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NEWSLETTER

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New Staff at Swayne McDonald

We are delighted to welcome lawyer **Trish Bentinck-Stokes**, legal executive **Daphne Ma** and legal secretary **Audrey Bridle** to the Swayne McDonald team – they are based at the **Botany Junction** office as from 1 September 2009. **Trish** started her legal career in the mid 1980's as a legal executive and after earning her legal executive certificate, embarked on a LLB degree at Auckland University – studying part time and working full time in a medium sized Auckland legal practice. *continued on Page 4...*

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Government Targets Drugged Drivers

The Land Transport Amendment Act ('the Act') was passed on 25 July 2009 and will come into force on 1 December 2009. The Act was in response to the public's growing concern about drug-impaired drivers posing a serious risk on our roads. All drivers should be aware that the Act not only covers controlled drugs but also prescription medicine that is not taken in accordance with the instructions of a health practitioner.

Under the Act it is now an offence for a person to drive or attempt to drive a motor vehicle when they are impaired and their blood contains evidence of the use of a controlled drug or any prescription medicine.



Currently police officers are only able to ask a driver to take an impairment test but they cannot force them to do so.

Under the Act a police officer will have the ability to require a person to undergo a compulsory impairment test if they have good cause to suspect that a person has consumed either prescribed medication or illegal drugs. An individual can be required by a police officer to undergo an impairment test if they are:

- a driver or someone attempting to drive a motor vehicle
- a person whom a police officer has good cause to suspect has recently driven or attempted to drive a motor vehicle under the influence of drugs, or
- the driver of a vehicle that has been involved in an accident or if they are unable to locate the driver then a person whom the police officer has good cause to suspect was in the vehicle at the time of the accident.

Impairment tests

The impairment tests to be implemented are already used extensively worldwide and New Zealand police officers are to receive specialist training from trainers in the United Kingdom. Proposed tests include balance (the one-leg stand test), coordination (the walk and turn test), and the eye-pupil response test.

If a person fails the impairment test then a blood test will follow to establish whether the person has taken a controlled drug or any prescribed medication.

Defences

There are however some defences available. It is not an offence if the person consuming the controlled drug or prescription medicine has done so in accordance with:

- a current and valid prescription, and

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.

- any instructions from a health practitioner or the manufacturer of the drug or medicine.

It is also not an offence if the person has been administered the drug or medicine by a health practitioner without a prescription, and they have complied with any instructions the health practitioner has given them.

Penalties

The penalties for drug-impaired driving are similar to the current penalties for driving under the influence of alcohol; six months disqualification of licence and a fine of up to \$4,500.

Any evidence gathered for a conviction under the Act cannot be used as evidence in a prosecution under the Misuse of Drugs Act 1975.

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

Cross Lease Ownership

Ownership of a cross lease property means you own a share of the underlying land and lease flats (or houses) to yourself and other owners for (normally) 999 years. A cross lease plan is annexed to the certificate of title and is commonly referred to as the 'Flats Plan'. This shows common areas, restricted areas and delineates the area of each flat.

The common areas

The common areas, for example a driveway, may be used by all owners by virtue of their joint ownership of the land (if marked as a common area on their lease). There will be a covenant that the common

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.

area is not to be used for any purpose other than access for vehicles and pedestrians.

The restricted areas

The restricted areas are intended to provide each owner with a private area for their use such as a courtyard or garden. The rights that the owner enjoys over the restricted area depend on the actual terms of the lease itself. It is imperative that a prospective purchaser search all the leases of the property in order to ascertain the full extent of all restricted areas.

The flats

The area of each flat should be clearly delineated on the plan. A prospective purchaser should take the opportunity to compare the Flats Plan with the actual buildings on the property to ensure that there have been no additions, alterations, or demolitions which are not shown or recorded on the Flats Plan. The alterations or additions may encroach either on to the common area or on to a restricted area and the owner has no leasehold title to them, and is in breach of the lease if consent is not sought and the Flat Plans altered.

Objecting to title

If you are purchasing a cross-leased property you can object to title if the Flats Plan is defective. You are able to object to title subsequent to signing an agreement for sale and purchase, provided you do so within the correct timeframe.

If alterations or additions have been made to the flats so the exterior dimensions have changed, the vendor will be unable to give you a leasehold title to the alterations/additions and the title is defective.

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'.

New Staff at Swayne McDonald (continued from page 1)

For 17 years or so Trish carried out mortgagee sale and lending work for a well known Building Society. For the past 4 years Trish has operated her own general legal practice - **Bentinck-Stokes Law** - in Pakuranga, focusing primarily on Residential Conveyancing, Wills, Estate Administration,

On receiving an objection notice from a purchaser, the vendor usually has one of three options. S/he can correct the title, cancel the agreement, or negotiate with the purchaser.

To correct the title, the vendor must:

- have a cross-lease plan of the alterations or additions prepared and deposited in the Land Registry Office, and
- surrender the cross-lease and have a new cross-lease of the altered or enlarged building executed and registered.

This process is costly and relies on the co-operation of all parties.

In summary, a cross-lease title should be checked carefully to ensure there are restricted areas, common areas and the Flats Plan is correct. If you want to purchase a cross leased property and there is a problem with the Flats Plan, you may be able to have the vendor rectify the issue and proceed accordingly.

Enduring Powers of Attorney and Family Trusts. Bentinck-Stokes Law has amalgamated with Swayne McDonald as of 1 September 2009.

Audrey Bridle is a very experienced legal secretary and certified trust account administrator. Audrey has been a legal secretary for more than 20 years in the Pakuranga legal practice which for the past 4 years was owned and operated by Trish.



Daphne Ma is a registered legal executive who has

worked in Auckland city and suburban law firms since 1992. Daphne is fluent in Mandarin, Cantonese and English. Her areas of practice include conveyancing transactions, commercial leases, sale and purchase of small businesses, immigration and family trust matters.

The newest member of our staff is secretary **Dianne Carrington** – who returns to us after nearly 10 years away (the past 3 years with a specialist family law practice in Brisbane). Dianne was Devon McDonald's secretary for 2 years in the late 1990's – welcome back Dianne! Dianne is here to fill the Family Law Secretary role vacated by **Tracey Busby** who – after nearly 12 years with Swayne McDonald – has left the firm for "warmer climes". Tracey and her husband Alex are moving to the Far North – we are sorry to see Tracey go as will be the many clients who have come to know Tracey over the years. Our best wishes for the future go with Tracey.

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