

12 A Prince Avenue
Mount Maunganui

Telephone: 928 4422
Facsimile: 928 4440

email: admin@lyon-oneale.co.nz
www.lyon-oneale.co.nz

Aspen House
40 Willow Street
Tauranga

Telephone: 928 4422
Facsimile: 928 4420

NEWSLETTER

Issue 3
August 2010 – October 2010

Inside this edition

Paths, Terrain and Automobiles - What is Reasonable Access to Land?.....	1
Pre-Paid Funeral Trusts.....	2
Directors Duties.....	2
Solicitors Nominee Company.....	3
Contracting Out Agreements	3
Trusts - Relationship Property	4
Snippets	4
The Importance of a Current Will	4

A summary of the different events being hosted by the firm over the next few months is enclosed.

Paths, Terrain and Automobiles - What is Reasonable Access to Land?

The Court of Appeal recently considered this issue in the case of *Murray and Tuohy v BC Group (2003) Limited and Ors [2010] NZCA 163*. The appellants and their neighbours owned adjoining properties in the Wellington hillside suburb of Ngaio. The properties were created by a subdivision in 1963. The appellants purchased their property in 1989 with the only access to the property via a steep council owned pedestrian footpath.



Twenty years later and suffering health problems, the appellants sought an order under Section 129B of the Property Law Act 1952 requiring their immediate neighbours to provide access to their property through a right of way easement, on the basis that their land was landlocked. Section 129B is the remedial provision available to a landowner whose land is landlocked.

The Court of Appeal said that the approach in Section 129B cases is well settled and involves three stages (briefly) stated as:

- deciding whether the claimant's land is landlocked within the meaning of the section,
- if yes, determining how the discretion given to the Court by the section should be exercised, and
- if the Court decides to grant access to the landlocked land, to determine the terms of access.

The High Court, from which the appeal came, held in February 2009 that the appellant's property was not

Fundraising Charity Dinner

With guest speaker
Theresa Gattung

Thursday 16 September 2010
6.30pm, The Sebel, Trinity Wharf
\$80.00 per Ticket



In Support of
For further details contact:
melanie@lyon-oneale.co.nz or 07 928 4422

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

landlocked for the purposes of Section 129B (and accordingly there was no need to consider the second and third stages).

Under section 129B(1)(a) a “piece of land is landlocked if there is no reasonable access to it”. It was the appellant’s case that taking into account modern day community expectations and standards, a residential property without vehicular access does not enjoy reasonable access and is therefore landlocked.

In the Court of Appeal, Justice Gendall, who delivered the reasons of the Court, stated “we cannot accept that it is necessarily the case that under modern day community standards vehicular access on to the site of a residential property is necessary for it to enjoy reasonable access”.

Further into the judgement Justice Gendall stated “obviously, if people cannot get onto their property it has no reasonable access. If they can access it from a public roadway or walkway through a suitable pedestrian route then such access may be reasonable, depending on the circumstances”. In this case there was evidence from the respondents that this was typical of access to properties in Wellington’s hilly suburbs.

The Court of Appeal agreed with the High Court’s conclusion that, as a matter of fact having regard to contemporary standards, the present access was reasonable and that vehicular access was primarily a matter of convenience for the appellants. Accordingly the appeal was dismissed.

Pre-Paid Funeral Trust

Recently we have established a pre-paid funeral trust for clients of the firm. This allows our clients to set aside funds now to be used solely for funeral expenses.



The pre-paid funds will be held in our trust account in the name of “LOA Funeral Trustee Limited – *Client’s name*: Pre-paid Funeral Expenses” and will earn interest at a competitive rate. The interest rates of our trust account are generally better than interest rates individuals can obtain due to

the nature and size of a law firm’s trust account.

We do advise that funds paid to our pre-paid funeral trust cannot be returned and will only be applied to funeral expenses. After a client’s funeral expenses are

paid any remaining balance will be paid to the administrator of the client’s estate.

A certificate of pre-paid funeral trust will be issued which can be supplied to Work and Income New Zealand to verify that your funds are held solely for funeral expenses. Under the current residential care subsidy rules a maximum of \$10,000.00 can be excluded from means testing if held in a pre-paid funeral trust.

