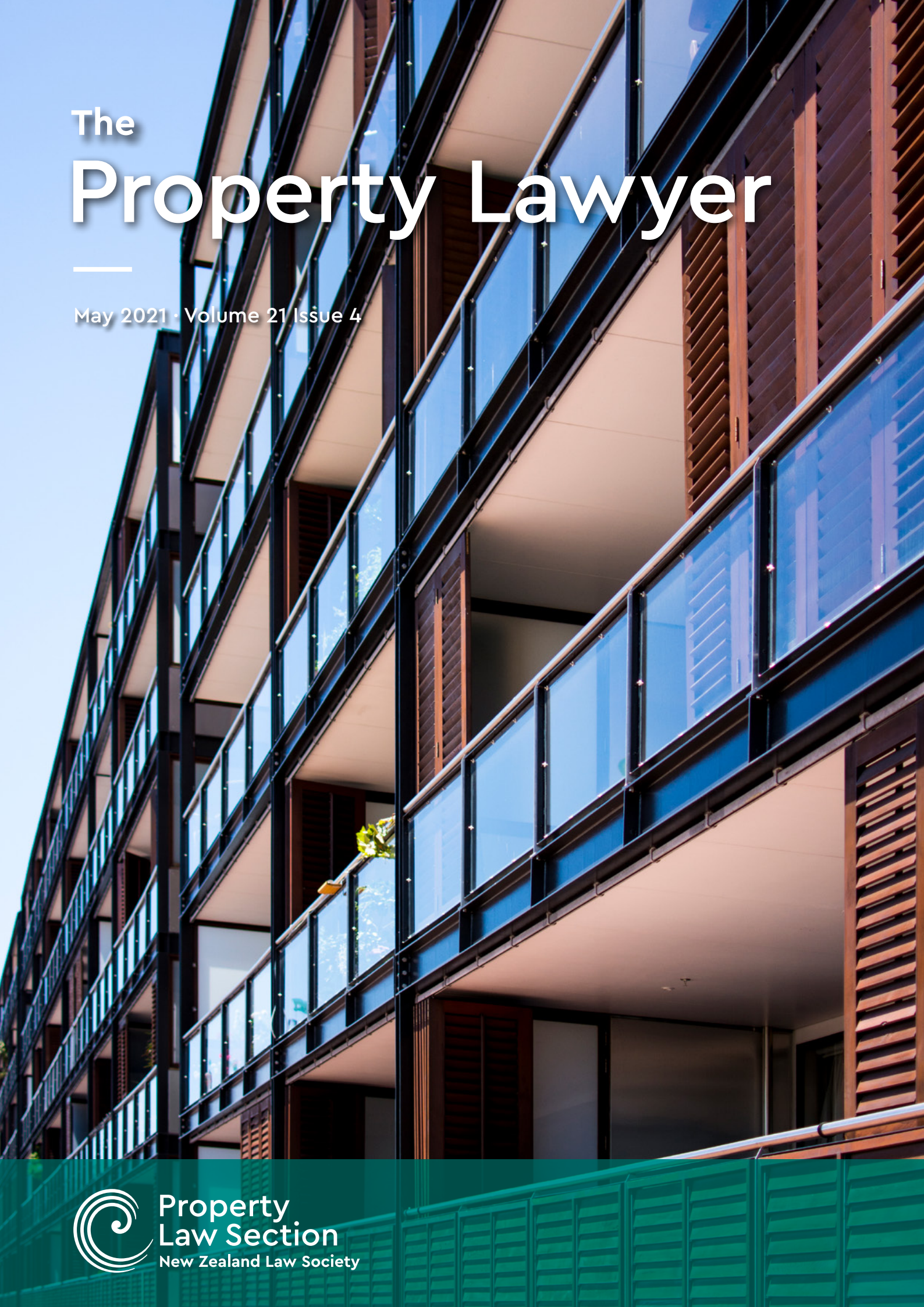

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FROM THE CHAIR

Changing of the guard

BY **MARK SHERRY**

I WOULD LIKE TO BEGIN MY first column as the incoming Chair by acknowledging and thanking Duncan Terris for his leadership of the PLS over the past 6 years, and for his many years of service before that in various roles over the past 20 years. On Duncan's watch, our membership has steadily grown to the highest number ever at 1,527 (which is over 10% of all practising lawyers). Duncan has been an accessible leader, always offering sound, pragmatic advice. He has also represented the views of property lawyers and the PLS at Law Society Council meetings, showing courageous leadership in times of change. Duncan has ably chaired our Executive Committee meetings, and always maintained a sense of humour and perspective. His leadership style has helped to foster camaraderie and good relationships around the Executive table and with our external stakeholders, such as LINZ, various government departments, banks and non-government organisations. Personally, I am delighted that Duncan is continuing on the Executive for another term and staying involved in the section's work, including as the Land Titles Subcommittee convenor.

I would also like to make the following acknowledgements:

1. Farewell to David Roughan who has just finished up on the Executive after serving three terms. David has been someone who has been forthright and willing to contribute on issues being faced by the profession. We thank David for his years of service.
2. Thank you to all our PLS members for voting in the recent elections. We had a very pleasing turnout.
3. Welcome to Michelle Hill from Dentons Kensington Swan on to the PLS Executive. Michelle has already been a great contributor in many areas affecting property law over the years and she will a great addition around the table.
4. An appreciation to the Executive for the confidence it has placed in me by nominating me to lead the PLS for the next year. The past 4 years as Deputy Chair have prepared me well for the wide range of issues being considered by the PLS on any given day, and I'm looking forward to the challenges that lie ahead.

Settlements with conveyancing practitioners – new guidelines being drafted

One of my first engagements soon after the PLS elections was to attend a meeting with representatives from the New Zealand Society of Conveyancers (NZSoC) and the ADLS Documents & Precedents ASPRE* Subcommittee (ADLS) to work through the various options being considered for settlements where vendors are represented by conveyancers in the post-bank cheque era.

As reported previously by Duncan in this column, a range of proposals for alternative settlement arrangements were being considered, due to the imminence of bank cheques no longer being available as a fall back.

NZSoC, ADLS and the PLS all agree that pressure must be kept on the 'powers that be' for an amendment to the Lawyers and Conveyancers Act so that conveyancers' undertakings can be made summarily enforceable in the same way as those given by lawyers are enforceable as officers of the High Court. With the endorsement of the New Zealand Law Society | Te Kahui Ture o Aoteara's Board, the PLS has written to the Ministry of Justice in support of NZSoC's request for such an amendment. However, we accept that a legislative amendment could be some way off and an interim arrangement is needed in the absence of bank cheques – one that protects clients, incoming and outgoing mortgagees, and the professional obligations of both lawyers and conveyancers.

There were four options on the table for discussion:

- an audio-visual link settlement arrangement with a simultaneous release of instruments and payment;
- reverse undertakings as embodied in current PLS guidelines 5.28 and 5.29;
- an escrow settlement arrangement whereby a 3rd party would hold the settlement funds, and
- a proposed deed of undertaking under s 18 of the Property Law Act.

After careful consideration, all have agreed that the best way forward is a new arrangement, whereby conveyancers acting for vendor clients should give their undertakings in the form of a deed. This would take us away from the current reverse undertaking and reflects a departure from the current PLS Guidelines. This new approach should – we believe – help to facilitate smoother settlements between our two professions whilst ensuring that necessary safeguards are in place for both lawyers' and conveyancers' clients, and their mortgagees.

A template deed of undertaking has been drafted, and will be included in an upcoming revision of the PLS Guidelines, along with amendments to the relevant guidelines. These changes will be referred to the NZLS Board for approval when it next meets on 25 June, but I am keen to see a draft version in circulation before then due to the fast-approaching sunset dates for bank cheques.

NZLS CLE Property Law Conference

It was wonderful to see and meet so many of you at the NZLS CLE Property Law Conference at Te Papa on 10 and 11 May. The conference was a great success and attended by over 300 practitioners. There are many people responsible for bringing this event together. I would like to mention the significant contribution by our planning committee. Duncan and I were pleased to work with Michelle Hill, Tim Jones and John Greenwood in bring the conference together. I'd also like to acknowledge NZLS CLE conference organiser, Phillippa Blair and her team for all of their efforts. Enjoy the fuller report from the Section manager and photos from the conference on page 9. ■

*Agreement for Sale and Purchase of Real Estate

FROM THE EDITOR

Unit titles reform

BY **JOHN GREENWOOD**

The Property Law Section prepared the New Zealand Law Society | Te Kāhui Ture o Aotearoa's submission on the (Unit Titles Strengthening Body Corporate Governance and other matters) Amendment Bill, which was tabled for the Finance and Expenditure Select Committee's consideration at a hearing on 12 May 2021.

The submission focused on three distinct parts being concerns over the content of the Bill; issues not addressed in the Bill but urgently to be addressed and then finally some important issues still to be addressed for future reform.

The submission noted there had been industry wide and body corporate criticism of the gaps and technical errors in the existing legislation and that the proposal to include additional urgent reforms should not delay the momentum in the Bill being passed.

Some of the key points in the submission follow.

The submission accepted the proposal that statutory duties should be imposed on body corporate managers. Noted duties include: the need to ensure that body corporates are not bound in contracts for terms that are too long; requiring better record keeping and stronger rules around handovers of body corporate records; and the ability to terminate contracts for non-performance. However, the submission did note that there were no offences or penalty provisions for managers or indeed there are none proposed in the Bill at all which remains a significant omission. Including penalties would help promote better behaviour.

We supported the need to prescribe a Code of Conduct for body corporate managers, similar to that proposed for body corporate committees in the Bill.

The troublesome area of utility interests was canvassed in the submission which suggested removing the concept of utility interest and replacing it with a more transparent phrase "share of operating expenses". Also, assessment may be better promoted by allowing majority decisions rather than special resolutions to pass assessments since voting on such issues tends to be governed by self-interest making it difficult to achieve reassessments of operating expenses.

The submission approved the suggestion that owners who owe levies should not vote nor should they be considered as part of a quorum, but they may participate in discussions.

The Law Society supports the amendment clarifying that the default provision is that matters are decided by way of ordinary resolution unless the Act provides specifically for the matter to be decided by special resolution. Mention was also made that there should be clarity around the issue of committee voting under section 108(2), which should be amended to state that all matters that require a special resolution are not able to be delegated to the committee since ordinarily committees votes are based on majority vote only.

There was acceptance around some controversy over proxy farming votes pointing out that building managers on occasion may have proxy votes by virtue of a lease with a power of attorney provision from owners with there being no ability for an owner to direct voting. For example, a lessee may vote against the owner's wishes disenfranchising owners particularly in relation to expenditure or larger maintenance costs.

The Law Society further commented that the new proposal concerning limiting proxy votes does not make allowance for situations where a couple or family trust may own several units but may want to appoint one of a group proxy to attend and vote for those owners. That should be an allowable exception.

It was pointed out by the Law Society that while there should be a limit on proxies the number suggested is too low to enable meetings to comply with meeting thresholds so the number of allowable proxies should be raised to enable more proxies to be held.

There has been much said around body corporate meetings being able to function remotely based on the Covid-19 pandemic amendments to the Unit Titles Act and we submitted that the existing section 88(3) amendment provision is preferred over the new proposed section 104A which was too onerous. Also, remote meetings should apply to both general meetings and committees.

The Law Society added that the

opportunity should be taken to consider verification for attendance both in person and remotely by signing a short declaration while in attendance or requiring pre-registration by owners attending remotely.

The point was also made that electronic voting prior to a meeting is used overseas and should be adopted in the New Zealand environment as well to encourage owner engagement.

The Law Society supported the provision that the Chairperson at a General Meeting should also be the Chairperson of the body corporate committee unless a body corporate decides otherwise.

We agreed that the decision making of the body corporate committee must be decided by simple majority vote with each resolution being recorded and included in the written records of the meeting. Further, that the committees must promptly report to the body corporate on the meetings it holds in the manner prescribed in the regulations.

The Law Society supports the introduction of a Code of Conduct for committee members and the separate conflicts provision which needs to also capture third party conflicts which can arise, such as where a manager also sits on a committee or where a committee member is to benefit from a remediation project.

The Law Society is also keen to see a defence of good faith provision to be provided for Chairpersons and committee members to encourage them to participate and volunteer in their unpaid roles.

We recommended that the regulations should be amended to clarify that committee proxies are not permitted, and also that committee members only have one vote.

The Law Society supports the view that the regulations need to include the use of email decision making and that only one owner or director of each unit may be elected to the committee to avoid the situation where committees are stacked by multiple owners from one or two units.

