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Property Speaking

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Welcome to the Winter edition of *Property Speaking*.

We hope you find the articles of interest. If you would like to talk further about any of the items covered in this newsletter, then please don't hesitate to contact us.

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The next issue of Property Speaking *will be published in November 2010.*

NZ LAW
AN ASSOCIATION OF INDEPENDENT LEGAL PRACTICES

Transferring Assets during a Relationship

Can have implications under the Property (Relationships) Act

The transfer of assets during a relationship does not guarantee their protection if your relationship then breaks down and your spouse or partner makes a claim. This article gives an overview of the implications of sections 44 and 44C of the Property (Relationships) Act 1976 (the PRA), and what can be done to safeguard assets when you and your partner separate.

If you transfer any of your assets to a third party during your relationship, with the intent to defeat the rights of your partner, the court can set aside the transfer. Also if you transfer a relationship property asset to a trust during your relationship that has the effect of defeating the rights of your partner, the court can make an order for compensation to your partner.

Setting aside transfers of property

Section 44 of the PRA empowers the court to set aside any transfer of property made, whether for value or not, by any person in order to defeat the claim or rights of their spouse or partner. The key point in this section is that the person making the transfer must be intending to defeat another person's claim or rights under the PRA.

This section has been in effect for many years but it is only recently that the court has interpreted it more broadly. In a recent High Court case, *Ryan v Unkovich*[1], two properties were transferred into trusts that had been formed by Ms Ryan without the knowledge of Mr Unkovich. The transfers took place during the course of the relationship. When the relationship came to an end Mr Unkovich applied to the court to have the transfer of the property reversed. Justice French gave a broad interpretation to s44 and agreed that the transfer of the property should not have occurred without his agreement and that Ms Ryan's intentions at the time should proceed to trial and be tested by the evidence.

It appears that the position is now that if two parties are in a relationship, and one party transfers assets, with the intent to defeat the claim or rights of the other party, the court will take a broad interpretation of s44 and look closely at the intentions of the party at the time the assets were transferred. If the court decides the intention was to defeat the claim or rights of the other party, the court will provide relief to the defeated party.

Compensation of dispositions of property

If s44 of the Act does not apply in your particular circumstances, s44C may be relevant. Section 44C provides that where relationship property is transferred to a trust during the relationship, and that transfer defeats the claim or rights of one of the spouses or partners, the court can make an order for compensation to the spouse or partner whose claim or rights have been defeated.

This section only allows compensation to be awarded out of relationship property. Therefore, if there is no relationship property because, for example, it is all in trust, then the only remedy available is to divert income from the trust to pay that compensation.

Conclusion

To protect your assets in case there is a relationship property claim, you should ensure that those assets are transferred before your relationship begins.

If you are unable to transfer the assets before your relationship begins, under s44 your assets will be vulnerable to challenge in a relationship property claim unless you can establish that you did not intend to defeat the claim or rights of your partner.

If you transfer relationship property to a trust during your relationship, under s44C the court may compensate your partner if the effect of the transfer is to defeat their claim or rights, with the proviso that the compensation may only be granted out of relationship property.

If you want to transfer what could be considered relationship property assets, we recommend you talk with us *before* you actually do so; it could save you a great deal of time, energy and money.

1 [2010] 1 NZLR 434

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Landlocked Land

How can you get reasonable access?

You own a secluded property amongst lush greenery in a hillside suburb. The only access is via a steep pedestrian path. This was a charming feature when you bought the property but you are not as fit as you used to be and would now like vehicular access. You have heard that the court can grant an order giving you a legal right to access the land through the neighbour's property. But will you get it?

What is landlocked land?

Landlocked land is a piece of land to which there is no reasonable access. The Property Law Act 2007 defines 'reasonable access' as physical access that is reasonably necessary for the owner or occupier to use it for the purposes authorised under the Resource Management Act 1991.

Clearly, if people cannot get onto their land then it has no reasonable access. But 'reasonable access' does not necessarily include vehicular access or, in some cases, even pedestrian access. While the access must be reasonable, it does not have to be the best that could be achieved. Whether a particular piece of land has reasonable access will always depend on the particular circumstances and will be determined within the context of the locality, topography of the area and modern requirements.

