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Associate

When people first seek advice about relationship property issues, the solicitor will always ask for some important dates – when did the relationship start and when did it end? Both dates are necessary so that the lawyer can work out how long the relationship lasted, which then determine which set of rules in the Property (Relationships) Act 1976 (“the Act”) applies.

Often people can identify the end date of the relationship, whether the relationship has ended as a result of separation or death, because of the recent and often unpleasant nature of the event. Marriage or Civil Union dates are also easily defined by reference to the certificate, if memory of the anniversary date is uncertain. But what is a de facto relationship and how do you know if you're in one and when it began?

A de facto relationship is a relationship between two people, of the same or different gender, who are aged 18 years old or older, who live together as a couple but are not married or in a civil union.

Helpfully the Act provides a list of suggested circumstances to be taken into account, to determine if two people are living as a couple. The list of circumstances are:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (e) the ownership, use, and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;
- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship.

It is not an exhaustive list, as other information can also be taken into account. It is not a case of just “ticking boxes” but rather an evaluative assessment where common sense needs to apply. As one of our local Judges put it in a Dunedin Family Court decision “Living together as a couple is concerned with the intention of the couple to be partners, having a commitment to a shared life and demonstrating that by their conduct.”

The person claiming that there is a de facto relationship has the onus or burden of providing evidence to establish the existence of the relationship. For that reason, solicitors advising clients about these issues will often ask detailed questions to find out the history of the relationship and ask for evidence such as bank statements (to show financial contributions), photos, or letters from friends and family.

In future articles we will look at what assistance the law provides to people dividing relationship property, if they are in a qualifying relationship (de facto, marriage or civil union). In the meantime, if you would like to discuss this article in relation to your circumstances, please do not hesitate to contact us.

-Jo Hambleton, Associate

Forestry – ETS: Action Required

If you own pre 1990 forest land you need to make a decision now (if you have not already) and either apply for an exemption or apply for credits. Please contact Nathan Adams if you have not already got an application underway.

GCA's Melbourne Roots: James Smith

This issue we will follow GCA's lineage from the practice established by James Smith in May 1863. His story is a reminder of the close connections between Dunedin and Australia in the 1860s. Smith was London-born but grew up in Tasmania. Sent back to England for his legal education, he returned briefly to Tasmania before moving to Melbourne in the 1850s. When he came to Dunedin in early 1863, it was to establish a Dunedin office for his Melbourne law firm Smith and Willan. Eighteen months later he took William Dempsey into partnership and the link with Melbourne seems to have been cut. They operated thereafter as Smith and Dempsey from premises in Stafford Street.

William Dempsey was another former Melburnian. He came to Dunedin soon after the Otago gold discoveries and quickly joined forces with Smith. Dempsey died in 1868, aged just 45. He would be long forgotten but for a generous legacy to the city's poor and marginalised. Apart from small sums to maintain his wife's grave in Melbourne and his own in Dunedin, Dempsey's estate was left to support the needs of inmates of the Dunedin hospital or the Industrial School (a reformatory for children). This legacy became the Dempsey Trust Fund. It survives today as one of Otago's oldest philanthropic trusts, administered by GCA and still quietly assisting needy children and healthcare patients.

Smith, meanwhile, became a significant personality in Dunedin's legal community. He made his name as defence counsel for the wife-poisoner William Jarvey in 1865. Smith was so effective in his cross-examination of an expert witness from Melbourne that the jury could not reach a verdict. A second trial was required to find Jarvey guilty and became the first criminal executed in Otago. Smith's reputation took a knock in 1869 when he was prosecuted for manhandling a bailiff out of his office. His conviction for assault was later overturned on a technicality. Smith and George Cook constituted the library committee of the local legal fraternity in 1867. They were also among the founders of the Otago District Law Society in 1871; Cook its first president and Smith a committee member.