With regard to minority relief concerning committee decisions, the Law Society supports the view to fill a legislative gap that committee decisions should be subject to minority relief within 28 days after a decision is notified to all unit owners.

On the matter of Long-Term Maintenance Funds and addressing section 117(3), the Law Society supports the view that the threshold of requiring a special resolution if expenditure is to exceed 10% is unworkable. The Law Society suggested that the threshold should be an amendment by ordinary resolution if up to 25% of expenditure is previously approved.

Amendments proposed to section 139 concerning service contracts will require that a body corporate must not enter into a service contract before a control period ends that has an effect of granting a longer than 24 months contract period after the date that a control period

ends. The Law Society supports such a provision.

The Law Society also suggests that body corporates be entitled to upset arrangements because they are harsh and unconscionable. Entrenched provisions are often included in encumbrance arrangements, covenants and signage licences; where developers enter into long term arrangements that benefit only the developer but not the body corporate.

The overhaul of the existing disclosure regime is supported but the requirement to produce seven years of financial statements and audits is excessive and the Law Society recommended that a three year threshold be introduced. Further, the submission called for the disclosure requirements to be extended to include, as well as weathertightness issues and earthquake strengthening, fire upgrades and other structural issues.

In terms of dealing with small, medium and large residential developments, the submission recommended that it would be simpler and more transparent to reduce reporting requirements to simply require all committee minutes to be circulated to owners.

The Law Society supports the proposed reduction in Tribunal fees from $850 for Category 2 proceedings and $3,300 for Category 1 proceedings to $300 for Category 2 proceedings and $600 for Category 1 proceedings. The suggested reduced fees and related matters would however see that altered fees including mediation would in reality be $1,000 and $1,7000 respectively, which is still prohibitive and should be reduced even further when considering that the jurisdiction has a $50,000 limit of what can be contested.

The Law Society recommended that the following matters, although not included in the Bill, require urgent reform:

- including in section 74 schemes the need to reference to earthquake strengthening and including an offence and penalty provision to encourage good behaviour with an infringement notice regime where a body corporate can impose penalties direct rather than through a Tribunal or Court decision;
- insurance arrangements need to be clearer – where obtaining indemnity cover required an assessment of "not available in the market" and noting there was no mention of the types of cover body corporates can arrange where some body corporates were not insuring for earthquake cover at all, given the spike in the insurance market. There is also a need for clarity around the definition of standalone units and to address the confusion between sections 135(1) and 137(2)(b) referencing "full insurable value" and "full replacement cover" with no reference to what types of cover are required;
- mention was made in the submission of the need to have a default provision where numerous body corporates do not have any elected Chairperson or even a committee. The position put forward suggested that a majority of owners may in writing or otherwise by consensus appoint a person with authority to arrange insurance and to sign documents on behalf of the body corporate and arrange each year for the holding of an Annual General Meeting approving the body corporate insurance cover to be arranged and the adoption of a long term maintenance plan and for the Chair of the meeting be authorised to sign any section 147(3) certificate;
- there is also a need to expand the definition of "owner" to include occupiers and tenants to cover access arrangements in sections 80(1)(a) and 80(1)(d) and include in the definition of "directors" managers and like to capture Crown entities and territorial authorities or companies listed on the New Zealand Stock Exchange who may own units, with managers to be deemed directors for the purposes of such regulations.

Many worthwhile amendments were proposed, but there is still a need to overhaul the Unit Titles Act as part of a more comprehensive review. Hopefully the Bill with the most pressing additional amendments will pass to at least put some integrity back into the Unit Titles Act 2010 and its regulations. ■

> there had been industry wide and body corporate criticism of the gaps and technical errors in the existing legislation and that the proposal to include additional urgent reforms should not delay the momentum in the Bill being passed

SECTION MANAGER

Latest news

BY **KIM BULL**

NZLS CLE Property Law Conference

It was wonderful being able to gather with so many property lawyers at the NZLS CLE Property Law Conference on 10 & 11 May at Te Papa in Wellington. This year the conference was also delivered to over 100 delegates via live web stream. Natasha, Melissa and I enjoyed meeting members and potential members at our PLS stand, some of whom I have only corresponded with over email. It's always good to put faces to names. We even signed up a few new members.

There was a good mix of technical and non-technical sessions, which kept delegates interested and entertained. The interactive panel session at the end of day one, hosted by our new Chair, Mark Sherry, John Greenwood, Tim Jones and Sarah Wroe was particularly well-received. On the back of its success, we are delighted that Auckland barrister and PLS member, Sarah Wroe, has joined us as a regular columnist in *The Property Lawyer*. We hope you enjoy the slightly different format of her new column on page 16.

Michelle Hill, our newest PLS Executive Committee member and our commercial lease columnist also spoke on the first day. A key message from Michelle's session was "always negotiate release of liability on assignment **upfront** when negotiating the lease".

Alistair Marshall's business development session resonated with many – a key message being how important it is to distinguish yourself as an expert in today's market. One way of doing this is to provide potential new clients with educational and other information in your area of expertise. This brought to mind how useful our Accredited Specialist Scheme can potentially be to members who use it as part of their marketing strategy. Consider signing up next April if you meet the requirements, including 10 years of experience in property law, 50% or more of your practice being in property, and 10 hours of property-related CPD in the year preceding your application (and thereafter to retain your accredited status).

These are just a few of highlights from a full and informative two-day schedule. If you were not able to attend, I highly recommend you purchase the conference booklet via the NZLS CLE website *www.lawyerseducation.co.nz*.

Membership renewals

Membership renewals are fast approaching and this is an opportune time to thank you all for your financial support over the past year. It has been a challenging one, but we have come through it with our strongest ever membership base. Fees will remain unchanged at $180 (+GST) for first members in a firm, and $150 (+GST) for subsequent members joining. The one-off discount that was offered last year as a result of uncertainty surrounding the pandemic has been removed. We are pleased to be back to business as usual, but with the benefit of the lessons learned last year about new ways of working and new services we can deliver to members around the country. ■

PLS events calendar

Event	Venue	Date
LINZ/PLS/ LENZ webinar	Online	1 June
Thinking Property	Dunedin	17 June
Thinking Property	Tauranga	19 Aug
Thinking Property	South Auckland	23 Sept
LINZ/PLS/LENZ lunchtime seminar	New Plymouth	8 Sept
Thinking Property	Napier	25 Nov

REGISTRAR-GENERAL OF LAND

An update on 'no survivorship' procedures

BY **ROBBIE MUIR**

This article provides practice notes on the operation of 'no survivorship' notations made before the repeal of the Land Transfer Act 1952 (LTA 1952), related *e-dealing* arrangements, and procedures for removal.

Effect of 'no survivorship' notations for transfers and other dealings

The LTA 1952 made provision for the entry of 'no survivorship' notations to provide court oversight and protection for beneficial owners for land held in joint ownership by trustees. While these provisions were repealed by the Land Transfer Act 2017 (the LTA 2017), they are saved and continue to apply in respect of any land titles noted in that way before the repeal took effect (see clause 8, Part 1, Schedule 1 of the LTA 2017).

Where these 'no survivorship' provisions apply, any transfer, mortgage or other dealing with the land must involve no less than the number of joint proprietors who were registered when the words 'no survivorship' were first entered on the title. The only exception is where a dealing by fewer proprietors is sanctioned by the High Court, as provided in section 132 of the LTA 1952:

> **132 *Effect of entry***
> *After any such entry has been made and signed by the Registrar in either case as aforesaid it shall not be lawful for any less number of joint proprietors than the number then registered to transfer or otherwise deal with the land, estate, or interest without obtaining the sanction of the High Court.*

Where these 'no survivorship' provisions apply, any transfer, mortgage or other dealing with the land must involve no less than the number of joint proprietors who were registered when the words 'no survivorship' were first entered on the title

For example, if there were two joint proprietors when the 'no survivorship' notation was entered, they may transfer the land without court sanction providing both are a party to the transfer. But if they transfer to a sole proprietor, that proprietor will then need to obtain High Court approval for any subsequent transfer, mortgage or other dealing with the land.

E-dealings against 'no survivorship' titles

When an *e-dealing* is prepared against a title with the 'no survivorship' notation, Landonline displays a message to that effect. Upon pre-validation, a message will display advising that the transaction will step down for checking by Land Information New Zealand (LINZ) staff. In these cases, registration will only proceed if the instrument transferring or otherwise dealing with the land:

- involves no less than the original number of joint proprietors on the title when the "no survivorship" notation was originally entered, or
- is accompanied by a copy of a High Court order sanctioning the dealing if fewer proprietors are involved.

Removal of 'no survivorship' notation by order of the High Court

The 'no survivorship' notation may be removed from a title by order of the High Court under section 133(2) of the LTA 1952. Upon receiving a sealed duplicate of the order, LINZ will remove the notation from the title in accordance with section 133(3) and these restrictions will no longer apply.

In general, the 'no survivorship' notation cannot be removed simply by having the joint proprietors transfer the land to themselves or others.

Removal of 'no survivorship' notation by application to the RGL

While the Registrar-General of Land (RGL) does not have a general discretion to remove 'no survivorship' notations, and the LTA 1952 clearly contemplates High Court involvement and oversight in these matters, the judgment of Fogarty J in *Sell v Registrar-General of Land* [2013] NZHC 1219 suggests the RGL may have scope to

remove these notations without a supporting court order in certain circumstances.

In line with this authority, the RGL will consider removing 'no survivorship' notations in circumstances where it is clear that the land has been sold, by the requisite number of proprietors, in exercise of an express power of sale in accordance with the trust on which the land is held. This may be evidenced by a statement in the form of a statutory declaration by the lawyer acting for the joint proprietors transferring the land, or by the joint proprietors themselves:

- that the 'no survivorship' notation on the title refers to a trust of which the joint proprietors are trustees,
- that the joint proprietors have sold the land in the title to the transferees in exercise of an express power of sale under the trust,
- that the 'no survivorship' notation is no longer required, and
- requesting that the notation be removed from the title on registration of the transfer.

Another possible scenario is where trustees are simply winding up a trust, in exercise of an express power to do so in terms of the trust, but there is no sale to third parties. This is typically effected by a transfer by the requisite number of joint proprietors severing the joint tenancy, and evidenced by a statutory declaration. In these circumstances, the same reasoning in the *Sell* case applies. A request may be made for the removal of the notation, provided the relevant evidence is lodged with the dealing.

Removal of notation in other circumstances

In any other circumstances where removal of a 'no survivorship' notation is sought without the sanction of the High Court, it would be advisable to consult the RGL's office in the first instance before attempting to lodge documentation for registration with LINZ. ■

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E-DEALING CONSULTANT

Transmission amalgamating companies

Companies Office and LINZ compared

BY **DUNCAN TERRIS**

Background

When dealing with companies we search the Companies Register in much the same manner as a LINZ Land Register search and assume that the information is current and accurate. There are however a few pitfalls that are addressed in this article. In the past, the Companies Office seemed to impose more rigorous checks on name approval to ensure there was no same or similar name already registered. That seems to be less the case now, and it leaves respective companies to have their own 'fight' over matters of passing off and existing intellectual property interests. Problems that can arise as a result are illustrated in the case study below.

There seems to be less strenuous checking by the Companies Office with changes made to the Companies Register, as compared with the Land Register. There has been recent publicity in the High Court case of *Avon Parnell Ltd v Chevin* [2021] NZHC 650. LINZ officials are currently in discussion with the Companies Office to identify and close potential risk areas that could lead to wrongful alterations to the Land Register.

TSM company amalgamation – same name but different company: a case study

Following an amalgamation of companies in 2015, a dealing was recently lodged with LINZ to transmit the "affected" properties of 26 companies into the name of the amalgamated company.

Because of the delay in registering the transmissions 'TSMs', two of the companies listed on the amalgamation certificate had been removed from the Companies Register – one on the same day the amalgamation certificate issued, and one later in 2015. It also appears that these two companies had never owned property in the Land Register.

By the time the TSMs were lodged for registration, two new companies with the exact same names had been registered in the Companies Register, and owned property in the Land Register. Neither the Conveyancing Professional (CP) nor the Primary Contact realised that these were two entirely separate companies before submitting the dealing. In addition, LINZ understandably did not detect this before registering it. The registration error was raised with LINZ by a director of one of those companies.

