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# NEWSLETTER

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Dear Client

In this issue we address a number of current legal issues.

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### THE NEW REINZ PLAIN ENGLISH SALE AND PURCHASE AGREEMENT

The Real Estate Institute of New Zealand's ('REINZ') new Agreement for Sale and Purchase ("the new agreement") was introduced in July this year in an effort by REINZ to create its own form of agreement that uses clear language and appeals to the lay person. Before the introduction of the new agreement, it was standard practice to use the Auckland District Law Society ('ADLS')/REINZ Agreement for Sale and Purchase ("the standard form agreement").

The standard form agreement has been in use for over 20 years, is tried and tested, and very familiar to both real estate agents and conveyancing professionals. Consequently, there

has been extensive discussion and critique of the new agreement.

Commentators have pointed out that:

- Much of the language in the new agreement is subjective, resulting in the potential for differences in interpretation, leading to a risk of uncertainty between the vendor and purchaser.
- Some terms are not properly defined, which may lead to differences in interpretation.
- The new agreement identifies too many terms as being "essential terms" whereas some are procedural rather than essential in nature. If a party refuses to comply with an essential term the other party may elect to refuse to complete settlement.

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- Disputes must be referred for mediation, however, the new agreement does not set out the mediation process to be followed.

A significant difference from the standard form agreement is the way in which the standard conditions (i.e. title approval, LIM, builder's report and tenancy) in the new agreement are dealt with. The party approving the condition ("the approver" which normally will be the purchaser) must not unreasonably withhold approval of a condition. If the approvers withhold their approval they must give notice to the other party that the condition is not satisfied, the reasons why it is not satisfied and what is required to rectify the problems. The other party then has five working days to either agree to rectify the problem or they may elect to cancel the agreement. During this five working day period the approver cannot cancel the agreement.

Some positive changes that the new agreement has introduced include the following:

- Layout - the font size is larger, the agreement is well spaced out and sentences are limited to 26 words.
- A new approach to GST, which requires knowledge of whether the seller is on a payments basis or invoice basis.
- Warnings throughout the new agreement which are useful for readers to alert their attention to a possible problem.
- The addition of a building report condition to the standard conditions to alert purchasers that such a report may be wise to obtain.

Overall, most commentators believe the new agreement will lead to uncertainty for both the vendor and purchaser, an increased number of disputes and a resulting increase in legal costs. It is therefore strongly recommended that both vendors and purchasers seek legal advice before signing any new agreement for sale and purchase.

### UNIT TITLES LAW CHANGE UPDATED

The Unit Titles Bill ('the Bill') was introduced to Parliament on 5 March 2009 and if passed into law will repeal and replace the Unit Titles Act 1972 ('the Act'). The Act governs multi-unit developments such as apartment blocks, townhouses, and office buildings. The Act was not designed to deal with the complex, large scale developments of the present day and the Bill goes a long way to revamp the badly outdated legislation.

One major change to the Act will be the specific disclosure requirements for vendors and developers of unit title properties. Vendors especially will need to be aware of the proposed disclosure requirements as it is mandatory for them to provide disclosure statements to a purchaser on the following occasions:

- before a Sale and Purchase Agreement is signed
- 5 working days before settlement
- at any time before settlement if the purchaser requests

Vendors need to be aware that if a disclosure statement is not provided to the purchaser within the specified timeframe then the purchaser may be able to defer settlement or even elect to cancel the contract. Vendors will also need to be careful to provide purchasers with accurate information as purchasers will be entitled to rely (in a legal sense) on that information.

Developers will be required to provide the body corporate with disclosure statements dealing with the construction systems of the buildings and their compliance with the Building Act.

Another major change is the move from the need for a unanimous resolution of the members of the body corporate to a 75% majority. The purpose for this change was to prevent voting on important matters from being blocked by one unit owner.

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The common property of unit titles will now be owned by the body corporate. Presently common property is owned by the unit owners as tenants in common. It is proposed however that unit owners should still have a beneficial interest in the common property.

The body corporate will be required to make a long-term maintenance plan which must include expected maintenance requirements for the following 10 years, an estimate of costs involved with those maintenance works, and the basis for levying the costs from the unit owners.

The Act is very inflexible regarding unit entitlements which determine voting rights and how much unit owners contribute towards body corporate costs. The Bill seeks to address this by separating unit entitlements into two elements:

- ownership interest – which is determined by the value of the unit
- utility interest – which is determined by the extent to which the unit owner uses the shared facilities and services

Another major change is the way in which disputes under the Act are dealt with. Under the Bill any disputes will be referred in the first instance to mediation and then adjudication through the Tenancy Tribunal. Disputes were previously resolved solely through the courts.

As apartments and townhouses become a preferred style of living in the modern world, having a knowledge of unit owners' rights and obligations under the Act is necessary. After the Bill is passed, all existing unit titles and bodies corporate will have 15 months to bring themselves in line with the provisions of the new Act.

## TRUSTEE DUTIES

The duties of a trustee need not be onerous, but a failure to carry out those duties may, in a worst case scenario, result in a claim against you by a beneficiary who has suffered a loss as a result of your actions or omissions.

For those readers who have consented to act as a trustee for a friend or family member without really understanding what that role entails – the list below, while not exhaustive, sets out some of the most important trustee duties.