Smith retired to London and died there in 1904. His practice had gone through various names since Dempsey's time: Smith and Anderson in the 1870s; Smith, Chapman, Sinclair and White in the 1880s; Smith, Chapman and Sinclair in the 1890s. The Sinclairs will feature in another profile. The 'Chapman' was Frederick Revans Chapman, coincidentally George Cook's son-in-law. Chapman was born in Wellington (the son of a judge) but educated abroad and studied law in London. He began practising in Dunedin in 1872 and quickly emerged as one of the city's leading barristers. A man of many talents, Chapman was also an important pioneer archaeologist. He was appointed a judge of the Supreme Court in 1903 and knighted in 1923.

Chapman was succeeded by William Cunningham MacGregor, another partner who would go on to high office. A Scotsman, MacGregor had come to Dunedin as a nineteen-year-old in 1881 and begun his legal training. Two years later he completed his exams as the top law student in New Zealand. MacGregor established his own Dunedin practice before linking with the Sinclairs to form Smith, MacGregor and Sinclair in 1903. In 1914 he was appointed Kings Counsel and Crown Solicitor for Otago. He became Solicitor-General in 1920, and a judge of the Supreme Court in 1923. When he moved to Wellington, MacGregor's partnership was taken over by Harold Barrowclough. Barrowclough was a distinguished veteran of WW1. He would go on to earn further distinction in both the military and the law, serving as commander of the New Zealand Division in the Pacific in WW2 and becoming Chief Justice in 1953.

When Allan Haggitt became a partner in the 1920s the practice was renamed Ramsay, Barrowclough and Haggitt. Allan Haggitt's father and grandfather had been pioneer Dunedin lawyers. His son, Michael, joined the firm in 1955. Grand-daughter Kate became the first fifth-generation New Zealand lawyer in the 1980s. The Haggitt name has been paired with Brent in two completely separate Dunedin law firms. Spencer Brent first went into partnership with D'Arcy Haggitt jr (Allan's uncle) in 1871 as Haggitt and

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Brent. The Brent name survived in that firm until the 1960s, though the last Brent involved was Spencer's son, Francis, who died in 1943. A fresh Brent line was established in 1954 when John Brent joined Allan Haggitt's practice. He was descended from the original Spencer Brent's brother. The partnership became Robertson, Brent and Haggitt in 1961, and Brent and Haggitt in 1971.

There are no Haggitts in GCA at present but David Brent is a partner, the fourth generation of his family in Dunedin law. David's son, Allan, will graduate this year from Otago. His degree? LLB of course!

Leaky Buildings



Nathan Adams
Partner

Many of us associate "leaky buildings" with problems home owners are having further North. While generally speaking this is the case, it is also relevant to us in the South. The extent of the problem may not be known for many years yet particularly in the South. Some in the industry suggest that it takes much longer for the issue to become apparent in the South than it does in the North.

While the size of the leaky building problem is likely to continue to grow in New Zealand as more and more properties are found to be affected, a remedy for affected owners through recovery action against responsible parties will become more and more difficult to obtain. There are two main reasons for this.

The first is that there is only a limited amount of time to bring a claim. Any claim must be lodged within 10 years of building the home (usually this runs from the date when the Code Compliance Certificate was issued). This means that even if you have only just bought the building, the "10 years from build date rule" applies.

The second reason is that if a claim is not made as soon as you realise that there are problems, the result could be that the amount of money payable to you decreases. This is because if the building was fixed earlier, the damage would be less as would the repair costs. As a matter of fairness, those responsible should not bear extra costs caused by your own inaction.

Features that may be indicative of a leaky building include "monolithic cladding" and the lack of exterior eaves or a soffit overhang. There may also be evidence of shrinkage cracks.

If you have any concern you need to act now. Not doing so could result in you missing out on the opportunity to recover costs from those responsible and having to bear all of the repair costs yourself.

How long the process takes will depend on many factors, and so it is difficult to predict. You should be aware that if the Department of Building & Housing considers that you, as a claimant, are not making your best efforts to sort the matter out and get the building repaired, it may disallow your claim. Accordingly it is important for everyone to approach these matters in good faith.