When the matter was raised with the CP, they advised they had confirmed all of the records of title with the client, but because of the large number of titles (25 titles being dealt with in 10 separate TSM instruments) the errors were not noticed. In this example however, a cross-check of the company numbers should have identified that two companies listed on the amalgamation certificate were no longer registered in the Companies Register. In addition, a quick check of the details of the directors of those two companies should have raised further questions. Another potential red flag could have been that the two titles that had been transmitted in error related to properties in the North Island, when all of the other titles related to properties in the South Island.

Risk of fraudulent changes to Companies Register

We are all aware of the identity verification steps that LINZ requires of us with any e-dealing that results in a change in the Land Register. The requirements have worked well in fraud prevention for more than 15 years. Fundamentally, when dealing with an individual we cross check identity and link them to the property address.

Alterations to details in the Companies Office of a particular company can be done more easily by fraudsters filing a change of company officers and putting their own legitimate name as a director, for example. That allows the fraudster to pose as the authorised signatory for the company to raise a mortgage over the property owned by the company, or even sell it. Unfortunately, this is not a hypothetical example and the High Court judgment above has essentially this same fact scenario. It illustrates the need for vigilance when dealing with a new client involving a company transaction.

Recommendation

In a multiple amalgamation situation, a thorough search and cross check of the company names and numbers with linked directors and shareholders should reduce the risk of the above scenario happening to you.

Likewise, when onboarding a new client who is dealing with a company, extra care should be taken to ensure that they are the legitimate director (and shareholder if appropriate) of that company. Other checks such a sighting historical sets of accounts and conducting a Google search of the company and directors could assist in this regard. ■

COMMERCIAL LEASES

First penalty under overseas investment regime for lease transaction

BY **MICHELLE HILL** AND **GABRIEL STEWART-MURRAY**

THE HIGH COURT HAS JUST IMPOSED the first penalty on an overseas person for leasing land without Overseas Investment Office consent.

Regulation of commercial leasing is an area of the overseas investment regime that receives considerably less attention than its freehold counterpart. However, the lease of sensitive land for more than 3 years will be captured by the Overseas Investment Act 2005 (Act), and require consent, where the tenant is an overseas person. A tenant entering into such a transaction will therefore be subject to penalties under section 48 of the Act. Until the recent High Court decision of *The Chief Executive of Land Information New Zealand v Bin Zhao* [2021] NZHC 857, no overseas person has been fined under the regime for leasing sensitive land. In this article, we look at this case as it sheds some light on the Court's application of the penalty framework in the context of commercial leasing.

Michelle Hill

Gabriel Stewart-Murray

Background facts

Mr Zhao, a Chinese citizen entered into an oral agreement to buy a lifestyle block in Coatesville, Rodney. Upon arrival in New Zealand, Mr Zhao (who did not at that point have a strong grasp of the English language) was told he could not purchase the property because it would be a breach of the Act. Accordingly, instead, Mr Zhao and the vendor entered into a deed of lease for a term of 10 years, with one right of renewal for a further 10 years at a peppercorn rental. Mr Zhao also entered into a written agreement for the sale and purchase of the property, which was conditional on him obtaining residency, and was granted a power of attorney by the vendor in relation to the property. Since the date of the judgment, the transaction has settled.

In May 2018, after becoming a permanent resident of New Zealand, Mr Zhao reported his breach of the Act. Subsequently, the Chief Executive of Land Information New Zealand (Regulator) began an investigation into his involvement in the lease and agreement.

Issue

Since Mr Zhao admitted he was liable for giving effect to an overseas investment without obtaining consent, the Court's sole focus was to determine the quantum of the penalty imposed on Mr Zhao under section 48(2) of the Act.

Decision

Mr Zhao is an overseas person under the Act. The regulator did not plead that Mr Zhao made any gain from the transaction, that there was any loss suffered in relation to the breach or that there was any cost to remedy it. Therefore, the highest penalty Mr Zhao could face was $300,000.

The Court adopted the usual approach when determining civil penalties, which is to follow the criminal sentencing approach[1]. It must first identify any aggravating or mitigating factors of the contravening conduct to determine an appropriate starting point before adjusting the starting point in light of any factors that are specific to Mr Zhao that justify an increase or reduction in quantum of penalty.

The Court noted several factors that were relevant when determining penalty, including:

- Mr Zhao, now a permanent resident, is entitled to purchase the property;
- breaches involving leases should not necessarily be regarded as less serious than those involving the

purchase of freehold land;

- the power of attorney Mr Zhao had over the land meant it was intended that he have effective control over it;
- the structure of the arrangement meant there was an element of pre-meditation (although it was accepted that Mr Zhao believed the transaction was compliant);
- this was the first case of a self-reported breach under the Act involving a lease;
- the lease was for a period that far exceeded the three year threshold required to be captured by the Act; and
- the size and value of the land was significant.

While the Court considered these factors when determining an appropriate starting point for the penalty, the Judge noted that Mr Zhao had a limited grasp of the English language and relied on the advice of his lawyers to assess whether his conduct breached the Act.

> breaches [of the Overseas Investment Act] involving leases should not generally be regarded as less serious than those involving the purchase of freehold land

Commentary

This was the first case of a self-reported breach of the Act involving a lease. It was also particularly noteworthy, for property lawyers, because the Court made it clear that breaches involving leases should not generally be regarded as less serious than those involving the purchase of freehold land.

The case also demonstrates the importance of overseas persons gaining specialist advice before investing, whether by freehold acquisition or lease, in any sensitive land in New Zealand. ■

Michelle Hill is a Partner at Dentons Kensington Swan in Auckland. This article was written with the assistance of **Gabriel Stewart-Murray** a Law Clerk at the firm.

1. *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558.

RESOURCE MANAGEMENT

Local government facing legislative changes and legal challenges

BY **HELEN ANDREWS**

2021 CONTINUES TO SEE SUBSTANTIVE CHANGE AND action in the resource management and local government arena, much of which potentially has significant consequences for developers and landowners. In previous columns, we have outlined upcoming reform of our resource management legislation and introduction of new policy direction. In this edition, we highlight:

- the recently announced review into the future of local government; and
- legal challenges (by way of judicial review) to two important CBD and infrastructure projects in Auckland.

Review into the future of local government

Hot on the heels of the Randerson Panel's recommendations for reform of the resource management system, as well as significant changes to the provision of water services, a further shake-up of local authorities also appears to be on the cards.

On 23 April 2021, the Minister of Local Government, Hon Nanaia Mahuta, established an independent review into the Future of Local Government (the Review). The Review is to consider, report and make recommendations on this matter to the Minister.

Need for a review of local government

The need for (and therefore announcement of) the Review comes as little surprise, for several reasons.

First, the last major review and restructuring of local government occurred in the late 1980s, in conjunction with the introduction of the Resource Management Act 1991. Thus, it was somewhat predictable that such a review would also occur in parallel with the recently announced reforms of the resource management system.

Second, the need for such a review (and overhaul) of our local governance structure and functions was clearly signalled by the Randerson Panel itself. In that regard, the Panel noted (at page 6 of its report, New Directions for Resource Management in New Zealand) as follows:

> "There are two matters outside our terms of reference that we wish to briefly comment upon. The first relates to the reform of local government. It has become clear to us that the resource management system would be much more effective if local government were to be reformed. The existence of 78 local authorities in a nation of just five million people is difficult to justify. Much could be achieved by rationalisation along regional lines, particularly in improving efficiencies, pooling resources, and promoting the coordination of activities and processes. Reform of local government is an issue warranting early attention."

Helen Andrews

it was somewhat predictable that a review [of local government] would also occur in parallel with the recently announced reforms of the resource management system

Third, the local government sector itself, led by Local Government New Zealand (LGNZ) and Taituarā – Local Government Professionals Aotearoa, has consistently been seeking a programme of work to 'reimagine the role and function of local government'. They consider this workstream was required in order to build a sustainable system that delivers enhanced wellbeing outcomes for our communities.

Fourth, concerns have previously been raised regarding the future role (if any) that local government would fulfil, if it does not provide water services. In response, the Minister had already suggested that this is something that would be the subject of a future review, with a focus on the positive contribution local government can make to wellbeing.

Other factors that have contributed to the need for the Review are the technological and societal changes we have experienced since the Local Government Act 2002 was enacted, as well as the need for central Government to determine how the Treaty relationship should be provided for through the local

government system (and ensure that occurs).

Status and purpose of the Review

The Ministerial review is not a formal inquiry under the Inquiries Act 2013. However, the Review Panel's Terms of Reference (ToR) indicate that many of the operational matters (such as administrative support, planning and reporting) will be consistent with inquiries conducted under that Act.

The ToR also provide that the purpose of the Review is as follows:

> "The overall purpose of the Review is, as a result of the cumulative changes being progressed as part of the Government's reform agenda, to identify how our system of local democracy and governance needs to evolve over the next 30 years, to improve the wellbeing of New Zealand communities and the environment, and actively embody the Treaty partnership."

Scope of the Review

In short (and as the ToR describe it), the Review's scope "covers what local government does, how it does it, and how it pays for it". The scope also includes (but is not limited to) a future-looking view of the following:

- roles, functions and partnerships;
- representation and governance; and
- funding and financing.

Importantly, the impact of current reform programmes on local government, such as those related to the three waters sector and resource management system, are also within the scope of the Review.

To fully address this scope, the ToR state that the Review will have two areas of focus. The initial and priority focus will be on how local government will be a key contributor to the wellbeing and prosperity of Aotearoa in the future. In Stage 2, the Review will then focus on answering the priority questions identified during the Stage 1 scoping work.

Responsibility for and timing of the Review

Members of the Review Panel have been appointed through the Cabinet appointments process. Jim Palmer has been appointed Chair of the Review Panel, with the other panel members being John Ombler QSO, Antione Coffin, Gael Surgenor and Penny Hulse.

The timeframe for the Review is as follows:

- The Review may commence from 3 May 2021.
- An interim report will be presented to the Minister signalling the probable direction of the review and key next steps on 30 September 2021.
- A draft report and recommendations will be issued for public consultation on 30 September 2022.
- The final report of the Review will be presented to the Minister and LGNZ on 30 April 2023.

Next steps and opportunities for engagement

Unsurprisingly, the ToR state that the Government will "welcome the work of the Review but will not be pre-committed to the implementation of its findings". Thus, it can be expected that that as is the usual process, Cabinet will consider the findings of the Review, before announcing what responses will be made in respect of those findings. Accordingly, it will be some time before any action is taken (or reforms implemented) as a consequence of the Review.

The ToR also require the Review Panel to undertake a "robust" engagement process throughout the duration of the Review. As

such, developers and landowners should be looking for, and taking up, opportunities to participate in the Review, as they arise. We will keep readers updated in that regard, in future columns.

Key CBD and infrastructure projects the subject of legal challenges

Continued (and potentially increasing) legal challenges to key projects required to support development are perhaps a sign of things to come. For example, Auckland Council and Waka Kotahi respectively are currently the subject of two such challenges, by way of applications for judicial review to the High Court.

First, the "Save Queen Street Society" (SQSS, led by developer Andrew Krukziener) has judicially reviewed Auckland Council's proposed works to further pedestrianise Queen Street. Auckland Council (together with Auckland Transport) have long signalled their intention that such works should be progressed in the near future. However, their plans were significantly accelerated when they used last year's Level 4 lockdown as an opportunity to hurriedly implement many of the planned measures on at least a temporary basis. That was done under the guise of providing pedestrians on Queen Street with further space for "physical distancing".

Many shop owners and developers with interests in Queen Street have subsequently raised concerns regarding the poor quality of the temporary works. They considered these were further discouraging (and preventing) people from accessing Queen Street, at a time when visitor numbers to the CBD had already been decimated by boarder closures.

In response, Auckland Council proposed to implement a pilot project of more permanent pedestrianisation works, similar to those already seen in High Street. SQSS has therefore sought a judicial review of the Auckland Council's decision-making around that pilot programme, as well as an injunction to stop those works commencing in the interim.

The interim injunction was unsuccessful and the pilot programme has just commenced. However, it is likely that the substantive judicial review will still be pursued.

Second, climate change advocates All Aboard Aotearoa (AAA) have applied to judicially review the $1.4b, Waka Kotahi lead Mill Road project in Auckland. The proposed 21.5km Mill Road arterial route has been in the planning for some time and would provide an alternative route between Manukau and Drury, running parallel to and to the east of State Highway 1. It is one of the projects included in Supporting Growth's agenda, aimed at easing the current congestion on State Highway 1.

AAA's challenge is on the grounds the project will have a negative impact on carbon emissions and climate change. As such, it is inconsistent with Aotearoa's international commitments (in particular under the Paris Agreement), as reflected in the Climate Change Response Act. AAA also considers the project to be inconsistent with the Government's recent declaration of a climate change emergency. If successful, it can reasonably be anticipated that AAA (or similar groups) will also seek to challenge further large infrastructure and other projects on the same basis.

