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Enjoy reading this Winter 2014 edition of *Property Speaking*; we hope you find the articles inside both interesting and useful.

If you would like to talk further about any of the topics covered in this e-newsletter, please don't hesitate to contact us – our details are above.

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## All Trustees Must Sign when Dealing with Trust Assets

### No short cuts when dealing with property

*When establishing a family trust that usually owns your family home and some investments, the usual 'mum and dad' trust has you and your partner as trustees, together with an independent trustee. This article looks at the importance of ensuring all trustees sign all relevant documentation when dealing with trust assets.*

You've taken the sensible step of transferring your home into a family trust. There are now three owners (the three trustees) listed on the title – you and your partner/spouse, and Mary who is your independent trustee, and also your lawyer. In the past, Mary has always acted on your instructions. After all, you still think of your home as being 'yours'. But could you, if you wanted to, commit your trust to the sale of your home – without Mary's signature? Is it safe to assume that Mary will 'rubber stamp' the Agreement with her signature if you tell her to?

From a purchaser's perspective, could they enforce such an Agreement against the trust, when it has only been signed by two of the trustees (ie: you and your partner/spouse's signature), but not signed by the independent trustee?

### Recent decision says all trustees must sign

According to the recent decision in *WT Trustee Company Ltd v Cato and Ors*<sup>1</sup>, the answer is a definite NO. In *WT Trustee Company Ltd*, a couple's Waiheke Island home was owned by their family trust. The couple were the trustees of that trust, together with their third independent trustee Mr Compton.

The couple decided to sell the trust's Waiheke property. Negotiations for the sale of the property to WT Trustee took place fairly quickly over the course of a weekend and the couple signed the Agreement for Sale and Purchase. WT Trustee claimed that various assurances had been made to the director of WT Trustee by the real estate agent and the couple, to the effect that Mr Compton's signature was just a formality, or that it would be forthcoming, or that the couple had the power to bind Mr Compton. A 'Sold' sign went up on property. WT Trustee paid the deposit to the real estate agent. Mr Compton then refused to sign the Agreement, because he believed that the price was too low. WT then lodged a caveat against the title to the property, which had the effect of preventing the trust from selling its property to anyone else.

After the trust applied to remove the caveat so it could put the property back on the market, WT Trustee applied to the High Court to keep the caveat on the title. In order to succeed, WT Trustee had to show that they had a 'reasonably arguable case' that the Agreement was legally enforceable. The judge decided that there was not enough evidence of a binding agreement to support the company's caveat. She said, "*As a general rule, all registered proprietors must execute any agreement for sale and purchase before the vendors are bound to sell. It is usually presumed that any registered proprietor who does execute does so on condition that the other or others will do likewise.*"

To be enforceable, the Agreement had to have the signatures of *all* the trustees. Without Mr Compton's signature, it wasn't possible for the couple, or the trust's real estate agent, to commit Mr Compton to the Agreement, or to make the Agreement enforceable against the trust, by making promises or representations about what the trustee would, or wouldn't agree to. To bind Mr Compton without his signature at the time they signed the Agreement, the couple would have had to show WT Trustee some evidence that they had Mr Compton's authority to sign on his behalf. And this they did not have.

With limited exceptions (for example, powers of attorney, and executors of estates), if a person's name is on the certificate of title, their signature (or in the case of a company, the director's signature) will normally be required.

### All trustees have joint obligations

If you are a trustee of a family trust this is an important principle to remember when dealing with property. An independent trustee's signature is not just a 'rubber stamp', and trustees will not always do what you tell them to do. Trustees are obliged to consider the best interests of the trust's beneficiaries when deciding whether or not to sell any trust assets, and at what price.

This principle is also relevant if you are considering buying a property which is in the name of three or more people or is owned by the trustees of a family trust. It's not safe to assume that you have a binding agreement until you have the signature of all the parties named on the title. ■

<sup>1</sup> *WT Trustee Company Ltd v Cato and Ors* [2014] NZHC 1084

## Paper Roads and Public Access

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*Paper roads are relatively widespread across New Zealand farmland. They are more precisely called 'unformed legal roads' and have the same legal status as any other legal road. This means that the public can pass and re-pass over them on foot, on horseback or in vehicles. Up until now, the existence and location of paper roads or a local authority's obligations and responsibilities towards them, have not been commonly known to the public.*

### Paper roads now public knowledge

Although paper roads may be marked on survey plans, because they haven't been formed, those paper roads are difficult to identify on the ground. The Walking Access Act 2008 was passed to provide the New Zealand public with free, certain and practical walking access to the outdoors. It also established the Walking Access Commission. The Commission has developed an online Walking Access Mapping System (WAMS) to inform the public and overseas visitors about land open to public access. On the WAMS website the public can identify the location of areas open to public access, including paper roads. The system can be accessed **here** or through the Commission's **website**. The Walking Access Commission has also published a Walking Access Code which sets out the rights and responsibilities of recreational users and landowners.

### Creation of paper roads

Most paper roads were created from England in the mid-1800s by people with little knowledge of New Zealand terrain and at a time when survey records didn't have the degree of accuracy they have today. Consequently, the exact location of the paper roads may be uncertain, they may be in places that are inaccessible or it may be unlikely they will ever be formed into 'real' roads.

