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NEWSLETTER

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Kylee Hunt - Associate

Lyon O'Neale Arnold is pleased to announce that Kylee Hunt has recently become an Associate of the firm.



Kylee specialises in commercial law with a focus on company formation and structuring, commercial contracts including all aspects of commercial leasing, and commercial transactions together with a general interest in trusts and estate planning.

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melanie@lyon-oneale.co.nz

Family Trusts: They Are What You Make Them

We have long been advocates of the humble family trust and have assisted many clients in this area.

Family trusts are still worthwhile tools for creditor protection, smooth transfer of assets on succession, relationship property claim protection, and rest home/residential care subsidy assistance to name a few benefits.

While family trusts may have lost some favour in the past with many people opting to set up a Loss Attributing Qualifying Company (LAQC) instead, our opinion has always been that there are distinct roles for both family trusts and LAQC's in asset planning and we are seeing a resurgence in popularity of family trusts.

However, with such resurgence comes some concerns that people are cutting costs by setting up a family trust themselves and in doing so are missing out on valuable advice regarding the ongoing operation of the family trust in accordance with the deed of trust and well establish trust law.

One major concern is that after setting up the family trust, many people continue to operate in the same manner as they did prior to the creation of the trust. One of the major features of a family trust is that when an asset is transferred into the trust, the individual owners (the vendors) no longer own or have control over the asset and instead it is the trustees that become the legal owners and control the assets with the best interests of the trust and therefore, the beneficiaries in mind. The problem arises when the vendors are also the trustees of the family trust (the purchasers) and fail to think and act as trustees and instead continue on in the same manner as they had when they owned the asset in their individual names.

Where there is no separation between the vendors and the purchasers in terms of their management and control of the assets, the trust is moving into dangerous territory and maybe determined by the courts to be a sham. If such a determination is

made, the family trust will offer none of the protection that would have been hoped for when setting up the trust, and assets will be made available to creditors or a spouse or de facto partner pursuant to a relationship property claim for example.

We strongly recommend people against setting up their own family trust and urge you to come and see us first to discuss what your goals are and the long term plan for your assets. For anyone who finds

themselves in the position where they have set up their own family trust but are unaware of their duties as a trustee or how a family trust operates, we have information available on family trusts that will be helpful or are more than happy to meet to discuss with you in person.

Kylee Hunt

Every Rose has its Thorn

New Zealand's highest appellate court, the Supreme Court, has recently delivered its decision in *Rose v Rose*. The case is about the classification of property. The Property (Relationships) Act 1976 ('the Act') defines relationship property and separate property. Relationship property is the pool of common property and at separation it is to be divided equally, unless there are extraordinary circumstances that would make equal sharing repugnant to justice. However, *Rose v Rose* exemplifies how there are also pathways whereby separate property becomes relationship property.

Relationship Property

Relationship property as defined in the Act includes:

- the family home – whether acquired before or during the relationship
- family chattels – whether acquired before or during the relationship
- all property jointly owned
- property owned immediately before the relationship began, if it was acquired in contemplation of the relationship and it was intended for the common use or the common benefit of the partners
- all property acquired after the relationship began, unless it is separate property (s9 and s9A) or the succession, survivorship, trust and gift provisions (s10)
- increases or gains in relationship property, subject to exceptions
- increases in the value of one partner's separate property, if the increase is attributable to:
 - the use of relationship property
 - the direct or indirect actions of the other spouse or partner

Separate Property

Separate property is defined in the Act as being any property that is not relationship property.

Rose v Rose

The basic approach of the courts has been that if the non-owning partner contributes to an increase in the value of the other partner's separate property that increase in value becomes relationship property.

In this case, Mr Rose's separate property included a farm that he owned prior to the marriage.

Mrs Rose sought to share the increase in the value of the farm at the date of separation. Mrs Rose argued that during the course of the marriage relationship her outside earnings combined with her duties as a homemaker enabled her husband to keep his farm and develop it into a vineyard. During the term of the marriage relationship the farm appreciated in value significantly due to inflationary pressures and its location within a prime grape region in Marlborough.

The Court accepted Mrs Rose's argument and held that Mrs Rose was entitled to a 40% share in the increase in the value of the separate property. Mr Rose was given a 60% share giving him greater credit for the inflation and general increase in the value of the land.

It is considered a landmark decision because despite the apparent indirectness of Mrs Rose's contributions, she was awarded a 40% share of the increase in the value of the separate property.

A Suggestion

One way you may possibly prevent separate property becoming relationship property is to record it in a section 21 Agreement, which also specifies that no matter what the contributions made to the relationship by the other partner during the life of the relationship, it is to remain separate property.