We will provide updates on both judicial review proceedings in future columns, as they become available. ■

Helen Andrews is a Partner at Berry Simons Environmental Law in Auckland.

SUSTAINABILITY

Sustainability and affordable housing

BY **DEBRA DORRINGTON**

At least one sustainability development goal directly and undeniably impacts the day-to-day work of a property lawyer. Sustainable Development Goal 11 reads "*Make cities and human settlements safe, resilient and sustainable*".[1]

Our success or otherwise will be measured by the "proportion of urban population living in slums, informal settlements or inadequate housing." This target is one set for achieving the goal.

> "By 2030 ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums"

Unless there is significant and urgent change in how we provide housing, we will fail to meet both the target and the end goal.

By dint of process, we as property lawyers are intrinsically involved. We facilitate the existing system. We profit from the liveliness of the market. That keeps us so busy and focused on the technical aspects of our instructions that, even with the best of intentions, we are slow to question the bigger picture.

Consider doing more.

Architects in Australia have spearheaded a new system of property ownership in the Nightingale developments and there is no reason lawyers cannot proactively seek a better system here. There are stages in the development process when broader issues can easily be raised – when designing ownership structures for example. We can engage in conversations too, both amongst ourselves and with influencers and decision-makers, to evolve thinking around legal and financial structures needed to address housing affordability in New Zealand.

Recent tweaking of the law aims to deal with the lack of affordability, but in my view, achieving widespread affordability requires more fundamental change. It is worth understanding what role greater flexibility in how we own and occupy our homes might have in providing housing to all New Zealanders.

We facilitate the existing system. We profit from the liveliness of the market. That keeps us so busy and focused on the technical aspects of our instructions that, even with the best of intentions, we are slow to question the bigger picture

Community living

Co-operative living is commonly seen as a way of making housing more affordable. Quite aside from the benefits of living with shared responsibilities to others, sharing facilities reduces cost.

There is a willingness in New Zealand to create communities of co-operative living. Earthsong[2], Cohaus[3], Peterborough Housing Cooperative[4], OHU[5] and the Urban Habitat Collective[6] are all examples, but our systems and our laws don't make it easy to establish these communities. Many groups with great ideas and great energy have fallen by the wayside in frustration. Without a regulatory structure that supports the development and funding of affordable housing, only the robust and the well-funded survive the journey.

Those who do are forced to manipulate their structure to fit our legal and taxation systems – at significant cost. I remember a co-house client explaining that the cost of their tax and legal advice meant sacrificing the planned children's playground.

Across the Tasman others are doing better.

Housing as a commodity

In New Zealand we are wired to believe that owning property is about making money – whether we're flipping or we're staying in one home for decades. Property is viewed in terms of an investment, a commodity, irrespective of whether it is also a home. The country is missing a universal system that enables home ownership without it being our retirement fund strategy. We would do well to have known processes, available, simple, robust and accepted structure documents and regulations, and mainstream funding mechanisms that bypass this assumption.

Because of the absence of specific financial and legal structures, New Zealand co-housing generally results in private ownership of homes (albeit it with shared ownership of common areas). Consequently, even in these housing

structures, challenging the commoditisation requires a system that restrains on-sale prices. The communal aspect of the development and the use is not enough of itself. It provides one round of affordable housing, but subsequent prices are left to the market.

Ownership of the property by a co-operative or by a single philanthropic owner, for whom profit is not the underlying objective, might enable restrictions on the terms of transfer to be more easily embedded.

Nightingale

Nightingale Housing began in 2007. A group of architects, concerned at issues of sustainability and the quality of housing, purchased a block of land in inner city Melbourne and built a residential development called The Commons. They followed principles of sustainable and affordable housing. Now a not-for-profit social enterprise is behind the Nightingale projects, established initially to ensure information garnered from early projects was shared.

Architects can now apply for licences to develop housing projects using the Nightingale principles. They pay a fee. If they are accepted as a licensee, they receive intellectual property relating to the completion of the developments. Information and lessons learned continue to be shared.

Purchasers of Nightingale homes are found using a ballot system.

Four developments have been completed using these principles. Twelve more are underway. The housing:

- is minimalist in design
- includes communal facilities
- will be carbon neutral in its operations
- is energy efficient
- prioritises public transport, shared vehicle use and bicycles over individual car ownership.

The homes are initially sold at cost, not a profit:

- to residents only
- with a percentage retained for community housing providers
- using a ballot system that gives priority to some – including essential workers and carers.

A re-sale system operates that retains affordability. Homeowners agree to the registration of a caveat on the title limiting re-sale options. The sale price is limited to an amount equal to what the owner bought the property for plus a percentage increase equal to the increase in median house prices since the property was bought. The relevant increases might relate to the suburb where the property is or might be more broadly determined.

Canada

It is interesting to see the proactive steps Canada is taking as it aspires to the same 2030 target as New Zealand. They have introduced a national housing strategy which supports "the development of game-changing even disruptive ideas to dramatically improve housing affordability and sustainability." The goal is to develop world-leading strategies to deal with housing problems.

A performance measure focuses on new ways of working with traditional and non-traditional partners towards creating options for housing solutions.

The Expert Panel on the Future of Housing Supply and Affordability actively examines housing systems and the National Housing Strategy Solutions Lab funds organisations exploring new ways of dealing with housing challenges.

A fund of Can$300m is available to support the removal or reduction of barriers to housing supply. Organisations (for profit and not-for-profit), government entities, teams of experts and others can apply for funds to develop their ideas about solving barriers to the supply of housing.

Perhaps we can learn from the new ideas these initiatives produce. ■

1. *https://sdgs.un.org/goals*
2. *www.earthsong.org.nz*
3. *http://cohaus.nz/*
4. *www.peterborough.nz*
5. *https://ohu.nz/*
6. *www.urbanhabitatcollective.nz*

MĀORI LAND

Alienating Māori land

Requirements, limitations, and recent amendments

BY **CLAIRE TYLER**

The Te Ture Whenua Māori Act 1993 (the Act) uses the term 'alienation' to encompass many kinds of Māori land transactions. The definition of alienation is very wide and includes every form of disposition of Māori land.

For instance, it extends to any sale or gift of Māori land, the making or grant of any lease, licence, easement, profit, mortgage, charge, or encumbrance. It also extends to any deed of family arrangement for succession and the creation of a trust over Māori land.

Significantly, pursuant to section 146 of the Act, no person (including Māori land trusts and incorporations) has the capacity to alienate any interest in Māori freehold land otherwise than in accordance with the Act.

Trusts and incorporations

Māori land trusts and incorporations are governed, in relation to alienation, by near-identical sections of the Act. If either entity wishes to alienate any land vested in them through sale or gift, they require the consent of either 75% of the owners (if no owner has a defined share in the land), or from the owners who, together, own 75% of the beneficial interests in the land.[1]

Trusts are subject to a new rule preventing trustees from alienating land in this way if the status of the land has been changed from customary to freehold land.[2] If either entity wishes to lease the land for more than 52 years ("long-term lease"), they only require consent from at least 50% of the owners (if no owner has a defined share in the land) or from the persons who collectively own at least 50% of the beneficial interests in the land.[3] Any alienation by sale or gift must be confirmed by the Court.[4]

Under section 152 of the Act, the Court must grant a request for confirmation of an alienation of Māori freehold land if it is be satisfied that:

- the administrative requirements for the alienation have been met, as set out in the Māori Land Court Rules 2011;
- the alienation is not in breach of any trust to which the land is subject;
- the consideration properly takes into account the value of the land, buildings, fixtures, minerals and anything growing on the land and is adequate in the circumstances;
- any purchase money involved has been secured with the the Māori Trustee or court appointed agent or trustees; and
- the right of first refusal for sale or gift to members of the preferred class has been complied with, under section 147A, if relevant.

Mortgages or other long-term instruments of alienation (which includes leases, licences, and forestry rights, for example), need to be forwarded to the Registrar,[5] for issuing of a certificate of confirmation and noting. The instrument will receive a certificate of confirmation and noting if the Registrar is satisfied, under section 160(3) that:

- The administrative requirements for the instrument have been met; and
- The alienation does not contravene any provisions of the Act and is not in breach of any trust to which the land is subject.

Significantly, the instrument has no force or effect until the certificate has been issued and noted by the Registrar.

Any instrument of alienation effective for less than 21 years does not require noting by the Registrar.[6]

Collective ownerships

The owners in common of a block of Māori freehold land wishing to alienate are largely governed by the same rules as trusts and incorporations. There is one notable exception, being that instruments for alienations of *any* length of time (not only those over 21 years) require a certificate of confirmation and noting by the Registrar.[7]

New amendments

Recent amendments to the Act have changed some of the alienation rules. Since 2002, any trust, incorporation, or owner of Māori freehold land wishing to sell or gift land is required to offer the 'preferred class of alienees' (which includes an owner's descendants or cousins, the hapu connected to the land, or their trustee representatives) a right of first refusal.[8] The amendments, which came into force in February, give entities more guidance for carrying out their rights: how notice must be sent, to whom, and what the deadlines for refusal must be.[9]

Conclusion

Many clients will not understand that they are not able to deal with their Māori land freely. It is important that property lawyers are aware of the complexities that alienations involve, and therefore know when to advise clients to take further legal advice. ■

1. Sections 150A(1)(a) and 150B(1)(a) Te Ture.
2. Section 150A(1A).
3. Sections 150A(1)(b) and 150B(1)(b).
4. Sections 150A(3)(a) and 150B(3)(a).
5. Sections 150A(3)(b) and 150B(3)(b).
6. Sections 150A(3)(b)(ii) and 150B(3)(b)(ii).
7. Section 150C(3)(b).
8. Section 147A(1).
9. Sections 147A(2) – (7).

RELATIONSHIP PROPERTY

Parties cannot contract out of the Family Protection Act

BY **STEPHANIE AMBLER**

Nearly 40% of marriages and civil unions in New Zealand each year are remarriages. Second, or even third, marriages and de facto relationships are becoming increasingly common, many involving children from previous relationships. Couples embarking on subsequent or later in life relationships are more likely to enter into contracting out agreements to give themselves certainty around division of assets in the event of a separation, particularly those wanting to ensure that their assets are passed down to their children. But many people do not realise that a contracting out agreement will not prevent their partner making a successful Family Protection Act claim against their estate.

Background

Matthews and Phochai,[1] concerned a de facto relationship between Mr Matthews and Ms Phochai. Mr Matthews had been married twice and had three children and Ms Phochai had been married twice with two children. The de facto relationship commenced in mid-2005 and they executed a contracting out agreement around the same time. The agreement provided that separate property would remain separate, as would salary and wages, and that the agreement was to be binding in all circumstances, including death. During the relationship, the parties maintained separate bank accounts and had not intermingled income or assets and lived in a house belonging to Mr Matthews.

Mr Matthews died in 2016 and his will did not make any provision for Ms Phochai as it pre-dated the de facto relationship. Ms Phochai made a claim against his estate for provision under the Family Protection Act, on the basis that Mr Matthews had breached his moral duty to provide for her.

Family Court proceedings

During the Family Court proceedings, Mr Matthews' son, the main beneficiary under the will, accepted that Mr Matthews had a moral duty to provide for Ms Phochai and had failed to do so. The key issue before the Family Court was what proportion of the estate was required to rectify Mr Matthews' breach. The Family Court awarded her a 30% share of the deceased's assets, which was appealed on the basis that it was more than the minimum necessary to rectify the breach.

High Court proceedings

The High Court stated that it was settled law that a contracting out agreement cannot settle or exclude future claims arising under the Family Protection Act, because it is contrary to public policy.[2] However, the court considered that the existence of a contracting out agreement could be relevant to assessing what was required to rectify the deceased's breach of moral duty. The court acknowledged that the duty to the surviving spouse was usually paramount, but that the approach would be different where the deceased had been married more than once and where there were adult children from a previous relationship.

The court concluded that the Family Court award was greater than the minimum necessary to rectify the breach and reduced it to 25% of Mr Matthews' estate. The court considered that the Family Court had overestimated the value of the estate and underestimated the value of Ms Phochai's assets. The Family Court had also, erroneously, taken Ms Phochai's need to support her family into account. The High Court accepted that Mr Matthews had no obligation to support Ms Phochai's family, particularly considering the contracting out agreement. As the Family Court had upheld the contracting out agreement, the High Court held that the agreement was relevant to fixing the award, which should therefore be at the lowest end of any potential range.