### The duty of efficient management

- Whether you are an original, substitute or additional trustee you must first become familiar with and abide by the terms and conditions of the Trust Deed.
- Know the extent of the assets and liabilities of the trust and make sure that these are properly held in the name of the trustees.
- Ensure that the trust is managed and administered properly and that the trustees meet to discuss and agree on issues. Do not be a rubber stamp of the settlor's wishes. Take minutes of these meetings and record all resolutions.
- Make sure that the administration costs of the trust are kept to reasonable levels.

### The duty to keep and render accounts to beneficiaries

- Make sure that a clear audit and paper trail is kept of all decisions and transactions. This will involve secure storage of the trust deed, minutes of meetings and resolutions, financial accounts, correspondence and other trust documents.
- If the beneficiaries request information, the trustees have a duty to make certain information available, such as the trust deed, financial statements and investment strategies.

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The duty to act personally

- Carry out your trustee duties personally.
- You may instruct an agent to carry out your decisions but you must make your own decisions and not be dictated to by other trustees, the settlors or beneficiaries.
- Trustee resolutions must be unanimous.

The duty of loyalty

- Always act in the best interests of both present and future beneficiaries and be impartial between beneficiaries.
- Avoid conflicts of interest.
- Do not benefit or profit from your position as trustee unless authorised to do so.
- You must always protect the interests of the beneficiaries.

In all things, a trustee's standard of care is measured against that of an ordinary prudent business person managing the affairs of others. Of course a higher standard is required if the trustee is a professional person such as a lawyer or accountant.

The management of trusts often come under scrutiny and all of the benefits of having a trust may be lost if the trust records and procedures do not meet the required standard. It is therefore important to keep a clear audit and paper trail and to bear the above trustee duties in mind. It is also important to insist that you, as a trustee, are kept up to date with all of the trust's affairs.

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**EVERY ROSE HAS ITS THORN -  
RELATIONSHIP PROPERTY**

New Zealand's highest appellate court, the Supreme Court, has recently delivered its decision in *Rose v Rose*. The case is about the classification of property. The Property (Relationships) Act 1976 ('the Act') defines relationship property and separate property. Relationship property is the pool of common property and at separation it is to be divided

equally, unless there are extraordinary circumstances that would make equal sharing repugnant to justice. However, *Rose v Rose* exemplifies how there are also pathways whereby separate property becomes relationship property.

Relationship Property

Relationship property as defined in the Act includes:

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

Separate Property

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

Rose v Rose

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

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

Mrs Rose sought to share the increase in the value of the farm at the date of separation. Mrs Rose argued that during the course of the marriage relationship her outside earnings combined with her duties as a homemaker enabled

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her husband to keep his farm and develop it into a vineyard. During the term of the marriage relationship the farm appreciated in value significantly due to inflationary pressures and its location within a prime grape region in Marlborough.

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

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

#### A Suggestion

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

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### HOW TO SECURE YOUR DEBTS

The Personal Property Securities Register ('the Register') is an electronic record of any debt security interests held against any personal property (except land) owned by an individual or organisation. In order to register a security interest over property a creditor needs to have ownership rights in the property.

#### Purpose of Register

If someone owes you money ("the debtor") for personal property that you have provided to them, then you are a secured party and have a security interest in that property. Your security interest attaches to that property for the purposes of the Personal Property Securities Act 1999, if you have given value to the debtor and the debtor has rights in that property. For example, an electrician installs lighting into a shop

and the shop-owner fails to pay for it. The electrician has given 'value' to the shop-owner (the lighting) and the shop-owner has 'rights' in the lighting because they own it. Therefore, the electrician has a security interest in the lighting.

The purpose of the Register however, is to allow you to further protect your security interest by registering it. This enables you to enforce your security interest against a third party. For example, a debtor may sell property that you have a security interest in to a third party. If your security interest is registered then you are able to enforce your interest against that third party.

#### Priority of secured parties

The goods that you have a security interest in may also be subject to a security interest from another party. By registering a security interest on the Register, you are granted priority over other unregistered security interests. If all security interests are registered, then priority is given in order of the date of registration. Therefore, when it comes to registering a security interest against goods, time is of the essence.

#### Registering your security interest

In order for you to register an interest on the Register, you must register a financing statement. The cost for registering a financing statement is \$3.00 and the process for doing so is as follows:

You must set up a Secured Party Group ID ("group ID") the first time you access the Register. All future registrations are made under this group ID. Once you have set up your group ID then you are able to register a financing statement against your debtor.

The following details are necessary in order to register a financing statement:

- In regards to a debtor that is an individual; full name, date of birth and address.
- In regards to a debtor that is an organisation; type of organisation i.e. company, partnership or trust and organisation's contact address.

It is imperative to retrieve this information from a debtor when entering into a security agreement with them as the fields are mandatory and a

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financing statement cannot be registered without it.

You must also enter information about the collateral (personal property) including the type (e.g. goods) and a description.

#### Searching the register

The Register can also be searched by anyone at a fee of \$1.00. The following searches are all available on the Register:

- Debtor Person Search
- Debtor Organisation Search
- Motor Vehicle Search
- Aircraft Serial Number Search
- Financing Statement Number Search

It is advisable to search the Register before entering into an agreement to sell, supply or buy in order to avoid people that repeatedly do not pay their debts

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### CROSS LEASE OWNERSHIP

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

#### The common areas

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

#### The restricted areas

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

#### The flats

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

#### Objecting to title

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

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

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

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ON NEWSLETTER ITEMS

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