NZULR ABSTRACTS
Vol 24, No 1 June 2010

SHARING THE INCREASE IN VALUE OF SEPARATE PROPERTY UNDER THE PROPERTY (RELATIONSHIPS) ACT 1976: A CONCEPTUAL CONUNDRUM

MARGARET BRIGGS AND NICOLA PEART

In 2001 Parliament enacted some far-reaching amendments to the Property (Relationships) Act aimed at bolstering the equal sharing regime and removing obstacles to equality to secure an equitable outcome for spouses and partners. However, the changes made to s 9A—the provision that enables increases in value of separate property to be converted to relationship property—fail in this regard. This article will demonstrate that s 9A is now conceptually incoherent, internally inconsistent and incompatible with the aims and principles of the Property (Relationships) Act. Indeed, the amendments to s 9A are a retrograde step that have undermined the coherent approach to the classification and division of increases in value of separate property that the courts had already begun to develop prior to the 2001 amendments.

PROPERTY, CONTRACT AND THE FORGED REGISTERED MORTGAGE

MATTHEW HARDING

This article considers two questions that arise with respect to mortgages of Torrens land that have been brought into existence by third party fraud taking the form of forgery. First, does the title that the mortgagee gains upon registration extend beyond the mortgagee's charge, to cover the mortgagee's right to the performance of a promise to repay the money advanced to the fraudster? Secondly, in the case of a forged "all moneys" mortgage, under what circumstances will a court regard a term of the unregistered loan contract as incorporated into the registered mortgage instrument and therefore potentially within the title that the mortgagee gains upon registration? In considering these two questions, the article examines critically the approaches of courts in Australia and New Zealand to the relation of property and contract in the Torrens setting.

THE LINK BETWEEN CORPORATE GOVERNANCE AND CORRUPTION IN NEW ZEALAND

REBECCA HIRSCH AND SUSAN WATSON

Corporate corruption, in contrast to public sector corruption, has recently attracted increasing attention—mostly due to corporate scandals occurring internationally over the last decade. As the financial and social impact of corporate corruption can be immense, the corporate world needs to address this issue. The recent global financial crisis has further revealed the shortcomings of existing regulation. This article advances the legal debate about corporate corruption by approaching it from a corporate governance and company law perspective. Focusing on a New Zealand context, it is ultimately demonstrated that the corporate structure itself as well as the existence of poor corporate governance practices may contribute to the susceptibility of corporations to corrupt behaviour. Evaluating legal countermeasures, we arrive at the conclusion that initial steps have yielded a positive effect. However, these efforts need to be continued and advanced in order to significantly curtail opportunities for corrupt activities in corporations.

PAYMENT AND CANCELLATION OF DIVIDENDS: WHEN TWO WORLDS COLLIDE

MARK KEATING

When payment of a dividend is complete has many consequences for the company and its shareholders. It would therefore be expected that the legal treatment of that dividend was consistent between company law and tax. However, competing High Court decisions differ over the status of dividends declared by a company that subsequently becomes unable to pay the dividend without breaching the solvency test prescribed by the Companies Act 1993.

A series of company law cases have extended the solvency test so it applies both when a dividend is declared and when it is subsequently paid out to the shareholders, often years later. By contrast, a recent tax case determined a dividend is complete and irreversible immediately it is declared, regardless of whether those funds have been paid out to shareholders.

This article considers the different statutory regimes for company and tax law and compares the consequences for both the company and its shareholders to determine whether the divergent treatment can be reconciled. The author concludes the reasoning in the company law cases is flawed and prefers the analysis adopted in the tax decision.

THE MEANING OF "COMPETITION"

JOHN LAND, JESSE OWENS AND LEELA CEJNAR

This article provides a detailed analysis of the meaning of "competition" in New Zealand under the Commerce Act 1986, and in Australia under the Trade Practices Act 1974. It expresses the view that what competition means is the absence of market power to set prices or other terms and conditions of trade, and that such absence of market power can result from constraints imposed by either rivals or customers.

It challenges the contention that an increase in price or a decrease in output in a market is enough to indicate a decrease in competition. A more accurate test of whether competition has been lessened in a market does not depend on these outcomes but rather on the level of rivalry between market participants and constraints on their ability to set trading terms.

ATTEMPTING CLARIFICATION OF CONSTRUCTIVE TRUSTS

JESSICA PALMER

The constructive trust is traditionally a somewhat nebulous concept. Cases of constructive trusts are commonly divided in to institutional and remedial constructive trusts; the former comprising a wide range of different factual scenarios that have traditionally given rise to a trust, and the latter comprising less frequent instances of judicial discretion said to give rise to a trust. Yet these labels tell us little about the underlying justification for the recognition of a constructive trust. In this article, the author suggests that constructive trusts ought to be considered as playing either of two roles—to create an equitable proprietary right or to recognise an existing equitable proprietary right. Recent cases are examined in order to justify this approach and to shed light on the particular boundaries for when constructive trusts can legitimately create or recognise equitable property rights. The implications of this approach for such issues as the timing of constructive trusts and the duties of constructive trustees are briefly referred to.

IS 50:50 SHARED CARE A DESIRABLE NORM FOLLOWING FAMILY SEPARATION? RAISING QUESTIONS ABOUT CURRENT FAMILY LAW PRACTICES IN NEW ZEALAND

JULIA TOLMIE, VIVIENNE ELIZABETH AND NICOLA GAVEY

Twenty-one women who had disputes over care arrangements with the fathers of their children and were involved in New Zealand family law processes related to those disputes were interviewed about their experiences. On some of these women's accounts individual family law professionals appear to be adopting an idealistic approach to 50:50 shared day-to-day care, viewing it as the presumptively right arrangement for all children and, on this basis, one the New Zealand Family Court is likely to award. This article contrasts such an approach with the research literature emerging from Australia and elsewhere which suggests that post-separation care arrangements for children must be crafted in response to the unique circumstances of each case, and, in particular, the practical resources available to both parents, the parenting skills of the respective parents, the nature of the co-parenting relationship, and the age and temperament of the child in question. The literature raises serious questions about the advisability of 50:50 care arrangements in situations where the parents are in conflict and are unable to prevent children from witnessing or becoming involved in that conflict, or where the children are very young.

BAIN, BAYES AND BASICS: RELEVANCE UNDER THE EVIDENCE ACT 2006

BERNARD ROBERTSON

The Supreme Court has heard two cases relating to the "fundamental principle" of the Evidence Act 2006 that relevant evidence is admissible: R v Bain *[2009] NZSC 16, [2010] 1 NZLR 1 and* R v Wi *[2009] NZSC 121, [2010] 2 NZLR 11. In* Bain*, the Judges differed over whether evidence was relevant but its low probative value was outweighed by its potentially prejudicial effect (s 8 of the 2006 Act) or was irrelevant. This difference is analysed in Bayesian terms and shown to be intractable at the margin and the policy ramifications mentioned. The judgment in* Wi *is argued to be based on a failure properly to examine the relevance of the evidence before proceeding to consider whether it fitted within the definition of propensity evidence, with the result that a strained definition of "propensity" was adopted.*