If you think a pre-paid funeral account would suit you, or someone you know, please feel free to contact us.

Nick Earl
nick@lyon-oneale.co.nz
 Phone: 07 928 4421

Director’s Duties

While companies provide limited liability and are considered a separate legal entity, directors can become personally liable if they breach their duties. These duties have become increasingly important in light of the recent financial downturn. When there is financial uncertainty, directors are more likely to make



decisions for which they could be held liable. This in turn gives rise to increased media attention.

Recently there have been numerous reports of the Securities Commission taking proceedings against directors of finance companies for misleading investors.

Under the Securities Act these directors face fines of up to \$500,000 in civil proceedings, and up to five years imprisonment or fines of up to \$300,000 in criminal proceedings. Therefore directors need to be aware of their obligations to the company.

Duties under the Companies Act 1993

The key duties, found in Part 8 of the Companies Act 1993 sections 131-137, include the following:

- The duty to act in good faith and in the best interests of the company.
- The duty to use their powers for the purpose for which they were conferred and not for any ulterior motive.
- The duty to act in accordance with the obligations under the Companies Act 1993 and the company’s constitution.
- That a director must not agree to cause, or allow the company’s business to be conducted in a manner that is likely to create a substantial risk of serious loss. To determine this the court will look at what an

'ordinary prudent director' would have done in the circumstances.

- The duty not to take on any obligations unless it is believed on reasonable grounds that the company will be able to perform those obligations when required to do so, and
- The duty to use the reasonable care, diligence and skill that a reasonable director would exercise in the circumstances.

Recent Director Liability Cases

Directors must actively ensure that they are meeting their obligations. The recent case *FXHT Fund Managers Ltd v Oberholster* held that directors who are not actively engaged in the company or 'sleeping directors' can be liable. In this case the inactive director was held liable for a breach of his duty of care even though it was his co-director who defrauded investors. Initially he was not aware of his co-director's dealings,

but as soon as he became aware he reported the matter to the authorities; however he was still held liable.

Similarly in *Lewis v Mason and Meltzor* the directors relied on a manager and did not exercise sufficient control over the company's financial position or the day to day running of the company. It was found that reliance on a manager does not excuse a director from liability and the directors were ordered to contribute to the Company's debts.

Summary

The above cases show the need for directors to take positive steps to discharge their obligations under the Companies Act, and be proactive directors who are aware of and adhere to the duties imposed on them.

Solicitors Nominee Company

Lyon O'Neale Arnold have run a solicitors nominee company for many years and through it have been able to provide good opportunities to both investor and borrower clients of the firm.

What is a solicitors nominee company?

A Solicitors nominee company is a company established by a legal firm which acts as a trustee for lending clients.

How does the system work?

Clients who wish to borrow from the nominee company approach us and their proposal is considered by the partners. The main criteria for lending is that the loan must be secured by a registered first mortgage over a freehold property and there must be a current valuation for the property. Any loans granted will not exceed two thirds of a registered valuer's assessment of the value of the property. In addition, the partners need to be satisfied that the borrowers are reliable and have the ability to meet their commitments on the loan.

Once approval in principle is given, detailed information is sent out to lender clients who have indicated their interest in investing. Subject to those lender clients approval their funds are then advanced to the borrower. Usually we amalgamate funds from several lenders to make

up one loan.

Term of Loan?

Loans are usually for a two year interest only term. The borrower may repay the loan before the due date, but in doing so incurs a bonus one month penalty interest which is paid to the lender. The lender has no right to get their money back in under the two year term, but if they do need it back, we can often arrange replacement lender funds to release money back to them early.

Interest rate?

The current interest rate paid to the lenders is 7%. This is not fixed and is subject to review if market interest rates move. Interest is paid quarterly on the 15th of February, May, August and November by borrowers and after processing by ourselves, is generally paid to the lenders a few days later.

Administration?

Pauline Keven attends to the administration side of the nominee company. She can answer any queries you may have or alternatively you can speak to the person in our firm with whom you normally deal.

