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# NEWSLETTER

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## Keeping You Informed

### Changes

You might have noticed that we have dropped off the “& Co” from the firm’s name. For some time we have been known in the community simply as “Swayne McDonald” so after 25 years of being “Swayne McDonald & Co, Barristers & Solicitors”, we have applied the “KISS” principal and are henceforth formally “Swayne McDonald, Lawyers”.

*But wait ... there's more!*

### New Branch Office

After 25 years of serving clients throughout the greater Auckland region from our Manurewa base, we are now also operating from a new branch office at Botany Junction, Manukau. Botany Junction is on the corner of Ormiston Road and Te Irirangi Drive.

Our new branch office should prove far more convenient to visit for our clients in the “eastern areas” – Pakuranga, Howick through Whitford to Beachlands and Maraetai. Initially, the Botany Junction office will be “manned” by one of our senior Legal Executives, Cheryl Smith. Cheryl has extensive experience in property transactions, especially Residential Conveyancing - for which she has a particular passion. If it would be more convenient for you to see any of our “Legal Team” at the Botany Junction office please let us know! Phone us on 265 2700 or call in and see us if you are in the Botany Junction area! – we are at 24C Botany Way –

*... and more ...*

### New Professional Staff

The practice continues to grow, and to meet the growth we have employed a new Lawyer. We are delighted to welcome Elise McCabe to the practice.

Elise completed her Law degree at Auckland and subsequently a Masters Degree (LLM) at the London School of Economics.

Since then Elise has had four years with larger Auckland City Legal practices focusing on Family Law (especially Relationship Property) and Civil Litigation. These areas will be the primary focus of Elise's work with us.

If you have family or friends who need advice on any Relationship Property or Family Law issue, or if you are looking to sue someone who has caused you loss, contact Elise for "jargon free" advice and prompt action!

## International Relocation of Children: When Disputes Arise

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### How The Problem Arises

Relocation disputes arise when the guardian who has day to day care of a child wishes to change his/her place of residence, along with that of the child, and the other guardian opposes the relocation. The proposed relocation may be to another country or to another city within New Zealand.

### Example

A typical scenario of a relocation dispute is:

Mary and Hohepa have been married for six years and separated a year ago. They have two children, Tama, 5 years and Annabelle, 2 years. The children have lived with Mary in Hamilton since the separation. Hohepa has contact with the children three weekends out of each month. Mary and Hohepa met in Australia. Mary's family all reside in Australia. Mary now wishes to return to Australia with Tama and Annabelle but Hohepa will not consent.

### The Legal Issues

As Mary wishes to relocate to another country with the children, Hohepa's consent must be obtained.

If Mary and Hohepa are unable to agree on the primary residence of their children, either parent may apply to the Family Court for the Court's direction.

If Hohepa becomes aware that Mary's departure may be imminent despite his expressed opposition to the move, he may file an Application for an Order Preventing the Children's Removal from New Zealand, until the Court determines the relocation issue.

Relocation disputes are dealt with under the Care of Children Act 2004 ("the Act"). The Act provides that the welfare and best interests of the children are to be the primary consideration and gives express guidance as to what matters the Court must take into account. The welfare of each child is different in every case and must be assessed on its merits.

The Act also requires the views of the children to be considered and a lawyer will be appointed by the Court to represent them.

If the relocation dispute is to be determined by the Court, a hearing will be held. Following the hearing the Court will make Orders. For example, the Court may make a Parenting Order providing for the children to be in Mary's day to day care in Australia and for Hohepa to have contact.

### Enforcement Of Orders

When children move outside of the New Zealand jurisdiction, it is important to ensure that Court orders will be adhered to. If they are not, there are enforcement procedures available to the aggrieved party. If the children are allowed to relocate to Australia, a signatory country to The Hague Convention, the relevant authorities of New Zealand and Australia can assist in the enforcement of the orders. New Zealand became a party to The Hague Convention on 1 August 1991.

The Act places particular emphasis on the importance of children's relationships with both parents and it is therefore important to ensure that proper safeguards are in place before children relocate overseas.

## Mining The Coastal Marine Area

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### Proposals To Mine – The Issues

Proposals and applications by parties for permits to explore or prospect for iron ore off the West Coast of the North Island raised concerns for communities located in the area. 'Kiwis Against Sand Mining' ("KASM") was formed in 2005 to provide a vehicle for addressing these concerns including that successful applications could eventually lead to mining in coastal marine area

("CMA") when the environmental impacts resulting from mining are largely unknown.

### Why The "Coastal Marine Area" Of The West Coast?

Expressed simply, the CMA includes the foreshore, seabed, coastal water, and the air above the water up to 12 miles out to sea. The CMA on the West Coast is an attractive location

for prospective miners as iron sand onshore dune deposits and offshore marine deposits can be found along 480 kilometres of coast from Kaipara Harbour to Wanganui. Furthermore, iron sand beach and sand dune deposits on the West Coast are some of the largest deposits in the world.



### The Legal Framework

Mining within the CMA in New Zealand is governed by the Crown Minerals Act 1991 ("CMA 1991") and the Resource Management Act 1991 ("RMA 1991"). The Acts create a dual regime for management of mineral resources and management of environmental effects associated with their use.