Conclusion

The prohibition on excluding Family Protection Act claims from contracting out agreements means that a spouse or partner may end up in a better position if their partner dies than if they separate, as the Family Protection Act will allow them to circumvent the contracting out agreement. Parties who want their assets to remain separate after death, may need to consider putting the assets in trust. This puts them beyond the reach of the Family Protection Act but can result in those assets being subject to a claim under sectioin 182 of the Family Proceedings Act in the event of a marriage breakdown. ■

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1. *Matthews and Phochai* [2020] NZHC 3455.
2. *Matthews and Phochai*, above n1, at [38].

RELATIONSHIP PROPERTY

Court of Appeal declines equal sharing of all trust assets

BY **CATHERINE BRYANT**

A recent Court of Appeal case *Dyer v Gardiner* [2020] NZCA 385 is a timely reminder of the dangers that new relationships can pose to existing trusts. Although the parties' 12-year marriage ended in 2012, the dispute over the assets of a trust settled by Ms Gardiner before they met is still ongoing eight years later.

Background

The trust was set up for the benefit of the principal beneficiary, Ms Gardiner's adult son, who had health issues rendering him dependent on his mother. When the parties married, Mr Dyer automatically become a discretionary beneficiary. Six months later, Mr Dyer met with Ms Gardiner and the other trustee, Mr Clark, to discuss Mr Dyer's desire to become a trustee and for the trust to be amended to enable him to become the beneficiary of 50% of the trust's assets five years from the date of the parties' marriage. Mr Clark described that meeting as "acrimonious".[1] Shortly after, Mr Dyer disposed his portfolio of shares to the trust for $46,960.16. He had acquired those shares from income he earned after the parties married. Fifteen months after the marriage, Mr Dyer became a trustee.

Acquisition of shares

In 2001, Ms Gardiner started a new job and was entitled to buy shares in the employer company or nominate a third party as the purchaser. Ms Gardiner nominated the trust which paid for the shares by borrowing from Ms Gardiner and using a loan arranged by her employer. In 2009, Ms Gardiner acquired further shares which she was required to purchase in her own name and not transfer for a certain time. Ms Gardiner paid for those shares through the trust and signed a declaration that she held the shares on behalf of the trust.

The tax debt and guarantee

During the marriage, the High Court found Mr Dyer's annual net income was $24,000. In 2005, the IRD advised Mr Dyer that he had been assessed as owing $199,000 in unpaid tax, including interest and penalties. The IRD agreed he could settle his tax liability by paying $100,000 to avoid the risk of bankruptcy, which he did by the trust guaranteeing a loan for Mr Dyer of up to $280,000. Following the parties' separation, the trust renegotiated its guarantee down to $200,000, but Mr Dyer defaulted on his obligations under the loan, requiring Ms Gardiner to take out a personal loan of $200,000 to cover his debt. At the time the parties separated, Mr Dyer's current account in the trust was in deficit by $29,426. During the marriage, the trust had also paid a litigation debt of $60,000 for him.

At the time of separation, the main assets in the trust were shares worth $432,215 and the family home, purchased after the parties married. Mr Dyer sought a half-share of the net sale proceeds of the family home, worth approximately $675,000, and a half-share of the current values of the shares held by the trust, and dividends on those shares, from the date of the parties' separation to the date of the hearing.

High Court and Family Court

In the Family Court Mr Dyer relied on sections 44, 44C and 11B of the Property (Relationships) Act 1976 and section 182 of the Family Proceedings Act 1980. The Family Court awarded him half the value of the shares under section 44(2) and the entire amount in the parties' current account with the trust under section 11B(2) to compensate him for the absence of a family home, but declined to make any orders under section 182. Ms Gardiner and the trust appealed, and Mr Dyer cross appealed the refusal to make section 182 orders. The High Court set aside the orders made under sections 44(2) and 11B(2) and dismissed all aspects of Mr Dyer's cross-appeal.

Court of Appeal

Section 44

Section 44 empowers a court to set aside dispositions of property that are made to defeat the rights of any person under the Act. It can apply to any property, not just relationship property. The Court of Appeal held that Ms Gardiner had disposed of all of the shares to the trust, even those acquired directly by the trust, because there was no real difference between Ms Gardiner acquiring them and transferring them to the trust, or the trust acquiring them directly through the right of assignment. Under cross-examination, Ms Gardiner acknowledged that she transferred relationship property to the trust to protect it from any claim by Mr Dyer. Accordingly, the Court of Appeal agreed with the Family Court that Ms Gardiner intended to defeat Mr Dyer's claim to the shares at the time she disposed of them to the trust.

The court can only grant relief under section 44(2) if it is satisfied the recipient did not acquire the property in good faith and for valuable or adequate consideration. The Court of Appeal was satisfied that the trust acquired the shares for either valuable consideration, as it paid market price for all the shares, either through loans from Ms Gardiner that she forgave under the gifting arrangements or by the trust taking responsibility for repaying money that was loaned to it to buy the shares.

However, the court held that the trust did not acquire the shares in good faith because the trustees were aware that the arrangements would ensure Mr Dyer could

not claim the shares and that that was the purpose of the arrangement. The court then considered whether it could make orders for relief. Subsections 44(2)(b) and (c) were not available and the court did not consider that it was appropriate to use section 44(2)(a) on the basis that, aside from $45,000 in 2001, none of the money used to purchase the shares was ever relationship property, the shares were not freely tradeable, and section 44C was a more appropriate avenue for relief.

Section 44C

Section 44C applies to dispositions of relationship property to a trust where the disposition has the effect of defeating the claim or rights of one of the spouses and section 44 does not apply. Unlike section 44, the disposition does not need to be made to defeat the claim of a party to the relationship. The court first considered whether it could grant relief under section 44C, because it had found that section 44 did apply. It concluded that the purpose of the requirement was to prevent double relief, so that the court was not prevented from granting relief under section 44C on the basis that it had chosen not to exercise its discretion under section 44(2).

The court held that relief was limited to the share portfolio that Mr Dyer had disposed of to the trust and the employer shares that Ms Gardiner had disposed of to the trust because they were both relationship property. In considering whether to grant relief in relation to Mr Dyer's shares, the court held that the factors favouring relief were that Mr Dyer's share disposition was significant at the time, there was little other relationship property available for division, and the shares were relationship property before being sold to the trust and were paid for from relationship property. The factors against granting relief were the significant direct and indirect benefits that Mr Dyer had received from the trust. Overall, the court decided to grant Mr Dyer a sum of money to compensate for those shares, as it would be too difficult to order that some of the trust's shares be transferred to him, due to the passage of time and intermingling with other shares owned by the trust.

In determining whether to grant relief in relation to the trust's shares in Ms Gardiner's employer, the court considered that Mr Dyer's true loss was being deprived of an interest in the increase in value of those shares. Again, favouring relief were the significant value of the shares and that there was little other relationship property available for division, and against were that the trust had acquired the shares from its own resources and the significant benefits to Mr Dyer from the trust. The deciding factor for the court in granting relief was Ms Gardiner's acknowledgement that the trust had acquired the shares to defeat Mr Dyer's interest. The court concluded that Mr Dyer was entitled to half of the increase in value of the shares and half of the dividends paid since separation.

Section 11B

Section 11B(2) provides that the court must award each spouse "... an equal share in such part of the relationship property as it thinks just in order to compensate for the absence of an interest in the family home". The Family Court held it therefore had the power to award all of the parties' current account with the trust to Mr Dyer in order to compensate him for the fact he has no interest in the parties' family home. The High Court disagreed and considered that he could not receive more than 50%.

The Court of Appeal held that "the section presupposes the existence of a pool of relationship property that would not otherwise be available for equal division. It is therefore a provision that will rarely be engaged."[2] If there is relationship property available to compensate a party for the absence of an interest in a family home, the court must then award equal shares, which in this case equated to equal shares of the combined trust current account.

Section 182 of the Family Proceedings Act

Prior to the commencement of the relationship, the trust was settled with $30,000 of shares, Ms Gardiner's then house, and was made a beneficiary of her life insurance policy. None of these were ante-nuptial settlements and, at the time of the marriage, Mr Dyer would not have had any realistic expectation of an interest in trust assets.

After the marriage, the trust sold the house and purchased a new property using the sale proceeds, a mortgage, and $80,000 from Ms Gardiner. The parties lived in the house without paying rent, but maintained the house, paid rates and entered into gifting arrangements to enable the trust to repay part of the mortgage. The trust also acquired the shares from Ms Gardiner's employer. The court concluded that these transactions were nuptial settlements for the purposes of section 182, as they resulted in the trust acquiring assets that would otherwise have been relationship property.

In considering whether Mr Dyer should acquire an interest in this property, the court compared his position after separation to what his position would have been had the parties not separated and concluded that there was little difference between the two positions. If the parties had remained together, it was highly unlikely that the trust would have conferred any trust property on Mr Dyer, as the primary purpose of the trust was to ensure Kevin's long-term care and welfare. Having refrained from exercising their discretion throughout a 12-year marriage, the trustees were unlikely to change their minds. The court tested its conclusion by asking, theoretically, how the trustees would likely have reacted had Mr Dyer requested a share of the trust's assets after 12 years of marriage, and concluded that the trustees would have rejected any such request. Therefore, the end of the marriage did not affect Mr Dyer's position in relation to the trust's assets. Accordingly, the court concluded that it should not grant Mr Dyer relief under section 182.

Conclusion

This case illustrates the Supreme Court's approach to section 182 of the Family Proceedings Act in *Clayton v Clayton*, that the court must compare the spouse's position after the dissolution of the marriage with their position had the marriage continued, not their position had the nuptial settlement not taken place.[3] The Court of Appeal rejected equal sharing of all trust assets and Mr Dyer did not receive a share of what was essentially the parties' family home. ■

Catherine Bryant is a professional support advisor with Tompkins Wake.

This article is republished courtesy of *The Family Advocate*, Autumn 2021, volume 22, issue 3.

1. *Dyer v Gardiner* [2020] NZCA 385 at [18].
2. *Dyer v Gardiner*, above n1 at [139].
3. *Clayton v Clayton* [2016] NZSC 30 at [54].

A PROPERTY LAWYER'S BRIEF

Lifestyle bliss

BY **SARAH WROE**

This new column by Sarah Wroe follows the great success of the "practical, real life scenarios" panel session at the 2021 NZLS CLE Property Law Conference. It takes the format of an informal exchange of correspondence between a property lawyer and barrister.

Dear Sarah,

I would appreciate your views on a covenants case that I am dealing with. My clients have agreed that I could run this past you so that you can point me in the right direction. We don't need a full advice at this stage.

My clients Mr and Mrs Baggins are the owners of a lifestyle block. The block was created as part of a subdivision. There are four blocks in the subdivision. Each of the blocks in the subdivision is subject to a land covenant and the clause below is contained within that land covenant. Mr and Mrs Baggins and two of their neighbours have built new homes on their land and have modest outbuildings. The owner of the fourth lot, Mr and Mrs Gamgee have built a large equestrian facility and they are using it for commercial purposes. They have not built a house on the block. The structure is a large building that looks more like a commercial warehouse. Your client says that it sticks out like a sore thumb and ruins the landscape.

The covenant reads as follows:

That the covenantors shall not erect or permit to be erected or placed on the servient lands or any part thereof, any building or erection other than a single (not being existing building previously occupied or used or removed from another locality) single dwelling house and such farm outbuildings or ancillary buildings as are usual and reasonable for the type of rural use of the land in the subdivision (of which the dominant land and servient land form part) and of a nature, design or style (including that of a garden or landscaping aspects and fencing of surrounding grounds) in keeping with each other such that the dwelling house and any additional building and the surrounding grounds, therefore, blend in with the rural nature of the surrounding area to ensure that a pleasing and ascetically compatible appearance is maintained for the benefit of the dominant land and all the servient land.

What should I advise Mr and Mrs Baggins in respect of this structure built by the Gamgees?

What steps could the Gamgees take and how might they defend any application or legalise the structure?

Kind regards,

GANDALF
Solicitor, Middle Earth

Dear Gandalf,

To give your clients full advice I would need a lot more information. What follows are some preliminary thoughts and some cases that you might want to look at more closely.

