



FLETCHER VAUTIER MOORE
LAWYERS

LAW *for* SUCCESS

THE NEWSLETTER of FLETCHER VAUTIER MOORE, LAWYERS

SEPTEMBER 2005

Spring Issue

In our second to last issue for 2005, we explore the case of whether a personal cheque is valid tender when paying the deposit on a property, review recent legislation changes affecting asset/income testing such as rest home charges, and briefly look at what's involved in subdividing land.

If you have access to the internet, we invite you to look at our growing range of Legal Articles plus previous issues of our client newsletters. Alternatively, feel free to contact us for hardcopies.

Details of future free seminars are also outlined on our website, including "Structuring Your

Business for Maximum Benefit" which is advertised on page 4 of this newsletter. Keep an eye out for future additions.

Steve Fraser
Business Manager

Protection Against Asset / Income Testing



by *Fiona McConnochie*
Solicitor
Richmond Commercial Team

As the "user pays" criteria is increasingly applied to government and local body benefits and services, one instance causing great concern is the residential care subsidy relating to long term residential care, ie in a hospital or rest home.

The Social Security (Long-Term Residential Care) Amendment Act came into effect on 1 July 2005, and increased the asset thresholds enabling people to retain more of their assets as follows:

- From \$15,000 to \$150,000 for a single or widowed person in care
- From \$30,000 to \$150,000 for couples with both partners in care
- From \$45,000 to \$55,000 for couples with one partner in care (house and car remains exempt). Couples with one partner in care can opt to be tested against the

\$150,000 threshold for their total assets (instead of \$55,000 plus house and car).

When a person's assets reduce to these levels, they are eligible for the residential care subsidy.

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Thinking of Subdividing?



by Maurice Higgs
Legal Executive
Nelson Commercial Team

Where do you start?

The first step is to approach an experienced surveyor /resource consent planner to discuss with you whether subdividing is viable.

Who will be involved?

You will need the professional assistance of three key people:

- Your surveyor/resource consent planner;
- Your solicitor; and
- Your real estate agent.

They will usually work in consultation with each other as the work progresses.

Your surveyor will be able to advise you on the initial feasibility of subdividing in conjunction with the relevant Council District Plan, assist with service requirements such as drainage, sewage, roading, power, phone requirements, and also any engineering requirements.

In this article, Maurice Higgs talks about one of the most common types of subdivision – dividing land titles into sections for housing.

They will prepare and submit to the Council the application plan and resource consent application and, once approved, take care of a variety of survey and title plans required by Council and Land Information New Zealand (LINZ).

In addition to the above “paperwork”, your surveyor will be able to estimate the overall costs to help determine the likely section sale prices, and provide an outline of the time involved from start to finish.



Once the survey process is in hand, copies of the plan will be passed on to your solicitor or legal professional to prepare the new title documentation. They will also attend to all LINZ and bank requirements, documentation relating to preparing the sections for sale, and check to ensure the new titles contain all the correct information.

An estimate of legal and LINZ costs will be provided for you to consider in relation to the sale price of the sections.

When it comes time to market and sell your sections, your real estate agent will put their expertise to work in order to achieve an optimum price.

At Fletcher Vautier Moore we have a team of highly experienced solicitors and professional staff using up to date technology. We are able to provide an efficient service at competitive rates across the Nelson/Tasman region, having offices at Nelson, Richmond and Motueka, and visiting Takaka and Havelock weekly.

For professional assistance, contact Maurice Higgs, or any of our Commercial Team specialists. 📍

For an extended version of this article, visit our website www.fvm.co.nz and click on Legal Articles.

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The cost of rest home care

As the average cost of rest home care is between \$25,000 - \$35,000 per annum, a person's lifetime savings could rapidly be used up paying for care, except for those amounts that may be retained under the Act.

Transferring assets to a Family Trust can provide protection in this situation.

Before a person becomes eligible for a residential care subsidy, they must disclose to WINZ any asset parted with within the immediately preceding five years.

For this reason it is important that assets are placed in a Family Trust sooner rather than later.

If you would like to know more about future protection of your assets, contact one of our family trust specialists at any of our offices. 📍

For an extended version of this article, visit our website www.fvm.co.nz and click on Legal Articles.

Is the Property Yours or Not?

You've found your ideal property; it represents the fulfilment of your dreams. You've given the agent a cheque drawn on your account to pay the deposit and walked away, secure in the knowledge that your dreams are protected . . . but are they?



Not necessarily, according to a recently released decision of the (new) Supreme Court of New Zealand. In **Otago Station Estates v Parker** the Court considered the following facts:

The Parkers agreed to sell two blocks of rural land in North Otago to purchasers who nominated Otago Station Estates Ltd (**OSE**) as purchaser. The agreements were on the usual form used by real estate agents and lawyers. Of note:

- The purchaser was required to pay the deposit to the vendor or their agent “*immediately upon execution of this agreement*”; (clause 2.1)
- The vendor could only cancel the agreement for non payment of the deposit if the purchaser failed to pay within three working days of receiving the purchaser’s notice of intention to cancel. (clause 2.2)

The agreements were confirmed but the deposits were not paid.

