired after the relationship began, unless it is separate property (s9 and s9A) or the succession, survivorship, trust and gift provisions (s10)
- increases or gains in relationship property, subject to exceptions
- increases in the value of one partner's separate property, if the increase is attributable to:
 - the use of relationship property
 - the direct or indirect actions of the other spouse or partner

Separate Property

Separate property is defined in the Act as being any property that is not relationship property.

Rose v Rose

The basic approach of the courts has been that if the non-owning partner contributes to an increase in the value of the other partner's separate property that increase in value becomes relationship property.

In this case, Mr Rose's separate property included a farm that he owned prior to the marriage.

Mrs Rose sought to share the increase in the value of the farm at the date of separation. Mrs Rose argued that during the course of the marriage relationship her outside earnings combined with her duties as a homemaker enabled her husband to keep his farm and develop it into a vineyard. During the term of the marriage relationship the farm appreciated in value significantly due to inflationary pressures and its location within a prime grape region in Marlborough.

The Court accepted Mrs Rose's argument and held that Mrs Rose was entitled to a 40% share in the increase in the value of the separate property. Mr Rose was given a 60% share giving him greater credit for the inflation and general increase in the value of the land.

It is considered a landmark decision because despite the apparent indirectness of Mrs Rose's contributions, she was awarded a 40% share of the increase in the value of the separate property.

A Suggestion

One way you may possibly prevent separate property becoming relationship property is to record it in a section 21 Agreement, which also specifies that no matter what the contributions made to the relationship by the other partner during the life of the relationship, it is to remain separate property.

Cross Lease Ownership

Ownership of a cross lease property means you own a share of the underlying land and lease flats (or houses) to yourself and other owners for (normally) 999 years. A cross lease plan is annexed to the certificate of title and is commonly referred to as the 'Flats Plan'. This shows common areas, restricted areas and delineates the area of each flat.

The common areas

The common areas, for example a driveway, may be used by all owners by virtue of their joint ownership of the land (if marked as a common area on their lease). There will be a covenant that the common area is not to be used for any purpose other than access for vehicles and pedestrians.

The restricted areas

The restricted areas are intended to provide each owner with a private area for their use such as a courtyard or garden. The rights that the owner enjoys over the restricted area depend on the actual terms of the lease itself. It is imperative that a prospective purchaser search all the leases of the property in order to ascertain the full extent of all restricted areas.

The flats

The area of each flat should be clearly delineated on the plan. A prospective purchaser should take the opportunity to compare the Flats Plan with the actual buildings on the property to ensure that there have been no additions, alterations, or demolitions which are not shown or recorded on the Flats Plan. The alterations or additions may encroach either on to the common area or on to a restricted area and the owner has no leasehold title to them, and is in breach of the lease if consent is not sought and the Flat Plans altered.

Objecting to title

If you are purchasing a cross-leased property you can object to title if the Flats Plan is defective. You are able to object to title subsequent to signing an agreement for sale and purchase, provided you do so within the correct timeframe.

If alterations or additions have been made to the flats so the exterior dimensions have changed, the vendor will be unable to give you a leasehold title to the alterations/additions and the title is defective.

On receiving an objection notice from a purchaser, the vendor usually has one of three options — correct the title, cancel the agreement, or negotiate with the purchaser.

To correct the title, the vendor must:

- have a cross-lease plan of the alterations or additions prepared and deposited in the Land Registry Office, and
- surrender the cross-lease and have a new cross-lease of the altered or enlarged building executed and registered.

This process is costly and relies on the co-operation of all parties.

In summary, a cross-lease title should be checked carefully to ensure there are restricted areas, common areas and the Flats Plan is correct. If you want to purchase a cross leased property and there is a problem with the Flats Plan, you may be able to have the vendor rectify the issue and proceed accordingly.

The Hague Convention

New Zealand is a signatory to the Hague Convention on Civil Aspects of Child Abduction ('the Hague Convention'). The purpose of the Hague Convention is to provide a mechanism that enables abducted children to be returned to custodial parents. It has been implemented into New Zealand law under the Care of Children Act 2004.

Basic Principles

The Hague Convention has three basic principles:

- Custody of the child should be determined in the country where the child usually lives.
- The rights of the child are the primary consideration.
- Children should not be taken or kept overseas without the prior agreement of other people legally entitled to give their consent.

The Hague Convention was introduced to combat the problem of non-custodial parents taking their children overseas without the custodial parent's consent.

Seeking return of child to New Zealand

In order to use the Hague Convention to seek the return of your child to New Zealand the following requirements must be met:

- Your child is under 16.
- Your child was habitually resident in New Zealand before they were taken overseas.
- Your child has been taken or retained in a country that is a party to the Hague Convention.
- Your child was taken or is being retained outside of New Zealand without your prior consent or the consent of the Court.
- You were entitled to be consulted about your child being taken or being kept out of New Zealand, because of your rights in relation to the child.

Grounds to oppose return of child

If a person has applied for the return of your child under the Hague Convention then there are circumstances where you can refuse to return your child. Any one of the following situations may be grounds for doing so when:

- The application for return was made more than one year after the child was removed and they are now settled into their new environment.
- The person who is making the application for the return was not exercising their custodial rights at the time the child was removed.
- The person making the application consented to or later accepted the removal of the child.
- There is a grave risk that the child's return would expose the child to physical or psychological harm.
- There is a grave risk that the child's return would place the child in an intolerable situation.
- The child objects to being returned and has reached an age and maturity where it is appropriate to give weight to the child's views.
- The return of the child is not permitted by the principles of New Zealand law relating to human rights.

Child's views

A child is able to object to being returned back to the country they came from. The weight that a court gives to the child's objections will vary due to their age and maturity.

The Hague Convention is only enforceable in countries that are signatories. This means that you cannot use the Hague Convention to have a child returned from a country that has not signed the Hague Convention, for example China. For a list of countries that are signatories to the Hague Convention refer to the following website —

http://hcch.e-vision.nl/index_en.php?act=conventions.authorities&cid=24.