Mr and Mrs Baggins clearly believe that the equestrian facility does not comply with the covenant. Are they right? To advise them on that, you will need to adopt the approach that the court would follow. Interpreting clauses in a covenant is simply an exercise in contractual interpretation – as you will know, that means ascertaining the meaning that the document would convey to a reasonable person having all of the background knowledge that would have been available to the parties. Since the contract under scrutiny is also a registered instrument and subject to the principles of indefeasibility of title, there are some rules of interpretation which are unique to this context. In *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2019] 1 NZLR 161 the Supreme Court held that:

"(a) […] registered documents should be construed without regard to extrinsic evidence which is particular to the original parties and is not apparent on the face of the register.

(b) This does not limit rights to apply for rectification […].

(c) We would not exclude reference

> to facts which a reasonable future reader of the document could be expected to be aware of and would recognise as relevant and which they have access to, such as the configuration of land, any physical features to which the document relates or refers and any material referred to in the document."

That means that any documents around the history of the subdivision or previous uses of the land will not be admissible to aid interpretation unless it fits within (c) above.

In most cases, and certainly here, the words such as "nature, design or style" and compatible etc should be given the natural and ordinary meaning which fits the context with the contract.

The situation the Baggins are facing is very close to the case of *Taylor v Small* [2020] NZHC 2023. In fact, the wording of the covenant is identical. In *Taylor v Small* Justice Gordon found that the equestrian facility did breach the covenant as it was different in nature to the existing sheds and dwellings in the subdivision and not of the quality and topology of the other dwelling-houses. She interpreted the word "style" as a general reference to the quality and type of the buildings in the subdivision. The style of the equestrian facility was very different to the other dwellings and outbuildings in the subdivision and was thus a breach of the covenant.

Since litigation is always costly and uncertain, Mr and Mrs Baggins should consider whether there is anything that they would accept as a solution which falls short of asking for removal of the building. Would they accept any changes to the building itself, or landscaping, or would they live with it if the Gamgees paid compensation? If negotiation does not result in a pragmatic solution, an application can be made to the High Court for a mandatory injunction requiring removal of the offending structure. That application was successful in *Taylor v Small*. The only factor counting against an injunction was the cost and inconvenience in having to remove the building. In that regard Justice Gordon held that the defendants had been the authors of their own misfortune.

Do not forget to check the terms of the covenant for provisions that allow costs of enforcement to be claimed on an indemnity basis or possibly liquidated damages that can be claimed up to the date of remedy of the breach.

You also asked about the Gamgees and what approach they might take. Generally, a client facing an allegation of breach of covenant will have the option of negotiating a resolution through making changes on their land or offering a payment to avoid litigation. Clients will usually be very reluctant to accept that

their neighbours can dictate what they do on their own property no matter how clearly the covenant is worded. You will have to hope that the Gamgees get clear advice about the likely cost and any clauses in the covenant that might give rise to indemnity costs against them or liquidated damages. *Taylor v Small* was a long running dispute that went up to the Court of Appeal and back down again. It will have been very costly on both sides. If Mr and Mrs Gamgee do not appreciate the reality of the likely costs and risks of litigation, they may not be prepared to make enough concessions to secure a deal that avoids court.

If court proceedings are issued, aside from defending the claim on the basis of interpretation, Mr and Mrs Gamgee might apply to extinguish or modify the covenant under sections 316 and 317 Property Law Act 2007. Section 317 sets out the criteria that need to be met for an order to be made. You should read it carefully. These include things like a change in the nature or extent of the use of the benefited or burdened land and or in the character of the neighbourhood since the creation of the easement or covenant, or the proposed change will not substantially injure any person entitled under the covenant. The court will adopt a two-stage approach, identifying if a criterion is met and then considering if discretion should be exercised in favour of modification or extinguishing the covenant.

The Supreme Court has recently considered the operation of section 317 and related issues in the case of *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157. The history to this case illustrates how difficult these cases can be as the Court of Appeal over-turned the High Court and the Supreme Court then allowed the appeal but took a slightly different approach to the High Court. In allowing the application for modification in the *Synlait* case, the Supreme Court endorsed a move towards a less conservative approach to section 317 whilst recognising the balancing exercise between the sanctity of contract and property rights and the public policy of proper and full utilisation of land. There it was acknowledged that the proposed change to a covenant would make it harder for the owner of the benefited land to apply for resource consent to carry out quarrying activity (the right to do so being protected under covenants). Since it would not be substantially or significantly harder, the court allowed the modification. Rezoning was also a relevant, though not a decisive factor.

Returning to Mr and Mrs Gamgee's possible defence, there is nothing that suggests that they would succeed under a section 317 application. The best advice for them is to negotiate some changes in the exterior of their building or additional landscaping or perhaps a payment of compensation to your clients. Failing that, they would have to be told that a court order to remove the building is likely to follow – if the Baggins can fund court action.

In my experience, the cases most likely to settle and avoid court are those where the clients and the lawyers have managed to remain civil and professional and avoid unnecessarily aggressive correspondence.

Do not forget to check the covenant for any dispute resolution terms and remember mediation is always an option too.

Good luck!

Kind regards,

Sarah Wroe
Barrister

Sarah Wroe is a barrister practising from Eldon Chambers in central Auckland.

The editor welcomes ideas for future scenarios that readers would like to see covered in this column. Please email them to *property@lawsociety.org.nz*, with *The Property Lawyer* in the subject line.

Become a mentor, develop yourself while giving back

With a new CPD year kicking off now is a good time to think about what your development goals will be for the year ahead, and this year you could think about becoming a mentor.

The New Zealand Law Society runs an online mentoring programme where we match mentors with mentees to help support and guide them in their professional growth. Becoming a mentor is a very rewarding way to help someone else, while developing yourself. It's free to sign up, and you can agree on the expectations around how often to meet and the type of support you can provide.

You don't need to wait to be very senior to become a mentor. Often it can help to have someone who has recently experienced what the mentee is going through. ■

If you're interested in signing up or have questions, email: *mentoring@lawsociety.org.nz*

REGULATORY

Cheques being phased out has implications for lawyers' trust accounting

BY **THE NEW ZEALAND LAW SOCIETY INSPECTORATE**

THE USE OF CHEQUES BY BANKS IS ENDING THIS YEAR. Law firms still using cheques should be preparing to change to electronic payments. The Law Society inspectorate has some guidance on substitute payments of cheques relating to trust accounts.

There has been a quiet revolution in the last decade or more as electronic banking has largely replaced cheques as the dominant mode of payment in New Zealand. This change is looming to its conclusion as various banks signal they will cease accepting cheques. Various dates across 2021 are understood to be:

28 May	ASB stops issuing all cheque books and bank cheques
31 May	ANZ stops cheques
31 May	MOJ will no longer be processing incoming or outgoing cheques after 31 May 2021
25 June	Westpac stops cheques
30 June	BNZ stops cheques
27 August	ASB stops cheques

The Ministry of Justice has further guidance on methods of payment:

- *www.justice.govt.nz/fines/ways-to-make-or-receive-a-payment*
- *www.courtsofnz.govt.nz/file-and-pay*

Law firms rarely issue trust account cheques but should now look to cease these completely as these dates approach. The obvious alternative is making the payment electronically where this is possible.

As noted above, applications that used to be common for cheques, for example probate fees, can now be made by credit card.

There have been instances where making the payment electronically is not possible; for example, this has been commonly found in payments made to Immigration NZ; visa application fees etc.

In such instances firms have been using their credit cards to make the payment and then arranging to recover the amount paid from their client as a disbursement. The Law Society inspectorate is comfortable with these arrangements, so long as the recovery is bona fide, supported by evidence of client authority, and the funds are available for such.

In most instances that authority will be implicit but if not readily apparent, then explicit authority should be secured. Explicit authority could be as simple as an exchange of emails where the client confirms the transaction.

Two scenarios will commonly arise:

- where a client has funds in the trust account that would ordinarily have fuelled a cheque, then the expected accounting treatment would be to complete a journal to your Firm's Interest in Trust ledger (if you operate a FIT ledger) or an electronic payment to the office account reimbursing yourselves for that payment.
- Where a client does not have funds in the trust account (ie an advance from the practice usually via the FIT ledger would ordinarily have fuelled a cheque) then the credit card payment is a disbursement that needs to be recovered either by way of your debtors' system (accounts receivable) or if your software permits as a debit balance awaiting when the client does have monies in the trust account. Of course, a practice can only accumulate debit balances to the extent of the available counter-balance in their FIT ledger.

It is planned that the Lawyers Trust Account Guidelines will be re-drafted later this year to reflect the cessation of cheques.

The credit card payment is not a trust account transaction, but the transfer of the reimbursement is. As with all disbursements the recovery can only be made at cost, ie firms cannot add any additional element or margin. Any charge for the time spent on making payments should be billed as a fee rather than by uplift.

Further detail and guidance on billing clients and recovering disbursements can be found in our practice briefing on Open and Transparent Billing.[1]

Whilst the credit card is not a trust account record, firms are reminded that that they should take great care over the use of that facility and be mindful of the potential for scamming.

CERT NZ is the government agency established to help New Zealand better understand and stay resilient to cyber security threats. CERT guidance in this area is simple:

- Keep an eye on your bank accounts and credit cards – always check your statements.
- Ring the bank and query any suspicious payments or withdrawals as soon as you see them.[2]

We would add that physical control of the credit card should be carefully managed, and a log of usage may be considered.

If lawyers have any queries, they are encouraged to discuss these with the inspectorate by emailing *inspectorate@lawsociety.org.nz*. ■

1. *www.lawsociety.org.nz/professional-practice/practice-briefings/open-and-transparent-billing*
2. *www.cert.govt.nz/individuals/guides/get-started-cyber-security*

THOMSON REUTERS

Westlaw AU case notes

04 FEBRUARY 2021 TO 05 MAY 2021

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CONTRACT

Ma v Li

14/4/2021, Andrew Associate Judge, High Court, [2021] NZHC 792

Civil procedure – Summary judgment

Contract – Parties – Agency

Equity – Remedies – Specific performance

Property – Real – Sale and purchase agreements

Successful application by M for summary judgment against L; L listed residential property for sale with agent for $1.35m; M made an unconditional offer of $1.05m; L made counter-offer with purchase price of $1.14m believing M would not buy at that price; agent presented offer to M which she accepted; M paid deposit; L had expected to use signed contract as marketing ploy to encourage further offers; L claimed she had arguable defence to summary judgment that agent had no authority to present counter-offer to M; M's first three affidavits did not follow procedure and attest to her belief that L had no defence and include grounds for that belief.

Held, failure of M's early affidavits due to genuine misapprehension about requirements; failures were not calculated to prejudice defendant or delay proceedings; undisputed that both parties signed an unconditional standard form contract for sale and purchase of land; M not advised by L or agent that it was not a genuine offer; clear offer and acceptance on objective assessment; L's contention that she did not intend to be bound rejected; L's agent did not make counter-offer but was intermediary that presented L's counter-offer to M; *Ngoi v Wen* [2017] NZCA 519 confirmed contract formed when purchaser communicated acceptance to vendor's agent; M established L had no defence to summary judgment; L ordered to perform sale and purchase agreement between M and herself within 30 days; application granted.

CAVEATS

Teece v Veint

9/3/2021, Paulsen Associate Judge, High Court, Invercargill, [2021] NZHC 409

Equity – Defences – Laches

Property – Real – Easements

Property – Real – Encumbrances – Caveats – Removal

Remedies – Specific performance

Successful application by T to sustain caveat lodged to protect contractual equitable easement; in 1997 T, a New Zealander living in the US, purchased Paradise Block ('PB'), part of Arcadia Station ('AS') near Glenorchy, from V to develop tourist lodge; as part of sale and purchase agreement T obtained right of access to use and potentially extend airstrip on AS, if creating airstrip on blocks 1 and 2 of PB proved not to be feasible; easement issue remained outstanding on settlement; T subsequently sought advice on viability of constructing airstrip on PB; advice indicated blocks 1 and 2 were not suitable for constructing airstrip, although other parts of PB potentially were; T brought proceedings seeking legal easement in 2003 and lodged caveat asserting interest over three titles of V's land pursuant to easement agreement; parties agreed to stay proceedings in 2004; T sought to revisit airstrip issue in 2019 after V entered into agreement to sell AS; agreement acknowledged T's caveat and right of first refusal to acquire land; T brought present proceedings in 2020 after V applied to Register-General of Land to lapse caveat.

