



BarltropGraham LAWYERS Bulletin

DECEMBER 2011 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS



Seasons Greetings

It has been a difficult time for New Zealand! The Christchurch earthquakes, Pike River and the Rena have all contributed to our woes. Collectively they will have an ongoing effect on our economy for years to come. Thank goodness the All Blacks gave us something to cheer about, even if the last 40 minutes of the Final was too stressful for comfort.

The Manawatu has fortunately avoided major tragedies and we head into the holiday period with the region in good heart and prospects of further improvement in 2012. Hopes that the property market would take off again have been unfounded. The year has been patchy, with economic fears from overseas regularly dampening the market whenever it showed signs of improvement. However, there is a shortage of housing stock in New Zealand and steadily rising costs should ensure that existing homes increase in value. If you are thinking of selling, wait a bit. If you are a buyer, now may be a good time to start looking.

Our year has been steady but we end on a sad note as my secretary Karen Bowles is retiring. Karen will be greatly missed but we wish her a well-deserved rest, with more time to devote to her grandchildren.

Enjoy the Festive Season.

LLOYD EVANS



XMAS BREAK

Our offices close at 3pm on
Friday 23 December 2011
and re-open at 8:30am on
Monday 16 January 2012.

We wish all of our clients
a very Merry Christmas
and Happy New Year.
We look forward to being of
service to you in 2012.

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THE UNIT TITLES ACT

The Unit Titles Act 2010 (the “2010 Act”) came into force on 20 June 2011 and replaced the Unit Titles Act 1972. The 2010 Act contains material changes from its predecessor and is now the principal authority pertaining to the establishment and management of developments such as apartment blocks, multi-layered commercial spaces and flats.

The key changes included in the 2010 Act are discussed below.

All common property in an establishment is now owned by the Body Corporate. Previously, ownership of common property was jointly vested in all unit owners. The change now allows the Body Corporate to more effectively promote the benefit of the development as a whole by representing all unit owners in relation to the improvement and maintenance of common property. Responsibility for the maintenance of building elements and infrastructure affecting more than one unit now lies with the Body Corporate. This means, for example, that the Body Corporate will be responsible for repairing a leak from a top floor apartment to a unit below (provided the leak is not attributable to the recklessness or negligence of the unit owner and/or occupier). Previously, the obligation

to remedy the leak would have fallen solely on the owner of the top floor apartment.

Minor alterations to individual units are now more feasible as the 2010 Act allows for increased flexibility relating to re-developments. Obtaining the consent of a Body Corporate is no longer required to carry out additions or structural alterations to units, provided the modifications do not materially affect the common property or the property of another owner.

The subdivision of principal units is also possible under the 2010 Act, allowing for the creation of a separate unit title development within the principal title, known as a subsidiary. This is known as a layered development and allows for multiple uses of a building—such as where a building has car parking, shopping complexes and apartments all within its confines.

The 2010 Act also allows for the creation of separate Bodies Corporate that govern subsidiary units, which are also part of the Head Body Corporate responsible for overall management of the development.

Unanimous consent of the Body Corporate is no longer required under the 2010 Act and a 75% majority is sufficient for decisions to be made. This

change has been welcomed by many as it means decisions will less likely be held up by difficult owners.

Bodies Corporate are also required to develop long term maintenance plans in advance, giving owners the opportunity to pay regular instalments over time. This is to avoid owners having to pay large, one-off special levies for work required on common property such as lifts.

The 2010 Act seems to attempt to be more flexible and pragmatic. To some extent the 2010 Act may give unit titles owners more certainty and therefore promote unit titles as a form of land ownership.



The Washington Post’s Mensa Invitational once again invited readers to take any word from the dictionary, alter it by adding, subtracting, or changing one letter, and supply a new definition.

Here are the winners:

Cashtration (n): The act of buying a house which renders the subject financially impotent for an indefinite period of time.

Intoxication: Euphoria at getting a tax refund, which lasts until you realise it was your money to start with.

Reintarnation: Coming back to life as a hillbilly.

Giraffiti: Vandalism spray-painted very, very high.

