

Welcome to the Spring edition of *Commercial eSpeaking*.

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If you would like more information on any of the topics covered in this issue of Commercial eSpeaking, please don't hesitate to contact us. The next issue will be published in February 2010.

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Disputes Between Co-Owners of Land and the Property Law Act 2007

If there is no formal agreement

Co-owners of real estate sometimes find themselves in dispute on a variety of issues relating to their joint venture property. The underlying relationship between them will, prior to purchase, generally determine whether or not a co-ownership agreement is formalised. This article is not aimed the consequences of the breakdown of a relationship between co-owners whose rights fall under the Property (Relationships) Act 2006.

Before acquiring a property, co-owners should address the need to have a formal agreement to record variously their respective contributions, the duration of the joint venture, whether or not a sunset clause is appropriate, and how one of several co-owners wishing to exit the property early is to be paid. Prior consideration of such issues will relieve future uncertainty. Disputes between co-owners who do not have a formal agreement will often need to work within the Property Law Act provision where one or more seeks the court's assistance in terms of a partition or sale of the property.

Old legislation

Broadly speaking, under the now repealed 1952 Property Law Act a co-owner wanting a partition was on the face of it entitled to this, and the court had only two choices: partition or sale.

If the court did not order a sale it had to order partition. Furthermore, where people owning an undivided half share (or more) in land applied to the court for an order for sale of *all* the land, the court was bound to grant that order unless evidence from the remaining co-owners demonstrated good cause.

Property Law Act 2007

In the new legislation the position is now broader under the corresponding provisions (ss339-343) of the Property Law Act 2007. Essentially, the court may now:

- » Order a sale or partition
- » Refuse a sale or a partition, or
- » Compel one or more of the co-owners to buy the share of the other co-owners at a fair price.

There are consequential orders (fixing of price, compensation and so on) available under s343 where one of the three central outcomes noted above is granted.

In reaching its decision the court must take into account the following:

- » The extent of the applicant's share in the property
- » The nature and location of the property
- » The number of other co-owners and the extent of their shares
- » The hardship to the applicant arising from a refusal of the order, compared with the hardship to any other person arising from making of the order
- » The value of any contribution made by a co-owner to the property, and
- » Other matters the court considers relevant.

In a High Court decision on the new provision, *Holster v Grafton*¹, the judge was not prepared to compel the owner of an undivided 1/6th share in a property to sell that share against her wishes to other family co-owners from whom she had become estranged. The judge further observed that such a request should rarely be granted.

What was particularly noteworthy about the *Holster* decision was the judge's unwillingness to avail himself of any of the remedial options available, even after taking into consideration all the factors referred to earlier in this article and in particular, the 'hardship' criteria. The judge's reasoning was that the legislation requires a careful balance between resolving conflicts fairly on the one hand and undermining property rights on the other hand. On these particular facts, there was insufficient hardship to justify forcing one of the minority owners to sell their share in the property against their wishes.

As with all new legislation, there is a settling-in period and it is not until the new provisions have been thoroughly tested in the courts on a number of occasions that outcomes become more predictable. *Holster* won't be the last word on the subject.

¹ High Court, Christchurch, CIV 2006-409-001982

Access to Justice through the Disputes Tribunal

Monetary jurisdiction claims extended

Since 1 August 2009, the Disputes Tribunal's monetary jurisdiction has been extended. Previously, claims were limited to \$7,500 or \$12,000 if both parties agreed. However, from 1 August 2009 the limit has increased to claims of \$15,000 – or to \$20,000 if both parties are in agreement.

The move formed part of the government's small business relief package announced on 4 February 2009 by Prime Minister John Key. It was aimed at improving the business environment by reducing the impact of taxes on a business's cash flow, improving access to credit and reducing business compliance costs. Justice Minister Simon Power has said on two occasions:

Being tied up in a District Court dealing with small claims is one of the trouble spots for small businesses, it costs them valuable time and money, and

The government is very keen to smooth the way for these businesses, so we will encourage the use of the lower cost and lower compliance of the Disputes Tribunal by raising the threshold at which cases can be heard there.

The Disputes Tribunal's maximum claim level was last set in 1998, and became inadequate due to changes in the economic environment and the rising cost of litigation. The gap between the cases that can be taken to the Disputes Tribunal and those viable to be taken to the District Court had significantly widened.

This change will reduce costs in up to 3,600 cases a year which will now be able to be heard in the Disputes Tribunal. Previously these cases would have been held in the District Court and many would not have been pursued due to the costs involved. Justice Minister Simon Power.