Held, T was required to justify continuing caveat by establishing reasonably arguable case for claimed interest in AS; onus then fell on V to completely satisfy Court that T's legitimate interests would not be prejudiced by removing caveat; V's argument proceeded on basis that T had not made a decision that creating airstrip on blocks 1 and 2 was not feasible; in fact T had decided that airstrip was not feasible in 2003 and purported to exercise contractual right to call for legal easement; whether T breached implied term to act promptly was no longer relevant; fact of delay did not establish T's lack of good faith; while nothing meaningful happened in relation to easement between 2004 and 2020, parties mutually decided to stay Court proceeding in 2004 and V took no further interest in issue because he did not then intend to sell AS; while delay prejudiced V as he was now elderly, sought to retire from active farming and faced penalty interest claim, caveat was acknowledged in agreement to sell AS and purchaser's refusal to settle did not appear justified; could not be satisfied that T would not require use of airstrip on AS in future and legal right to use airstrip might be of significant monetary value; despite V's age, not convinced delay meant justice could not be done between parties; undertaking by T to pursue proceedings diligently required condition of sustaining caveat; application granted.

MĀORI LAND

Mercury NZ Ltd v Waitangi Tribunal

30/3/2021, Cooke J, High Court, Wellington, [2021] NZHC 654

Administrative law – Judicial review – Justiciability
Civil procedure – Parties – Standing
Maori law – Land – Claims
Maori law – Maori jurisprudence – Tikanga principles
Maori law – Treaty of Waitangi – Waitangi Tribunal – Reports

Largely successful application by MNZL and others for judicial review of WT's preliminary determination regarding applications for two areas of land to be returned to Ngati Kahungungu ('NK') ownership; WT had been given the power in 1988 to order that lands transferred to state-owned enterprises were returned to Maori; resumption power had only been used once; WT had (a) found Treaty breaches in relation to NK in the Wairarapa, and (b) issued a preliminary determination on resumption; proposed returning land (a) at Pouakani in the central North Island which was used for a power scheme operated by MNZL and (b) licensed Crown forest land at Ngaumu in Wairarapa; Pouakani land had been transferred to NK after their Wairarapa land had been adversely affected by activities of European settlers; Pouakani land was (a) in the traditional area of other iwi including Raukawa and (b) essentially useless; part of it had subsequently been compulsorily acquired by Crown for hydro-electric power generation; Ngaumu land had been acquired by Crown in mid 1800s using processes that involved manifold breaches of Treaty; MNZL challenged decision of WT to exclude it from being heard in relation to Pouakani land; Crown, MNZL and Raukawa argued that WT had misinterpreted resumption powers; needed to be a much closer nexus between claim and the land; WT had erred in ordering resumption of Pouakani land because it was in the traditional area of Raukawa and Ngati Tuwharetoa; proposed decision was unlawful because it was inconsistent with tikanga and involved a contemporary breach of the Treaty; Crown argued that WT had misapplied the provision for compensation for Ngaumu land by including penalty interest; should only have been awarded interest to maintain real value of compensation; four year period for compensation under s 36 of the Crown Forest Assets Act 1989 should be extended; Crown had done its best to progress matter, but delays were out of its control; two NK entities opposed the judicial review application; argued that a preliminary determination of WT was not reviewable; narrow interpretation of Treaty legislation should not be adopted; WT was specialist body authorised to assess whether resumption was a proportionate response to Treaty breaches; had taken into account tikanga and mana whenua issues; NK was already occupying other land around Pouakani so that was not an outcome of WT's decision; opposed Crown's arguments in relation to compensation for Ngaumu land because WT's adverse findings were open to it on the material provided.

Held, WT's preliminary decision was susceptible to judicial review; was for Court to control the scope of its judicial review jurisdiction; should not be restricted by a technical reading of legislation to only allow review of a particular type of proposed decisions; preliminary decision had been made by body that would make final decision, with no right of appeal against that decision; WT had reached firm conclusions; was not a preliminary view of the law; had issued proposed decision so parties knew where they stood and could consider their options; MNZL's right to be heard was engaged, but was clear that Parliament had expressly intended that bodies like MNZL were not to be heard on resumption applications; would be able to challenge final decision by judicial review; Crown could also call MNZL witnesses when it appeared before WT; WT had misinterpreted resumption powers in ss 8A and 8HB of the Treaty of Waitangi Act 1975 ('TOWA'); provisions required claims to concern the land sought to be returned, in situations where land had been acquired by Crown from Maori in breach of Treaty principles; could be thought of as Maori resuming the exercise of full mana whenua; WT's approach meant that the claim did not need to involve breaches involving loss of rangatiratanga over the land; resumption could be ordered when there was no criticism of the Crown's acquisition of title; would be an interpretation dislocated from Treaty; TOWA provisions did not create a land-in-lieu jurisdiction; concerned return of lands that rightly belonged to Maori; remedial aspect should not be interpreted narrowly; but resumption power was not available to provide remedy for other breaches suffered by NK; was specifically focused on Treaty breaches associated with loss of mana whenua over the land in question, and appropriateness of return of the land; WT undertook a wider analysis than Parliament contemplated; assessed impacts of Crown's Treaty breaches on NK overall, then considered whether to order resumption to remedy those; approach went beyond adjudicative role given to WT; did not have discretion to make decisions that were inconsistent with tikanga or would involve contemporary breach of Treaty; tikanga formed a key part of the law to be applied, rather than merely being a relevant consideration; WT had held that it was not granting mana whenua and could not do so; but its conclusion was not consistent with tikanga in relation to mana whenua; NK's lack of mana whenua over the Pouakani lands was very significant; was not fatal to resumption claim but the fact that other iwi had mana whenua over that land probably would be; WT had erred in its approach to compensation in relation to Ngaumu lands; was insufficient identification of Crown's obligations and consideration of factors relevant to that obligation; challenges by MNZL and others to WT's findings were upheld in relation to (a) the connection between the claim and the land and (b) inconsistency with tikanga and principles of Treaty; challenge by Crown to WT's determination in relation to interest was upheld; WT's preliminary determination set aside; WT directed to reconsider claims; application largely granted.

Nicholls v Nicholls

19/2/2021, O'Regan J, France J, Williams J, Supreme Court of New Zealand, [2021] NZSC 8

Civil procedure – Appeals – Leave to appeal –Supreme Court

Maori law – Land – Trusts – Types – Ahu whenua trusts

Trusts – Breach of trust – Remedies – Accounting for profits

Unsuccessful application by GN for leave to appeal Court of Appeal ('CA') decision; GN one of the beneficial owners of Maori freehold land where he operated a holiday park; Trust successfully sought in Maori Land Court ('MLC') orders for GN's removal from the land and accounting to Trust for income earned from the campground since its inception; GN's appeals to Maori Appellate Court and CA were unsuccessful; GN sought leave to appeal on grounds (a) MLC did not have jurisdiction under s 18(1)(a) of Te Ture Whenua Maori Act 1993 ('TTWM') to order a giving of account as between beneficial owners and (b) trustees did not have the power under s 220(2) of TTWM to seek remedies against co-owners, by way of account for money they may have received.

Held, proposed grounds of appeal had insufficient prospects of success; not necessary in the interests of justice to hear the proposed appeal; application declined.

RELATIONSHIP PROPERTY

Young v Young

4/3/2021, Gordon J, High Court, Auckland, [2021] NZHC 369

Civil procedure – Costs – Ability to pay

Family law – Relationship property – Ownership or title

Successful application by Mrs Y for costs in two related proceedings; proceedings concerned residential property held by Mrs Y and her son, Mr Y, as joint tenants; Mr Y's former wife, Ms Kim ('K') brought proceedings claiming Mr Y's half share was relationship property under the Property (Relationships) Act 1976 ('PRA') and should be divided equally between them; Mrs Y then brought proceedings, supported by Mr Y, claiming beneficial ownership of the entire property and seeking orders under (a) s 339(1)(b) of the Property Law Act 2007 ('PLA') vesting the entire property in her and (b) s 142 of the Land Transfer Act 2017 to remove K's Notice of Claim; Court found for Mrs Y in both proceedings and dismissed K's claim except for order by consent under s 33(c) of the PRA vesting specified items in K and Mr Y as their separate property; Mrs Y sought costs against K as successful party.

Held, as the successful party, Mrs Y was entitled to a costs award against K; PLA proceeding was of average complexity and costs assessment on 2B basis was appropriate; factoring in an adjustment to Mrs Y's schedule for arithmetical error and deductions for double-counted appearance and incorrect number of days, Mrs Y was entitled to costs and disbursements of $40,027 for PLA proceedings; as Family Court ('FC') transferred proceedings under s 38A(1) of the PRA, they were deemed to have originated in Court, which had jurisdiction to award costs for FC phase; exception to High Court Rules 2016 costs regime was appropriate as Mrs Y's claim of $5,516 was for a lesser amount; while K lacked means to pay costs, they could not be reduced as she had not provided a basis for Court to consider abatement; application granted

TRUSTS

Clemett v Clemett

26/2/2021, Hinton J, High Court, Auckland, [2021] NZHC 317

Trusts – Trustees – Appointment – Court appointed

Trusts – Trustees – Dismissal, retirement or removal – Removal – By Court

Successful application by Mrs C for order under s 51 of the Trustee Act 1956 ('TA') removing herself and Mr C as trustees of Howmac Trust ('HT') and appointing Comac Trustees Ltd ('CTL') as sole trustee; Mr and Mrs C were now estranged and lived on separate floors of their former family home; Mr C, whose multiple sclerosis had confined him to a wheelchair, refused to engage with Mrs C on any matter concerning HT, except through lawyers; Mrs C had struggled to sort out matters concerning HT and to stave off demands and make payments to creditors for debts incurred concerning the four properties HT owned; properties were now in poor condition and HT had no cash; Mr and Mrs C received modest incomes, in Mr C's case from a sickness benefit; Mr C, who paid rates and insurance or one of the properties from his benefit, seemingly wished to remain in control of HT, but was unable or unprepared to take any effective action.

Held, a clear-cut case for Court to make orders; no objection was raised to CTL as suitable professional, independent trustee; while reluctant to remove Mr and Mrs C as trustees given Mr C's condition, inability to communicate with one trustee would make situation unworkable for a professional trustee; s 51 of the TA provided powers both to remove and to appoint trustees where it was inexpedient, difficult or impractical to do so without Court's assistance; Mr C's refusal to cooperate in conduct of HT, meaning Mrs C had to fund trust expenses personally and repairs could not be carried out, was ample justification for making orders sought; CTL had consented to appointment and removal of both parties, as Mrs C sought, was appropriate; as HT trust deed provided for minimum of two trustees and made no provision for corporate trustee, would order variation accordingly; orders made vesting properties in CTL as trustees for HT; Mrs C entitled to have her legal costs paid from trust fund; application granted.

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UNIT TITLES

Een v Body Corporate 384911

1/4/2021, Gordon J, High Court, [2021] NZHC 729

Civil procedure – Application – Originating

Property – Real – Title – Unit titles – Body corporates – Rights and powers

Unsuccessful application by E to set aside resolution passed by BC regarding provision of security by BC, majority of units comprised and run as five star hotel, hotel closed due to Covid 19 then reopened after refurbishment, security before closure provided by hotel, majority BC members submitted same level of security needed to manage security risks and for insurance purposes, two resolutions put before BC members (a) special resolution where hotel would provide security at no cost to BC, and (b) ordinary resolution where BC would arrange for security and levy the cost from members, minority voted against special resolution and it was defeated, minority voted against ordinary resolution but was passed by majority, minority submitted they were excluded from sharing in benefits of hotel so should not share in costs associated with it; BC asserted minority could participate in hotel, just not on previously enjoyed terms as hotel landscape less lucrative since Covid 19, minority submitted cost of security exorbitant and level of security above what was required.

Held, minority's choice not to participate in hotel on the available terms; security for building as a whole and minority received benefit too, if minority benefitted then they should pay share of cost, minority voted against security at no cost to them when could have accepted on no prejudice basis, cost not excessive as security put out tender and preferred option was lowest priced, minority did not establish material unfairness or injustice at the high level required, application refused. ■

CONTRACT

MGH Trah Ltd (vendor) v Fox Mortimer Trustee Company Ltd (purchaser)

[2021] NZCA 59 – Goddard, Lang and Hinton JJ – 11 March 2021

Unsuccessful appeal from decision declining claim for default interest on sale of residential property at Coatesville (Lot 2) – ASP (REINZ/ADLS 9th ed) included vendor warranty limiting construction on Lot 1 (cl21) – Purchaser filed proceeding relating to infringing vendor proposal for Lot 1 – Consent orders restricted construction pending trial – Purchaser notified claim for compensation in event non-compliant building proceeded – Interim sum deducted on settlement and held by appointed stakeholder – HC found: (i) cl21 was restrictive covenant which could be registered against title – granted permanent injunction restraining non-complying building; (ii) no breach of cl21 causing loss – sum held by stakeholder to be paid to vendors; (iii) claim for default interest refused – Vendor argued whole of purchase price should have been paid on settlement date given HC finding no compensation was ever payable and default interest was payable on unpaid portion – CA held: (i) by paying interim amount to stakeholder, purchaser taken to have met obligations under cl3.8(1) regardless of underlying merits of claim – interim amount paid on due date for purposes of cl3.12 – reasonableness of party's actions irrelevant; (ii) express provision in 10th ed, REINZ/ADLS that no interest was payable on interim amount (except net interest on stakeholder deposit) inserted by way of clarification.