How to Secure your Debts

The Personal Property Securities Register ('the Register') is an electronic record of any debt security interests held against any personal property (except land) owned by an individual or organisation. In order

to register a security interest over property a creditor needs to have ownership rights in the property.

Purpose of Register

If someone owes you money ("the debtor") for personal property that you have provided to them, then you are a secured party and have a security interest in that property. Your security interest attaches to that property for the purposes of the Personal Property Securities Act 1999, if you have given value to the debtor and the debtor has rights in that property. For example, an electrician installs lighting into a shop and the shop-owner fails to pay for it. The electrician has given 'value' to the shop-owner (the lighting) and the shop-owner has 'rights' in the lighting because they own it. Therefore, the electrician has a security interest in the lighting.



The purpose of the Register however, is to allow you to further protect your security interest by registering it. This enables you to enforce your security interest against a third party. For example, a debtor may sell property that you have a security interest in to a third party. If your security interest is registered then you are able to enforce your interest against that third party.

Priority of secured parties

The goods that you have a security interest in may also be subject to a security interest from another party. By registering a security interest on the Register, you are granted priority over other unregistered security interests. If all security interests are registered, then priority is given in order of the date of registration. Therefore, when it comes to registering a security interest against goods, time is of the essence.

Registering your security interest

In order for you to register an interest on the

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 this firm.

For those of our clients that are not familiar with the services of our nominee company, the following information may be useful:

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. The name of our company is Trapski Dowd Lawyers Nominee Company Ltd. Trapski Dowd was the original name of this law firm.

How does the system work

Clients who wish to borrow from the nominee

Register, you must register a financing statement. The cost for registering a financing statement is \$3.00 and the process for doing so is as follows:

You must set up a Secured Party Group ID ("group ID") the first time you access the Register. All future registrations are made under this group ID. Once you have set up your group ID then you are able to register a financing statement against your debtor.

The following details are necessary in order to register a financing statement:

- In regards to a debtor that is an individual; full name, date of birth and address.
- In regards to a debtor that is an organisation; type of organisation i.e. company, partnership or trust and organisation's contact address.

It is imperative to retrieve this information from a debtor when entering into a security agreement with them as the fields are mandatory and a financing statement cannot be registered without it.

You must also enter information about the collateral (personal property) including the type (e.g. goods) and a description.

Searching the register

The Register can also be searched by anyone at a fee of \$1.00. The following searches are all available on the Register:

- Debtor Person Search
- Debtor Organisation Search
- Motor Vehicle Search
- Aircraft Serial Number Search
- Financing Statement Number Search

It is advisable to search the Register before entering into an agreement to sell, supply or buy in order to avoid people that repeatedly do not pay their debts.

company approach us and their proposal is considered by the partners. The main criteria for lending are 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. The lenders know who the borrowers are. The borrowers never know who the lenders are.

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 interest rate is not fixed and is subject to review if market interest rates move. However, interest rates do not tend to change often. 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.

Cambodia Charitable Trust

Announcing the arrival of
“The Cambodian Market”

Creative Tauranga Community Gallery,
Willow Street, Tauranga
11th – 22nd September,
Mon – Fri 9 – 4.30 pm,
Sat 10 – 4 pm,

Offering you the opportunity to purchase original artworks, ceramics, silk scarves, handbags, T-shirts, crafts, jewellery and toys direct from Cambodia.

**A great opportunity to buy
Christmas presents that
make a difference.**

Supporting artisans and manufacturers in Cambodia, all proceeds go to
The Cambodia Charitable Trust
to fund its projects:

- Developing Education
- Supporting Business Development
- Enforcing Human Rights



**Please spread the news!
All are welcome.**

Snippets

Residential Tenancies Amendment Bill

In May 2009 the Residential Tenancies Bill was introduced into Parliament in order to further clarify the rights and obligations between landlords and tenants. It is designed to encourage the development of a rental market that provides stable, quality housing to those who rent their homes. Until the Bill is passed into law the existing provisions of the Residential Tenancies Act 1986 remain in force.

The changes include:

- extending the provisions of the Act to include tenants in boarding houses and some rented accommodation where meals or cleaning services are provided
- introducing common principles to indicate when landlords or tenants are responsible for charges such as water or rates

- introducing a more transparent process for terminating or renewing tenancies
- increasing the value of fines and exemplary damages to encourage landlords and tenants to comply with obligations under the Act
- providing for residential tenancy disputes to be resolved more quickly, fairly and cost effectively with improved dispute resolution processes
- improving the enforceability of Tenancy Tribunal Orders, and
- prohibiting tenants being charged ‘letting fees’.

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