Sarchasm: The gulf between the author of sarcastic wit and the person who doesn’t get it.

Inoculate: To take coffee intravenously when you are running late.

Karmegeddon: It’s like, when everybody is sending off all these really bad vibes, right? And then, like, the Earth explodes and it’s like, a serious bummer.

Decafalon (n): The gruelling event of getting through the day consuming only things that are good for you.

Glibido: All talk and no action.

Dopeler Effect: The tendency of stupid ideas to seem smarter when they come at you rapidly.

Arachnoleptic Fit (n): The frantic dance performed just after you’ve accidentally walked through a spider web.

Beelzebug (n): Satan in the form of a mosquito, that gets into your bedroom at three in the morning and cannot be cast out.

Caterpallor (n): The colour you turn after finding half a worm in the fruit you’re eating.

The Washington Post has also published

the winning submissions to its yearly contest, in which readers are asked to supply alternate meanings for common words.

Some of the winners:

Coffee (n) - the person upon whom one coughs; **Flabbergasted** (adj) - appalled by discovering how much weight one has gained; **Abdicate** (v) - to give up all hope of ever having a flat stomach; **Willy-nilly** (adj) - impotent; **Negligent** (adj) - absent mindedly answering the door when wearing only a nightgown; **Lymph** (v) - to walk with a lisp; **Gargoyle** (n) - olive flavoured mouthwash; **Flatulence** (n) - emergency vehicle that picks up someone who has been run over by a steamroller; **Balderdash** (n) - a rapidly receding hairline; **Rectitude** (n) - the formal, dignified bearing adopted by proctologists; **Circumvent** (n) - an opening in the front of boxer shorts worn by Jewish men.



DOES NEW ZEALAND'S JURY SYSTEM WORK?

Otago's Professor Kevin Dawkins asked himself that question and admits that he began his research in a sceptical frame of mind. He worried that the high rates of jurors being excused from duty—mostly for employment reasons—leads to a less than optimally competent pool of potential decision makers. He held reservations about their ability to grapple with complex laws. Dawkins is as surprised as anyone that his investigations have made him such a convert to the jury system for dispensing justice.

Some facts:

A 1999 Law Commission study showed that, despite employment being the leading reason for potential jurors asking to be excused, 80.8% of jurors were employed, with half of these in higher professional and managerial roles. Beneficiaries accounted for 3.2% of jurors, a little fewer than retired folk (4.5%) and similar to those on "home duties" (3.5%). 55% of jurors held tertiary qualifications.

In 2008-9 47% were aged between 40 and 60. Only 2.5% were under 20 years of age and 3.5% were over 70. It is a very different picture to critics' images of jurors as the doddering and unemployable. Faced with this, Dawkins took a closer look at cases where jury decision have been especially controversial.

"Many of the problems that have risen are not the fault of the jury at all. We have seen examples where the judges decided to suppress evidence, presumably on the grounds juries could not be trusted to attach the appropriate weight to it. We have seen defences run which should have been ruled out by the trial judge. By even allowing a defence to be put forward, the judge affords it some legitimacy. This issue is compounded where laws are not well written and instructions on how to apply them are unclear."

In other cases, judges and legal teams have not highlighted explicitly the "crunch issues" juries must decide upon. "Furthermore, the prosecution's case and the defence's rebuttal on a particular point—ballistics evidence, for example—can be weeks apart. That all hinders ease of understanding and judgement."

And then there is the problem of

"reasonable doubt". Best practice directions from the judge advise juries they need to be "sure" but they do not need to be "certain". To most minds—and to most dictionaries—the terms are synonyms. It's quite confusing and research suggests jurors are often uncertain about what this means.

But, says Dawkins, judges face exactly the same problem. Just like juries, they too are subject to prejudice, emotion, time pressures and negotiating complicated law. And if judges start making problematic judgments, it becomes an extremely difficult situation to remedy.

Say what you like about the jury system, says Dawkins, its highly devolved decision making model means that if a miscarriage of justice does occur, it is likely to be a one-off, not a systemic problem.