COVENANTS

Kaimai Properties Limited (Kaimai) v QEII National Trust (Trust)

[2021] NZCA 10 – Kos P, Cooper and Gilbert JJ – 15 February 2021

Unsuccessful appeal from decision declining declarations that open space covenants (OSCs) permitted expansion of quarry into covenanted areas – OSCs signed in 2005 by then owner of quarry land (D) – D believed he made it clear flexibility was required to allow quarry to expand – Under cl4.1 quarrying not to be carried out without prior consent of Trust – Kaimai purchased quarry land in 2009 with knowledge of OSCs and after legal advice – Under ASAP, D to assist in resolving any issues relating to OSCs and problem with boundary adjustment was not anticipated – In 2015 Kaimai informed Trust of request to expand quarry – Kaimai's position that cl4.1 obliged it to consult but Trust could not veto expansion – Trust considered it had veto and declined consent – HC upheld Trust position: meaning of cl4.1 plain

and not necessary to address extrinsic evidence; no common intention that OSCs would provide for right to expand quarry as basis for rectifying common mistake; rectification based on D's unilateral mistaken intention also rejected – CA upheld HC interpretation of OSCs and refusal of rectification – Application for variation might address circumstances that covenants were entered into without full understanding by former owner and Trust would have accepted smaller area accommodating expansion.

LEASES

Wanaka Stakeholders Group Inc v Queenstown Lakes District Council and anor

[2021] NZHC 852 – Van Bohemen J – 21 April 2021

Successful judicial review – HC declared Queenstown Lakes District Council decision to grant long-term lease of Wanaka Airport to Queenstown Airport Company to be unlawful – Lease amounted to a transfer of control of Airport, which was a strategic asset – Council had not followed process Local Government Act (LGA) required to transfer strategic asset control – Council consultation process carried out before granting lease also did not comply with LGA – Proposal on which the Council consulted did not fairly represent nature of decision to grant the lease – Court declared decision to grant lease to be unlawful, lease to be unlawful and set it aside.

PUBLIC WORKS

Minister of Land Information (Minister) v Dromgool (Objectors)

[2021] NZCA 44 – Cooper, Clifford and Goddard JJ – 5 March 2021

Successful appeal from decision setting aside EnvC report approving taking of land under s24(7) Public Works Act – TEL (network operator) sought easements to construct an electricity transmission line between Kaikohe and Kaitaia – Preferred route crossed land set aside for treaty settlements and agreement refused – Minister approved route across objectors' land after other routes rejected – EnvC found Minister's response to request under s186(1) RMA was "fully discretionary", adequate consideration was given to alternative routes and methods and taking of land was fair, sound and reasonably necessary for achieving objectives – HC allowed appeal and set aside report on basis Minister's discretion was not unfettered – Minister was required to consider s24(7) factors including alternative routes and methods – TEL's consideration was not to be attributed to Minister – CA considered role and obligations of Minister under s186 – Minister needed to be satisfied that project was capable of achieving favourable report under s24(7) but not personally to assess merits and choose between alternative means of achieving objectives – EnvC entitled to proceed on basis Minister's agreement indicated TEL (having relevant knowledge and expertise) had considered alternatives – EnvC report confirmed.

Dilworth Trust Board (Dilworth) v AG

[2021] NZCA 48 – Miller, Gilbert and Courtney JJ – 8 March 2021

Successful appeal relating to NZTA land beneath Newmarket viaduct compulsorily acquired in 1960s and 1970s – HC found lands were no longer required for original public work as at Oct 2012 but allowed Crown more time to consider whether land was required for another public work (s40(1)(b) Public Works Act), for exchange (s40(1)(c)) or whether an exemption under s40(2) applied – Dilworth wished to reacquire land subject to encumbrances for viaduct monitoring and repair – Following HC decision, Chief Executive of LINZ determined one block of land should be offered back but other was required for another public work as bus layover – CA found: (i) clear obligation to conduct s40 process within reasonable time after land no longer required – approach approved in Williams v Auckland Council – duty to complete process timeously arose even where NZTA made honest error about ongoing need for land – Judge wrong to allow more time to consider s40(1)(b) and s40(1)(c) and should have determined application of those provisions – time had also passed for Chief Executive or Crown to exercise discretion under s40(2)(a) – nothing to support positive finding as to exemption under s40(2)(b); (ii) declaratory relief warranted – Dilworth's interests not purely commercial when return on landholding maintained charitable purposes – Orders to offer lands to Dilworth on terms.

RELATIONSHIP PROPERTY

Cowan (C) v Cowan (father)

[2021] NZCA 31 – Miller and Goddard JJ – 24 February 2021

Successful application to lodge second caveat – Father was registered owner of properties at Lyall Bay, Wellington and Carterton – Sole legal title obtained by survivorship following death of wife (C's mother) – In 2002 couple had agreed father would "sell and gift his share" of the "joint family home" at Lyall Bay to C – Couple agreed relationship property settlement before wife died in Mar 2019 – Settlement provided Lyall Bay property to be wife's held on trust for benefit of children – Carterton property to be father's separate property – Caveat sought to prevent imminent sale of Lyall Bay property to developer – Associate Judge declined caveat on basis 2002 agreement was inconsistent with later one and must have been abandoned – CA found it plainly arguable C was beneficial owner and father knew that when he agreed to the sale – Record generally evidenced wife's continuing intention and father's agreement that Lyall Bay property go to C – Arguable that 2002 agreement subsisted unless and until replaced by 2019 one and both envisaged Lyall Bay property to be held in trust for C – Leave to lodge second caveat in interests of justice.

Preston v Preston

[2020] NZCA 679 – Kos P, Wylie and Muir JJ – 21 December 2020

Partly successful appeal relating to relationship property orders – Mrs P challenged orders declining: (i) under s182 Property (Relationships) Act, share of assets of trust Mr P established before marriage; (ii) to allow Mrs P's trust to purchase holiday home at specified price – CA upheld findings: (i) amendment adding "wife" as discretionary beneficiary under Mr P's trust deed was nuptial settlement – arrangement in contemplation of marriage with continuing provision in capacity as spouse – no requirement that settlement involve spousal vesting to trigger s182; (ii) Judge did not err in declining provision under s182 as matter of discretion – Mr P's children were fundamental raison d'être for the trust, trust assets acquired well before marriage and no contribution by Mrs P – Ward v Ward and Clayton v Clayton distinguished; (iii) Judge erred in approach to holiday property occupied by Mrs P – Mrs P's trust was entitled to transfer having triggered right to purchase – order to complete at specified price.

MĀORI LAND

Mercury NZ Ltd and ors v Waitangi Tribunal and ors

[2021] NZHC 654 – Cooke J – 30 March 2021

Successful judicial review challenges brought by Mercury NZ Limited, the Raukawa Settlement Trust and the Crown against preliminary Waitangi Tribunal determination that lands be returned to Ngāti Kahungunu – Tribunal erred to direct that land could be returned as a remedy for wider Treaty breaches – Breach needed to concern land in question – Tribunal also erred to direct that land in the rohe of Raukawa and Ngāti Tuwharetoa should be returned to Ngāti Kahungunu – Not consistent with Treaty or tikanga principles -Tribunal also erred to award interest under the statutory compensation scheme – Tribunal did not take into account the reasons for the delay in determining the particular claims being addressed as required.

RESOURCE MANAGEMENT

O'Keeffe v New Plymouth District Council (Council)

[2021] NZCA 55 – Brown, Clifford and Goddard JJ – 10 March 2021

Unsuccessful appeal from decision declining judicial review of Council decision granting resource consent – Redevelopment of St Mary's Cathedral complex in New Plymouth – Challenge to non-notification – Alleged inadequacy of information and failure to address issues relating to traffic/parking, special events, viewshafts and visual amenity in assessing affected persons for purposes of notification decision – HC found Council conclusions were reasonably reached and based on adequate information – Even if that were not the case, matter would have been remitted to Council for limited notification given substantial prejudice to church and lack of substantial prejudice to appellant if relief granted – Appellant asked CA to quash consent for special events and grant declarations of unlawfulness in respect of "visual/viewshaft" issues and costs – HC decision confirmed.

Mawhinney (M) v Auckland Council

[2021] NZCA 144 – Brown, Gilbert and Katz JJ – 29 April 2021

Partly successful appeal from decision restricting M from commencing or continuing proceedings relating to specified parcels of land in Waitakere Ranges for period of 5 years – Lengthy history of challenges to local authority decisions on subdivision and resource consent matters – HC found 3 proceedings were "totally without merit" under s166 Senior Courts Act – CA considered: meaning of phrase "totally without merit"; whether Judge erred in finding "bound to fail" threshold met and exercising discretion to grant order; whether "exceptional circumstances" test met for order of 5 years duration – CA concluded Judge amply justified in making s166 order but grounds for making order for 5 years not made out – Matters constituting "exceptional circumstances" not properly identified – Order for 5 year period set aside and order for 3 years substituted. ■

CPD *Calendar*

NZLS CLE Ltd
Continuing Legal Education
New Zealand Law Society

PROGRAMME	PRESENTERS	CONTENT	WHERE	WHEN
PROPERTY & TRUSTS				
WILLS AND ESTATES ADMINISTRATION *1.5 CPD hours*	*Anna O'Callaghan* *James Pullar*	Upon a client's death, issues centred around wills and estate administration can deeply compound an already stressful situation for all involved. Following on from a session at the Christchurch General Practitioner CPD Day in February this year, this webinar will help you make sense of the changing landscape in this complex area. It will include consideration of: common pitfalls, key case law developments, and the interaction between trust law and the administration of estates.	Webinar	26 May
EMPLOYMENT LAW – BUSINESS SALE & PURCHASE *2 CPD hours*	*June Hardacre* *Simon Mitchell*	Understanding the obligations to employees when buying or selling a business is essential in helping to ensure a smooth transition from one owner to another. This seminar will look at some of the key obligations that arise, including: requirements regarding employment contracts, vulnerable employees, consulting with employees, and redundancy entitlements.	Auckland Live Web Stream	27 May 27 May
COMMERCIAL PROPERTY – SUBLEASES *1.5 CPD hours*	*Mark Anderson* *Antionia Shanahan*	COVID-19 with the associated moves through the various lockdown levels and the extremely adverse impact on the economic landscape has resulted in significant anguish for commercial landlords and tenants alike. In the current environment, it is likely that you will have clients who are closely considering a potential sublease option. This webinar will take a practical approach to help ensure that you are able to provide effective advice in this area irrespective of the party that you are assisting.	Webinar	2 Jun
PROPERTY & SUSTAINABILITY - PRACTICAL TOOLS *1 CPD hours*	*Debra Dorrington*	This webinar is essential for property lawyers who want to protect both client interests and the environment by anticipating upcoming changes. Topics covered: How the Climate Change Response Act 2002 affects legal advice around property ownership, development and construction. How wider sustainability issues influence your advice to clients regarding risks and rewards: and practical tools to apply sustainability concepts for more effective boardroom decision-making.	Webinar	16 Jun
TRUSTS CONFERENCE – 2021 A TRUSTS ODYSSEY *13 CPD hours*	*Chair: Greg Kelly*	Described as "New Zealand's Premier Trust Conference" and the "Most useful update on current issues & developments in Trust Law" the biennial NZLS CLE Trusts Conference, now in its 12th year, will once again offer an excellent programme providing practical advice by a stellar line up of presenters.	Auckland Wellington Live Web Stream	21-22 Jun 28-29 Jun 28-29 Jun
RESIDENTIAL PROPERTY TRANSACTIONS *13 CPD hours*	*Lauchie Griffin* *Michael Hofmann-Body* *Nick Kearney* *Duncan Terris* *Anita Wan*	This small group intensive workshop guides you step-by-step through three transactions: a stand-alone fee simple residential dwelling, a cross-lease dwelling and a unit title property.	Christchurch Wellington Auckland Hamilton	12-13 Jul 26-27 Jul 9-10 Aug 23-24 Aug