#### Crown Minerals Act 1991

The CMA 1991 provides for management of mineral resources and the allocation of rights to Crown owned minerals such as iron ore. The Ministry of Economic Development manages New Zealand's Crown owned mineral estate and its management role is achieved through minerals programmes and minerals permits. A minerals permit must be obtained before lawful prospecting, exploration for, or mining of Crown owned minerals may begin. A broad range of matters must be taken into account when applications for permits are considered. However, the Act provides little scope for public involvement in the permitting process as there is no formal notification process enabling submissions to be made by the public.

However, a holder of a permit under the CMA 1991 must also comply with the provisions of the RMA 1991 before mining related activities in the CMA can begin. The RMA 1991 contains a number of features and mechanisms designated to act as constraints on potentially harmful environmental effects associated with mining in the CMA.

#### Resource Management Act 1991

The RMA 1991 treats the preservation and protection of the CMA as a matter of national importance and expressly restricts a number of activities from occurring without the authority of a Regional Coastal Plan or the relevant coastal permit. Coastal permits are required for all activities that are not permitted by the relevant Regional Coastal Plan. Given the scale and scope of a mining operation in the CMA, it is likely that an application for a coastal permit would be notified requiring notice of the application to be served on affected parties. On notification of an application, any person may make a submission in respect of the application thereby triggering the hearing provisions of the RMA 1991.

Even though a party may obtain a permit to mine under the CMA 1991 and in view of the largely unknown environmental effects of mining in the CMA, groups like KASM hope that the RMA 1991 will provide sufficient opportunity for public involvement and ultimately protect the CMA from irrevocable damage.



## Leaky Homes

### Background

There has been considerable publicity over recent times about the problem of houses which are not watertight – commonly known as "leaky building syndrome". There can be a number of causes for this, including:

- Incorrect installation of monolithic cladding systems
- Inadequate construction of design features which do not allow for proper deflection or drainage of water
- Inadequate administration by councils and the Building Industry Authority (the latter having been set up under the Building Act 1981 to monitor the implementation of building standards)
- A failure by the building industry to deliver the additional level of care and skill required for modern building systems

- The use of untreated framing timber which is susceptible to rotting if moisture penetrates the outer building frame

### What Do You Do If You Own An Affected Property?

If you observe signs of cracking, staining or discolouration either on the exterior or interior of your property, then a weather tightness specialist consultant should be engaged to assess the damage before undertaking any repairs. The consultant will be able to advise you as to the likely cause of the damage which, in turn, will enable you to assess what remedies are available to you.

### Weather Tight Homes Resolution Service

The Weather Tight Homes Resolution Service was established pursuant to the Weather Tight Homes

Resolution Services Act 2002 to assist home owners whose properties are affected by leaky building syndrome. The purpose of the Act is to provide access to "speedy, flexible and cost effective procedures" for assessment and resolution of claims. Despite this, it appears that in practice building owners are dissatisfied with the service and the high costs associated with pursuing claims. This dissatisfaction has resulted in the formation of several action groups to try and address the problem.



### How To Avoid Buying A Leaking Home

If you are purchasing an existing property, then arrange for a professional inspection of the house to be carried out by a qualified and experienced inspector. The relevant professional or trade organisations include:

- Building Officials Institute of New Zealand
- Building Research Association of New Zealand Accredited Advisors
- Institution of Professional Engineers New Zealand
- New Zealand Institute of Architects
- New Zealand Institute of Building Surveyors
- New Zealand Institute of Quantity Surveyors

## News in Brief

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### Extension Of Paid Parental Leave To The Self Employed

A Bill that has now been referred to the select committee proposes to extend paid parental leave to the self-employed. Self-employed mothers who have been working an average of 10 hours per week, during either the previous 6 or 12 months before the expected date of delivery of their child, will be entitled to 14 weeks paid parental leave. Parental leave payments may be transferred by a self-employed mother to an eligible partner.

To be eligible for parental leave payments a self-employed person is required to take a break from his or her work. However, unlike an employed person, the self-employed person can maintain a level of oversight of his or her business during the period of parental leave.

If the Bill is passed it will take effect from 1 July 2006.

If you are constructing a new home, then make sure the design takes into account the issue of weather management. This includes:-

- adequate drainage
- adequate ventilation so that water which leaks inside cladding can dry if it cannot drain away
- using a design which ensures rain cannot enter the building through eaves or other features
- the use of materials which are suitable to the environment for the area in which you are building

Make sure you obtain guarantees from the cladding installer, system manufacturer and your builder. In addition, check your builder is a member of Master Builders or the Certified Builders Association of New Zealand.

### Conclusion

In an effort to prevent further problems of buildings affected by leaky building syndrome in the future, the Building Act 2004 introduced stricter compliance procedures for the building industry. However, the problem is set to continue for some time in respect of buildings constructed prior to that Act coming into force and prospective purchasers should be aware.



### Maori Land Court Records

It is now possible to search Maori Land Court records online. The Maori Land Online ("MLOL") free service enables access to information and records including lists of current owners and their respective share entitlements, memorials affecting blocks of land and details concerning how blocks of land are administered – for example, by way of Trust or Maori Incorporation.

This has enhanced access to Maori Land Court records simplifying matters for owners, their representatives and other interested parties. The information can be accessed at

[www.maorilandonline.govt.nz](http://www.maorilandonline.govt.nz)

*If you have any questions about the newsletter items, please contact us, we're here to help*