Contracting Out Agreements

Kristina and John have been together for two years. John has several loans and owns the vehicle he uses for work. Kristina has two vehicles and some savings. Kristina receives a large inheritance and decides to purchase a waterfront property, not only for investment purposes, but also so she has somewhere to live mortgage free. During the course of the purchase, she is advised by her lawyer to enter a Contracting Out Agreement to protect the property. Kristina says she'll wait until they get closer to the

three year period to worry about it. Two years and six months into the relationship and John is refusing to agree to enter into a Contracting Out Agreement. He would rather the Act apply and he receive half the value of the house they are now living in. Katrina is at a loss and finds her relationship on edge. However, not wanting to lose the interest in her property, she tells John he has to move out and she too moves into a rental property until matters can be resolved.

The Property (Relationships) Act 1972 governs how assets are to be distributed and shared upon separation or death. The Act affectively covers all relationships, although it is marriages and de facto relationships (including same sex) that are subject to the equal sharing regime. Regardless of who owned what at the beginning of the relationship, the house utilised as the family home, chattels, vehicles and more, will be divided equally upon separation or death of a spouse.

Other than expensive and long drawn legal proceedings, a Contracting Out Agreement is the only

avenue available to avoid the equal sharing regime. Such Agreements will only be binding if they are certified by solicitors or Barristers who have given the relevant advice regarding the parties' rights and obligations under the Act.

Michaela Greaney
micheala@lyon-oneale.co.nz
Phone: 07 928 4433

Trusts – Relationship Property

Stuart and Michelle have been together for 1 year. Stuart has four children from a previous relationship and Michelle two. They are living in a rental. Prior to the relationship Stuart owned several pieces of land and commercial buildings. Stuart sells one of his commercial buildings to facilitate building new homes on each piece of land he owns. Soon after one of the spec homes are built, their landlord gives Stuart and Michelle 42 days notice to vacate as he wishes to sell the property. Stuart and Michelle move into Stuarts new spec home. After being there for 4 months, Michelle and Stuart purchase a house together and live there as the family home. Stuart sets up a Trust and transfers the commercial buildings and remaining spec homes over to the Trust. Three years and two months into their relationship, Stuart passes away suddenly. There is no Contracting Out Agreement. Michelle files an



Application seeking half everything Stuart owned at the time of his death, including the assets in his Trust and the value of the spec home they lived in prior to owning their family home.

Contracting Out Agreements are utilised to 'contract out of' the Property (Relationships) act 1976. The Act creates mechanisms allowing a Court to make orders for compensation where assets that would otherwise be treated as relationship property have been transferred into a trust during the period of the relationship.

Despite placing assets in a trust and drafting your Will to cater for your assets being dealt with in a particular manner upon your death, if there is no Contracting Out Agreement in place the Property (Relationships) Act 1976 can override your Will to the extent that the Court may decide to compensate the remaining spouse from assets transferred to the trust

Michaela Greaney
Michaela@lyon-oneale.co.nz
Phone: 07 928 4433

Snippets

The Importance of a Current Will

The recent High Court decision in *re Trotter* is a timely reminder of the importance of having a current will, particularly for parties who have recently separated.

Murray and Christine Trotter separated in May 2001 without a separation agreement or the making of a separation order. In October of that year a matrimonial property agreement was concluded that provided for the transfer of the matrimonial home into the sole ownership of Murray and the payment to Christine of half the equity in the home.

Murray occupied the home until his death in 2009 when he died intestate (i.e. having not made a will). Christine applied for Letters of Administration on the grounds that she had a sole beneficial interest in the estate.

The court noted the following:

- Regardless of the fact that the parties had executed a matrimonial property agreement, Christine had a beneficial interest in the estate as a surviving wife.
- Murray and Christine separated by mutual agreement and did not obtain a separation order from the Family Court and therefore Christine was not prevented from obtaining Letters of Administration.
- There were no other potential claimants.

The court found that no cause had been shown why Christine should not be granted Letters of Administration. Christine had the sole beneficial interest in the estate and therefore took priority under the High Court rules.

If you have any questions about the newsletter items, please contact us, we are here to help.