You should also be aware that you cannot sell your building while it is subject to a claim. The fact that a claim has been lodged is noted on the title. While this can cause some purchasers to be wary, the other view is that evidence of a successful claim may make them feel happier either that the building does not have problems, or that it had problems that were resolved.

If you are looking to buy a building you should make sure that you are satisfied that the building is not a leaky building and obtain specialist advice if you have any concerns.

–Nathan Adams, Partner and Taryn Gudmanz, Associate

Legally Speaking Group

The Gallaway Cook Allan "Legally Speaking Group" comprises a number of professional women from within the firm who have developed a short and entertaining presentation identifying some common legal issues. We try very hard to make sure it's not boring - recently we were described as "scintillating" - so that's not boring! We have presented to a range of organisations and groups including a number of local service groups and are looking for new speaking opportunities for this year or beyond. We can tailor the subject matter and the duration of the presentation to fit your group's needs. If you or your group's "speaker seeker" would like more information, then please contact either Jo Hambleton or Gina Chin. We'd love to hear from you.

Penny and Hooper – Are We All Avoiding Tax?



Bridget Irving
Solicitor

On 24 August 2011 the Supreme Court released its decision in Penny and Hooper (*Penny & Hooper v Commissioner of Inland Revenue* [2011] NZSC 95). The decision has caused a bit of a media kerfuffle so we thought a short summary might help some of you wade through the legalese and help you decide whether you need to get expert advice.

The Basic Facts

- Penny and Hooper were Orthopaedic Surgeons who had operated as private consultants. During this time their personal income was around \$650,000.
- In 2000 (or thereabouts) they restructured their operations by forming companies (owned by their family trusts), which operated their orthopaedic practices.
- Penny and Hooper then became employees of their respective companies and were awarded significantly reduced salaries of one fifth of their prior income.
- The balance of the 'company profits' was paid via a dividend to their family trusts.

What did the Court find?

The defining feature of the decision was the Court's discussion of a "commercially realistic salary". The Court did not have any issue with the business structure being used by Penny and Hooper, commenting that operating a company owned by a family trust is "entirely lawful and unremarkable".

In essence, Penny and Hooper had complied with the letter of the law in structuring their operations in the way that they did. However, in setting their salaries at such a low level they had acted outside the 'scheme and purpose' of the Income Tax Act. The tax avoidance arose when the business structure was used to award artificially low salaries whilst allowing Penny and Hooper to have, in effect, full access to the entirety of the company profits AND changing the level of tax that would otherwise have been payable. The Court noted "...plainly, the tax advantage was, objectively, at the very least one of the principal purposes and effects of each arrangement".

The concept of a 'commercially realistic salary' is not something set out in the Income Tax Act. So this decision is likely to lead to a number of subsequent cases where the IRD will attempt to thrash out what a commercially realistic salary is and how it is determined. The IRD's position in Penny and Hooper was that ALL the profit of the company should be have been attributed as income to the working owner when assessing income for tax purposes. The Court did not go this far, indicating that in some circumstances a low salary will be justifiable, such as when significant capital expenditure is required or poor business performance is anticipated and money needs to be set aside.

Should you be concerned?

For what it is worth, the IRD has indicated that this case will not lead to a witch-hunt for small business owners. However, where there is the following combination of factors the IRD will begin to take a closer look.

- A sole proprietor business is transferred to a company or similar structure.
- The business profits are dependent on the personal exertion and input of the owner.
- The business's profit is significantly higher than the owner's salary.
- There are no extenuating circumstances to justify the low salary, such as capital commitments or anticipated poor financial performance.
- The owner has, in effect, full use of the company profits but they are routed through an intermediary structure.

These circumstances may arise in any professional or trades-based business. Owners of such business would be wise to review their salary setting practices both going forward and looking back to ensure they are not going to attract any unwelcome attention.

If you have any questions or enquiries about the issues raised by this case, please call John Anderson or a member of our commercial team to discuss.

–Bridget Irving, Solicitor