Some time later OSE advised it was ready, willing and able to settle. When nothing happened, OSE issued proceedings seeking specific performance. The Parkers (through their lawyers) responded with a notice stating an intention to cancel unless the deposits were paid within three working days.

Within that three day period, OSE’s company cheque was drawn and its solicitors sent a fax to the Parkers’ solicitors advising that the deposits (and interest for late payment, paid under protest) had been deposited to the solicitors’ trust account.

It is at this point that the fun began!

The day after being advised that the deposits had been paid, the Parkers’ solicitors stated that a personal (OSE) cheque did not constitute legal tender and consequently, as the default in payment of the deposits had not been remedied, the contracts were cancelled. The solicitors subsequently (eight days later and presumably after the cheque had cleared) sent a bank cheque refunding the deposit.

The dispute made its way right through the hierarchy of the New Zealand court system, from the High Court to the Court of Appeal, to the Supreme Court. The various judgments are perhaps as notable for their diversity of reasoning as for their consistency of result.

In the High Court, Chisholm J stated that, although he would have been prepared to rule that a personal cheque was valid tender to pay a “usual” deposit, the position in response to a default notice was different.

His Honour held that certainty was paramount at that point and necessity to await clearance of a



Bruce Fraser
Partner
Nelson Commercial Team

cheque was incompatible with that principle, such that the cancellation of the contracts was valid.

However, the Court of Appeal did not agree that a personal cheque was acceptable to pay the “usual” deposit, but acknowledged that vendors (through their agent) frequently waived their right to payment in cash. The Court ruled that a vendor did not have to accept a personal cheque in payment of the deposit. The cancellation was valid.

The Supreme Court also upheld the cancellation. The Court noted both earlier decisions and considered the legal principles surrounding payment and legal tender. It endorsed an earlier (1981) view of Somers J that “*a person entitled to payment of a deposit is entitled to . . . the certainty of actual receipt. The entitlement is to more than a conditional payment with the need to await clearance of the cheque in order to know that payment has actually occurred, and with the right to sue for the debt suspended in the meantime*”.

Having said that, the Supreme Court acknowledged that a personal cheque may be (and often is) accepted, and if the vendor does not object, he/she is then estopped from challenging that mode of payment.

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Conclusions

Whether buying or selling, you should be mindful that a personal cheque in payment of a deposit does not fulfil the contractual obligation unless the vendor accepts a personal cheque and thereby waives his/her rights. A vendor who requires certainty is entitled to it and may insist on a bank cheque.

However, any vendor taking that view needs to ensure that the real estate agent (who, as their agent, binds them) is fully aware of their requirements and expectations. Practically a vendor should balance that against the fact that, under the Real Estate Agents Act, the agent cannot release the deposit for ten days without the authority of both vendor and purchaser.

As a purchaser, be alert to the issue, especially if you are responding to a notice; do not take the risk – pay by bank cheque or your dream property may slip through your fingers. ▲

Free Seminars

Tuesday 20 September - Motueka
Wednesday 21 September - Takaka
5.30 - 6.30 pm - Venues to be advised

STRUCTURING YOUR BUSINESS FOR MAXIMUM BENEFIT

When starting or purchasing a new business, many people find the legalities of the structure daunting.

Common questions that arise are “Will people take my business seriously if I operate as a sole trader?”, “Should I form a company?”, “What are the benefits of a trading trust?”, “How am I protected if I have a dispute with my business partner?”, “What are the tax implications?”

There are a wide range of operating structures and, while the general perception amongst the wider community is that a company is the “best” legal entity to operate a business, this is not necessarily always the case. Each business must be examined on a case by case basis to determine the most effective method of ownership and control.

To find out more about these legal entities and examine the advantages and disadvantages of each structure, join us at one of two seminars, initially being held at Motueka and Takaka. (Venues will be advised at time of RSVP.)



Presented by
Lee James and Bruce Fraser

View presenter profiles
see www.fvm.co.nz
'Our People'

RSVP by 5.00 pm **Wednesday 14 September 2005** to Vanessa Harris
phone 03 528 7030 or 0800 287 030 or e-mail vharris@fvm.co.nz

For a copy of an extended seminar outline, contact Vanessa Harris
or see 'Legal Articles' on our website www.fvm.co.nz

Staff Announcements

Deb Bloomfield transferred from our Richmond Property Team to our Nelson Litigation Team, replacing **Karen Stewart** as a Personal Assistant, and **Emma Fifita** joined our Richmond Property Team as a Law Clerk, having transferred from our Nelson Office. Also in July we welcomed **Susan Simpson** as a permanent Personal Assistant in our Nelson Commercial Team.

In August we extended our best wishes to **Kaye Lawrence**, Solicitor, Nelson Litigation Team before she went on parental leave, and we farewelled **Victoria Chisnall**, Solicitor of our Nelson Commercial Team.

Would you prefer to receive our newsletter via e-mail?

Please contact Penny Menzies, PA to Management Team, Nelson Office
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Visits to Takaka and Havelock weekly

www.fvm.co.nz