By amending the Disputes Tribunal Act 1988 and increasing the maximum claim level of the Disputes Tribunal to \$15,000, or \$20,000 with the consent of both parties, the government hopes to:

- » Improve access to the Tribunal for individuals as well as small businesses across New Zealand, and
- » Reduce the costs individuals and small businesses face when resolving civil disputes by enabling a larger number of cases to fall within the Disputes Tribunal jurisdiction.

The limits of the Dispute Tribunal

While the increase to the jurisdiction seeks to provide a cheap, straightforward, fast and less formal access to justice, there are a number of protection limits that would normally be found within a District Court. These limits include:

- » There must be a dispute; you cannot file a claim if someone simply refuses to pay a bill, when there is no argument about whether they owe the money
- » The Disputes Tribunal does not allow legal representation of the parties
- » Referee's decisions are not necessarily based on the law, but rather the substantial merits and justice of the case
- » Grounds for appeal are extremely limited, appeals can only be made if the proceedings were conducted in a prejudicial manner
- » Referees are not required to be legally qualified (although 80% of the referees currently are); and
- » Proceedings are held in private and decisions are not published.

Your claim and the Disputes Tribunal

If your claim falls within the new jurisdiction, the Disputes Tribunal may provide a cheaper and faster resolution than a District Court claim. However, the results can be unpredictable as the law is not necessarily as strictly applied as it would be in the District Court. Nevertheless, you may not have any choice whether or not to consider bringing the claim in the Disputes Tribunal because the District Court usually will order that the matter be referred to the Disputes Tribunal if it falls within its jurisdiction.

The most important aspect of bringing or defending a claim in the Disputes Tribunal is preparation. Although you ordinarily cannot be represented by a lawyer in the Disputes Tribunal hearing, we can provide you with help in organising your claim, and also with preparing submissions and evidence in support of your claim.

Business Briefs

Dramatic changes to District Court procedure

Sweeping changes to the District Court Rules are scheduled to come into force on 1 November 2009. The new rules completely overhaul civil procedure in the District Court, moving away from formal trials and placing emphasis on the just, speedy and inexpensive determination of disputes.

Parties will be required to file comprehensive fact and issue specific claims and exchange information capsules (comprising the key documents the party relies on) within set time frames. In most cases, formal discovery and inspection will be dispensed with and trials will be conducted within strict time limits. The objectives behind the changes are to ensure better access to justice and to recognise the need for proportionality in connection with the importance of the case, its complexity, the amount of money involved and the financial position of the parties.

Securities Regulations 2009

The Securities Regulations 2009 were recently introduced and came into effect on 1 October 2009. The 2009 Regulations will replace the Securities Regulations 1983 from 30 June 2010. Between 1 November 2009 and 30 June 2010 there are transitional arrangements prescribing which set of regulations are to apply. While both sets of regulations prescribe requirements governing the content of prospectuses and investment statements and also detail rules and restrictions relating to advertisements and certain other matters, the 2009 Regulations reflect an effort to:

- » Simplify and modernise the Regulations so as to reduce compliance costs for issuers and simplify offer documents for investors, and
- » Fill gaps and correct inconsistencies and make other improvements.

The 2009 Regulations also detail the content required to be included in simplified disclosure prospectuses that listed issuers may use when offering equity securities, debt securities or units in a unit trust in prescribed circumstances.

Google books settlement

Authors of books or bound texts, or of inserts in other people's books, should be aware of the Google books settlement. Google has been scanning (copying) entire books by arrangement with various United States-based libraries for over five years. It is said to have copied some 10 million books and is adding to that pile at 1,000 books a day; including numerous New Zealand titles.

The Authors Guild, the Association of American Publishers and certain individual authors and publishers issued proceedings against Google claiming that its copying without permission was copyright infringement. Google's primary defence was that copying books but making only excerpts of the digital copies available online amounted to fair use (a general defence to a claim of copyright infringement in the US, unlike the limited fair dealing defences we have here in New Zealand).

The parties have settled and it is the settlement agreement (yet to be approved by the US court) that applies to New Zealand authors and publishers. There is to be a hearing to decide if the settlement is fair under US law. The settlement requires authors and publishers to opt out of the settlement (which can be done online) or to lodge an objection with the court in the US. If rightsholders do not opt out then they will be bound by the settlement as eventually approved in the US. Effectively what that means is that a rightsholder will be unable to prevent Google copying and making use of its book in the US and unable to claim any damages for copying which has already taken place.

The official settlement website is www.googlebooksettlement.com/