



FLETCHER VAUTIER MOORE  
LAWYERS

# LAWS *of* SUCCESS

THE NEWSLETTER *of* FLETCHER VAUTIER MOORE, LAWYERS

OCTOBER 2003

## Message from the Managing Partner



Fletcher Vautier Moore has expanded over the last three years to meet the demands of our many and varied clients for which we provide legal services. To keep pace with that demand we needed to employ additional qualified legal staff, then beef up our administration teams in order

to provide adequate support. We now have in excess of 55 staff and 3 branch offices, and we are servicing clients in both Takaka and Havelock on a regular basis as well. This unprecedented growth has placed pressure on the firm's already cramped accommodation resulting in the decision to relocate in December to newly leased premises at 126 Trafalgar Street.

With the employment of new staff, the firm is now able to service client needs in a more timely and cost effective manner. Work is allocated on a cross functional team basis to meet the specific needs of your legal task. Teams generally comprise several partners and support staff that meet regularly to discuss the most efficient and cost effective way to move forward. This ensures you have access to the appropriate expert advice and information from the multi-talented members of our firm.

We've built our business through hard work, local relationships, a national focus and a commitment to providing the highest levels of client service at very competitive rates. To experience that difference, talk to us at Fletcher Vautier Moore.

Jock Sutherland MANAGING PARTNER

## We're moving

Around mid-December we hope to be moving into leased accommodation at Level 1, 126 Trafalgar Street.

Due to difficulties housing our existing staff, and with no room for any additional people, we are cramped into every bit of available space in our present building. As a result we suffer from a lack of space for meetings, seminars and training, which has a concertina effect on our ability to provide sufficient confidential client interviewing areas.

In order to maintain a professional service we have taken leased space in the new building being erected at Wakatu Square, which bisects Wakatu Lane, Achilles Avenue and Trafalgar Street. The new space will provide for the future growth of the firm and more importantly allow us to deliver client services more efficiently.

We will be sending a direct mail out to our clients and business associates with further details of the relocation and our new contact details shortly.

*Level 1, 126 Trafalgar Street.*



## Contents

- 1 Message from the Managing Partner   1 We're moving   2 Government considers allowing gay couples to "tie the knot"  
2 On a mission for commission   3 I am my trust... or am I?   4 Staff profiles   4 Staff Departures

## Government considers allowing gay couples to “tie the knot”

The New Zealand Government is considering adoption of a registered partnership system, a so called “civil union” that would allow same-sex and heterosexual couples to legalise their relationship.

Labour MP Tim Barnett has been working on the Civil Union Bill since 2000.

If passed, it will mean that couples can officially register their union and will be likely to gain next-of-kin recognition similar to married couples.

Existing legislation would be amended to specifically recognise

not only marriages and de factos but civil unions as well.

Under the proposed law, civil unions will be defined as being “in the nature of marriage”. The status and sanctity of marriage under the Marriage Act will be preserved, but the registration of civil unions will operate in parallel with the Marriage Act.

The proposed law will also allow for the registration of heterosexual couples, to meet the needs of existing de facto couples who may wish to be legally recognised but not as a “married” couple.



## I am my trust... or am I?

**If you are a trustee – are you familiar with your obligations when dealing with Trust assets?**

If you treat your Family Trust's assets as an extension of your own assets, you run the risk of being found to have committed a breach of trust, and could be personally liable for the repercussions of that breach!

### Trust Bank Accounts

Trustees need to ensure that the Trust has a separate bank account at all times. It is important that only Trust transactions are conducted through the Trust bank account.

If you are an independent trustee, you need to ensure that the Trust's bank accounts are used appropriately. Often independent trustees are kept in the dark about the Trust bank account, and have no idea if it is being used correctly.

It is not uncommon for some trustees to use a Trust bank account as their own for their day to day transactions. Using the Trust eftpos card to buy groceries or to pay for your night out is risky!

### Use of Trust Assets

As a trustee, you must ensure that the Trust assets are always recognised as belonging to the Trust and are not used for personal use. If you are an independent trustee, you must ensure that the other trustees adhere to their obligations as trustees and do not use Trust assets for personal use, or enter into transactions involving Trust assets without your prior approval.

The ownership of Trust assets needs to be correctly documented in the names of the trustees (as joint tenants), to ensure that there is no opportunity for improper use of those Trust assets by the trustee in whose name they lie. If you fail to ensure this, you could be liable for breaching your duty as a trustee.

### Recent Case

In the recent High Court case of ASB Bank Limited v Davidson & Others, a trustee was found to have breached the above 'golden rules'. Mr Davidson was held personally liable for a debt

incurred pursuant to a guarantee given by his Family Trust. This was because he did not obtain the unanimous approval of the trustees prior to committing the Trust to guarantee further bank advances. He signed the new documentation in his capacity as trustee of the Trust, without arranging for the other trustees to sign.

The Judge held that "Mr Davidson is yet another example of a person who, having arranged the formation of a Family Trust to protect assets and gain income tax advantages, thereafter chose to ignore the legal implications of his trusteeship and simply regarded the assets of the Trust as part of his overall assets which were available to him to do as he wished. He was able to do so because it is quite obvious that his co-trustees failed to exercise their responsibilities as trustees".