The Court of Appeal recently held[2] that a property in suburban Wellington which had access solely by way of a steep, badly lit walkway in disrepair was not landlocked. In that case, vehicular access was found to be primarily a matter of convenience for the owners. The walkway provided reasonable access to the land in the circumstances.

It has also been held that access by sea can be reasonable. For 46 years, a licensed tourist lodge only had sea access. The court held[3] that the property was not landlocked, even though there was no pedestrian access or vehicular access.

What can you do about it?

If you believe that your land is landlocked, you can apply to the High Court for an order granting you reasonable access to your land. If the court decides that you should be granted access, then this can be achieved by:

» Giving you a legal right to use an area of the neighbour's land (an 'easement') to access your land, or

» Ordering that part of the neighbour's land be transferred into your name.

In deciding whether to grant the order, the court will consider:

» The nature and quality of the access you had to your land at the time you acquired it

» How your land became landlocked

» Your conduct regarding the issue and the conduct of your neighbour, including any attempts you may have made to negotiate an agreement, and

» The hardship that you would suffer if the court did not make the order, compared to the hardship that would be caused to anyone else if the court made the order.

Other factors that will be taken into consideration include any existing access, its state of repair and the cost of upgrading and maintaining it.

If the order is made, you will usually have to pay compensation to the neighbour. You may also need to put up fences at your cost or pay other associated expenses.

Conclusion

When buying property, it is important to check what legal access rights you have to it and whether this will be suitable for you in the long term. You may find that your land has reasonable access and is not landlocked, even if you have to hike, climb or take a jet boat ride to get there.

2 Murray v BC Group (2003) Ltd [2010] NZCA 163
3 Kingfish Lodge (1993) Ltd v Archer [2000] 3 NZLR 364

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Property Briefs

Personal Property Securities Register: registering a lessor's interest

Why should a lessor register their interest on the Personal Property Securities Register (PPSR) when they already own the goods?

The owners of leased personal property (as distinguished from real property) should carefully consider whether their leases are deemed security interests under the Personal Property Security Act (PPSA) and therefore require registration of their interest on the PPSR. A lease for more than 12 months is deemed a security interest that must be registered to protect the owner's rights from claims by third parties with security interests in those goods.

Waller and Ors v New Zealand Bloodstock Limited and Ors[4] Illustrates this point. NZ Bloodstock leased a horse to Glenmorgan Farms while retaining legal ownership. The lease term exceeded a year. Bloodstock's interest as lessor and owner was not registered on the PPSR. Glenmorgan Farms (the lessee) defaulted under the lease. Bloodstock terminated the lease and repossessed the horse. At the same time Glenmorgan Farms defaulted to its financiers and a receiver was appointed. The financiers had registered their security agreement in the PPSR. The receiver claimed its right under the PPSA to take possession of the horse and its sale pursuant to the security agreement.

The court found that the security agreement registered on the PPSR gave rights to the receiver ahead of the owner (NZ Bloodstock), even though Glenmorgan Farms did not own the horse. Further, terminating the lease and repossessing the horse did not improve Bloodstock's position.

In summary, if a third party has a registered security interest in personal property, that security will take priority ahead of the true owner's interest in that property. Ownership of the leased goods by itself will not protect the owner's interest in the goods against the registered interest of a third party unless the owner registers its security interest as lessor in priority to all other interests.

Our advice is to always register a lessor's interest on the PPSR.

Securities Act: implications for owners of communal property

Membership of a society or homeowners association that confers rights to participate in the ownership and use of communal facilities (for example, a gated community) is a participatory security and is subject to the restrictions contained in the Securities Act 1978. The Act prohibits the offer to the public or the allotment of a participatory security unless there is a registered prospectus or an exemption notice. An allotment of a participatory security in breach of the Act, for example, the grant of membership in a homeowners association which creates rights in communal facilities without a registered prospectus or exemption notice, is void.

If you are establishing a gated community, for example, you should be aware of your obligations under the Securities Act.

4 [2006] 3 NZLR 629

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