### Ownership and maintenance of paper roads

As the local authority owns and administers all roads in its district (except highways) it's also responsible for paper roads. The local authority is not, however, legally obliged to form, repair or maintain paper roads. It's an offence to damage the surface of a road. This will include the turf of a paddock if the paper road is through a paddock. The local authority can ban access to the road if the public are using vehicles that are likely to cause damage. The owner of the adjoining land can also apply to their local authority for permission for stock to graze the paper road.

### Rights and responsibilities

The owner of the land adjoining the paper road cannot prevent the public from using the paper road or obstruct the paper road with fences, trees, vegetation, buildings, livestock or locked gates. The owner of adjoining land may, however, obtain permission from the local authority to erect a cattle stop or a gate as long as it's unlocked. Users of any paper road should be aware that it's an offence under the Trespass Act 1980 not to leave gates as they are found.

Under the Health & Safety in Employment Act 1992 the owner of land adjoining the paper road must warn users of the road of any potential hazards, such as tree felling, earthmoving machinery or pest control on the land near the paper road. The landowner is not obliged, however, to warn users of the road of natural hazards, such as cliffs and rivers.

### Resolving disputes

Disputes between users of the paper roads and adjoining landowners can arise in relation to the exact location of the paper roads and their use. As the local authority owns and administers all roads, they may be able to help resolve any disputes in relation to paper roads. The Walking Access Commission can also help with disputes about walking access. Otherwise, the Disputes Tribunal or the District Court might be the appropriate forum, if it gets to that point.

### 'Stopping' the paper road

Finally, the local authority and the Crown have powers to 'stop' a paper road. Stopping a road refers to the process by which the road ceases legally to be a road. Before stopping the road, the local authority must satisfy itself that the road is not needed now or will not be needed in the foreseeable future. The local authority cannot allow the private interests of any affected landowners to override the public interest that the paper road continues. ■

## Property Briefs

### Joint tenancy v tenancy in common

Where a property is to be owned by more than one person or entity, you can use one of two main forms of ownership.

The first option, and the most common form of ownership, is known as a 'joint tenancy'. When one of the owners of a joint tenancy dies, ownership passes to the survivor by right and is effected by registration. This form of ownership is mostly used by couples who, when they die, would leave their property to their partner or spouse.

The second option is to record ownership as 'tenants in common'. Property can be owned as tenants in common in equal or unequal shares. The ownership shares can reflect the contributions each of the owners are making to the purchase of the property. For instance, one of you may have a 20% share and two others could have 40% each. With a tenants in common situation, ownership doesn't automatically pass to the survivor when one of the owners dies. Ownership passes to the person entitled under the deceased owner's Will. If the deceased owner doesn't have a Will, ownership passes to those people entitled under the Administration Act 1969. Friends and people buying as a business arrangement often prefer to buy as tenants in common.

Any type of property can be owned jointly or as tenants in common – not just for land. For example, bank accounts, company shares, or vehicles can be owned jointly or as tenants in common.

When taking ownership of property with someone else it's important to carefully consider the implications of the type of ownership chosen and whether your Wills should be updated at the same time.

If you're buying the property as an investment, we recommend that you obtain advice from an accountant in respect of the tax and accounting implications of the purchase and the appropriate entity to complete the purchase. ■

### Forcing a sale and property sharing agreements

When you're buying property as tenants in common (see above), it's particularly important that you have a property sharing agreement that includes provisions on what to do if your property sharing relationship breaks down. Here we've put together a scenario about what could happen if there's a difference of opinion between tenants in common.

Peter Walden and Humphrey Wallace own a commercial building together as tenants in common. They each own a one half share. Peter Walden wants to retire, sell his share of the property and go on a cruise around the Bahamas. However, Humphrey Wallace doesn't want to sell his share as the property market is in a bit of a slump at the moment and doesn't think they will get the best price for the property. Humphrey unfortunately doesn't have the equity to buy Peter's share. Can Peter force Humphrey to sell?

The short answer is yes, Peter can force a sale of the property he holds with Humphrey. Peter can apply to the court under s341(1) of the Property Law Act 2007. The court has the power to order the sale of the property as a whole, in part or require the co-owner to purchase the other co-owner's share. However, the court must consider many factors when making its decision; it will not always order in favour of the co-owner wishing to sell. Applying to the court for relief can be a costly and often drawn out process.

Peter and Humphrey could have avoided the costly court process if they had had a property sharing agreement when they bought their property. A property sharing agreement deals specifically with various matters relating to the property, such as who pays outgoings (for example, rates, insurance and so on), what happens if one party wants to sell their share of the property, and how the property is to be valued should a share or the whole of the property be sold.

It's essential that when you're considering buying property with someone else that you get legal advice and give serious consideration to put in place a property sharing agreement. If Peter and Humphrey had done this, it could have saved them both a lot of stress and expense. ■

### Relationship property update: 30/70 asset split

After we had put this Winter edition together, a High Court decision<sup>2</sup> was delivered in a relationship property situation involving a Wellington medical specialist and his wife. In the Family Court, the wife had been awarded 70% of the couple's \$1.73 million assets, with the husband receiving 30%. This was a significant shift from the equal sharing regime. The husband's appeal to the High Court for 50% of relationship assets was dismissed. Justice Goddard disagreed with the medical specialist's counsel who argued against such a disproportionate split, saying that the wife helped her husband further his career and, in doing so, sacrificed her own earning potential and, as such, upheld the 70/30 division. ■

<sup>2</sup> *Jack v Jack* [2014] NZHC 1495 [1 July 2014]