Mr Davidson was held personally liable to pay the \$200,000 claimed, together with interest and solicitor/client costs.

### Be Alert

If you are a trustee, play it safe when dealing with the Trust's assets, and make sure the activities of your fellow trustees are not putting you at risk.

# On a mission for commission

## When can a real estate agent claim a commission?

### Entitlement to Commission

The agent must be licensed to carry on business as a real estate agent and must have a written appointment to act as an agent to perform a service for the vendor (the seller). The appointment need not state that commission is payable nor the rate at which commission will be charged. It must, however, state the acts the agent must perform to earn the commission.

### General Authority

A standard sale and purchase agreement contains a general authority for an agent to sell the property. By signing the agreement, you appoint and confer an entitlement to commission upon the agent listed in the agreement. An agent becomes entitled to commission as soon as a purchaser enters into a binding, unconditional contract with the vendor, regardless of whether or not the sale is ever completed.

### Introductions

Standard written appointments often contain 'introduction' provisions, providing for commission to be payable where the agent introduces a purchaser to the property. Commission is payable where there has been an 'introduction' and subsequent sale, even if the vendor and purchaser opt to conduct and finalise negotiations between themselves. The agent need only bring about the 'introduction'. Such provisions can also apply after the agency has expired.

However, the 'introduction' itself must be the effective cause of the subsequent sale. If the agent's introduction ceases to be instrumental in bringing about the sale, the agent's right to commission is lost.



### What is the Effective Cause?

It can be difficult to determine when an agent's introduction is the 'effective cause' of the subsequent sale. This is highlighted by the following case.

In October 2001, J entered into a sole agency agreement with FBRL. During the term of the agency, the agent introduced R and P to the property. R and P's offer to purchase the property was rejected in December 2001. The sole agency agreement expired a month later.

After the agreement expired J made improvements to the property and in March 2002 started marketing the property privately. In May 2002 R saw one of J's advertisements, re-inspected the property a month later, and purchased it shortly after.

FBRL learned of the sale and claimed commission on the basis that they had introduced R and P to the property during the term of the agency.

The District Court held that the introduction had a material bearing on the sale even though the agency had ceased five months earlier.

On appeal to the High Court, the earlier decision was set aside. While it was found that the initial introduction was material to the sale, it was not conclusive that the introduction was the effective cause of the sale. Fresh advertising, and the further work undertaken at the property, could have removed the causal effect of the original introduction.

### Our Advice

There are other circumstances where commission may be payable and there are many options when appointing an agent to sell your house. If you intend to sell your property – investigate your rights before you sign on the dotted line.

## Staff



### Alison Macdonald

Alison graduated from Adelaide and Auckland University with a double degree in Law and Arts (Majoring International Relations and Political Philosophy). She was born in Africa and has spent time in New Zealand, Australia, UK, USA, Nepal and Zimbabwe.

She enjoys working at Fletcher Vautier Moore because it offers a broad range of work experience. The Nelson lifestyle will provide Alison with opportunities to pursue her other interests and hobbies.



### Suellen Laffey

Suellen Laffey is a Legal Executive specialising in residential conveyancing. She also has experience in Wills and Estates.

After initially working and studying in Christchurch, Suellen moved to Nelson and worked for Fletcher Vautier Moore until leaving to start a family in 1988 and subsequently moving away from Nelson. Since then she has worked for several Christchurch law firms, before returning to Nelson with her family in 2002 to enjoy the lifestyle Nelson offers.

Suellen works part-time for the conveyancing team in the Nelson office.



### Meg Scally

Meg completed her studies at Otago University in 2000. She graduated with a Bachelor of Laws and a Bachelor of Arts majoring in Gender Studies. She was admitted as a Barrister and Solicitor in 2001.

After professionals she spent 2 years living in Melbourne where she experienced working on a wide spectrum of litigation including criminal matters in the Magistrate's Court, a Royal Commission and the settlement of a class action suit.

She joined Fletcher Vautier Moore in June 2003 where she is practising in all areas of litigation.

Meg enjoys the relaxed lifestyle and the range of cultural and recreational activities that Nelson has to offer.

## Departures

We advise that, effective from 31st August 2003, Hamish Fletcher has retired from the partnership to practise on his own account. We also farewell Kim Proctor-Western, Don Turley, Ron Fletcher and Michael Underdown who will join Hamish's practice.

Matthew Yoo has resigned to pursue a legal career in Auckland.

Any clients who dealt with any of the above solicitors can call our Business Manager, Steve Fraser, to discuss a suitable replacement as your legal

advisor. Please feel free to check our web page where all of our legal staff and their areas of speciality are listed, [www.fvm.co.nz](http://www.fvm.co.nz)



**FLETCHER VAUTIER MOORE**  
LAWYERS

**Nelson** 288 Trafalgar Street, PO Box 90, Nelson. Tel: (03) 548 1469, Fax: (03) 548 2994

**Richmond** 2 Cambridge Street. Tel: (03) 544 8666, Fax: (03) 544 4036

**Motueka** 12 Wallace Street. Tel: (03) 528 7030, Fax: (03) 528 9120

**Takaka and Havelock** by appointment