

# YOU AND YOUR PROPERTY

*In this issue Residential Property Lawyer, Michael Hofmann-Body discusses two recently reported cases involving trusts which highlight the importance of understanding your contractual rights and obligations before you enter into a contract for the sale and purchase of land.*

**E**llison v Scott involved a couple who purchased a property together. The husband carried out extensive building works to the property. Sometime after the works were completed the couple separated. Mrs Scott, as part of the relationship property split acquired her husband's interest in the house. Mrs Scott established a trust and transferred the house to it. The trustees included herself and a professional trustee company. No further building work was carried out to the house. Some years later Mrs Scott entered into an agreement to sell the house in her capacity as a trustee of the trust. Three years after the settlement the purchaser obtained a building report which disclosed serious defects in the works completed by Mrs Scott's husband. The Purchaser sought to claim for the cost of the remedial works from the Trust.

The standard Agreement for Sale and Purchase includes a warranty from the

Vendor that states "where the vendor has done or caused or permitted to be done on the property" those works were completely in accordance with permits or building consents as the case may be.

Mrs Scott argued, successfully, that the Vendor (being the Trust) had not carried out any works to the property and that the warranty did not apply. Despite the fact she had been an owner at the time the offending works were completed the court determined there had been a change in ownership and agreed with Mrs Scott.

It is always best to make full enquiries about a property you are looking to purchase prior to committing to the purchase. If the building report had been obtained as part of the purchaser's due diligence, the problem would have been identified and the onus for remedial work would have passed to Mrs Scott.

In *Thorpe and Harman* the question pertained to whether trustees must act



unanimously. In this specific instance the property was occupied by a de facto couple. The property was owned as to a half share by one of the couple and the other half was owned by the other other's family trust. The couple separated and negotiations were conducted between the two individuals as to the division of assets. Part of the negotiations included an agreement to transfer the property to one of the parties. Subsequently the Trust sought to argue they were not bound by the agreement between the couple as they had not been a party to the discussions.

Trustees may only delegate powers if the Trust deed makes specific provision for it. In this case there was no evidence the trustees not involved in the negotiations had delegated their powers and that Trust did not allow for delegation of trustee powers in any event. There was no evidence they had sanctioned the negotiations and as such the court concluded the trust was not bound by the decisions of the individual trustee.

In my opinion, the best approach when dealing with a trust is to ensure each of the trustees signs all the contractual documents. In the event a trustee has omitted to sign a contractual document that trustee should be required to either sign the document or failing that ratify the execution of the document by the other trustees in writing.

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HomeLegal is a division of Gillespie Young Watson, Westfield Tower Lower Hutt. For more information see [www.homelegal.co.nz](http://www.homelegal.co.nz) and [www.gywlaw.co.nz](http://www.gywlaw.co.nz)

## STOP PRESS

The Government has announced an intention to abolish Gift Duty from October 1, 2011. This announcement will have significant ramifications. For existing family trusts with gifting programmes in place there will be an opportunity to accelerate the gifting programme. It will also be of significance from an asset protection perspective. Trust lawyers at Gillespie Young Watson will be following the detail of the law change and any policy changes that may follow in relation to residential care subsidy eligibility. If you wish to be added to our email distribution list for updates on law changes please go to [www.gywlaw.co.nz](http://www.gywlaw.co.nz) to register.