Russia, Spain and Japan have all recently overturned their judge alone systems in favour of juries.

Dawkins' preferred approach now is not to rethink the jury system but to refine it. He agrees that the threshold for eligibility to elect a jury trial should be raised. Currently the option is available for cases carrying a maximum penalty of more than 3 months' imprisonment: in Canada and Australia this threshold is 5 years.

He sees a place for more judge alone trials in specific cases, "such as long, knotty, fraud cases where they really do benefit from a concentrated mind working out the complexities of the facts." This can now occur as a result of a recent change in the law.

Inquisition is the main alternative to the adversarial justice system on which the jury approach is founded. It allows a judge alone to question witnesses and determine guilt.

"The countries with judge alone and inquisitorial systems, without lay participation, tend to be totalitarian regimes. Inquisition puts an awful lot of power into the hands of very few. Those people then become very tempting targets for particular interests to seek to control. Also you are very much at the mercy of judges asking the right questions."

Juries may be an excellent bulwark against corruption and state power and justifiable on those grounds. Strong

laws exist to preserve jurors' anonymity and it is contempt of court to ask them how they reached their decision.

But how can we have confidence in a system that is fundamentally—necessarily, even—impossible to evaluate? How do we know that the guilty are held to account and the innocent set free? It is an inherently tricky question, both process and ethics wise, but attempts were made to address it within a 1999 Law Commission study into the experiences, performance and decision making of juries. The Commission compared juries' verdicts of 48 high profile criminal trials with perceptions of the presiding judges and analysis of evidence by researchers. It found that in 35 cases the outcomes were agreed with by the judge and/or regarded as supportable by the evidence (in one case the researchers believed the judge would have got it wrong). Other cases were subject to compromise where defendants were acquitted on some counts but found guilty of others, in part to ameliorate disagreements among jurors, while 5 trials resulted in fully hung juries. 3 trials were categorised as delivering "perverse or questionable verdicts".

Dean of Law Professor Mark Henaghan, a passionate defender of the jury system, says: "Our inability to evaluate juries is one of the system's greatest strengths. It's one of the few things in life we don't evaluate. Juries prevent the law from being a mechanical process that could be dispensed by a computer programme or legal technician. It's what gives the law its soul."

But shouldn't juries be bound by law? "Yes, directed by law but not answerable to it. That's its brilliance. It's the prerogative of juries to return verdicts that reflect their conscience, if not the law, and it's right that they should not have to answer for that.

Remember the case of the despairing father who returned from hospital having been told his baby daughter was one step from brain dead and then suffocated her. Yes, it was the unlawful taking of a life but the jury clearly did not have the heart to convict him. That tells us much more about the society we live in than the law ever could."

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PROTECTING YOUR INTELLECTUAL PROPERTY FROM TRADING RISKS

Running a business has its risks—the ultimate being the entity going out of business and having to shut up shop. The recent recession increased such a risk for many businesses, with some being unable to cope with the economic pressures and consequently becoming insolvent.

When a business becomes insolvent and is subsequently liquidated, the assets of the entity are seized and sold with the view to pay creditors. Intellectual property assets are no exception and assets such as domain names, trademarks and copyrights, as well as concepts relating to branding, are often also lost in the process. More often than not, such intellectual property assets are irreplaceable. It is therefore important that time and effort is invested in protecting such assets in the event that a company is put into liquidation.

Separating assets into two or more legal entities as a means of protection has been common practice for some time, with business owners transferring their houses and other personal assets into Trusts. However, with intellectual property, while it is possible to register legal ownership rights in a Trust (provided that ownership is recorded in the joint names of the trustees and not in the name of the Trust itself) problems can arise relating to the sub-licensing due to consent issues from co-owners. Additionally, the Intellectual Property Office of New Zealand is adopting a stricter interpretation of intellectual property laws that prohibits Trusts from owning intellectual property.

The separation of assets through the use of limited liability companies is therefore a more suitable vehicle for the purposes of intellectual property asset protection. Separate ownership using companies requires the establishment of two or more registered companies where one company, Company A, owns the intellectual property and the other company, Company B, acquires a licence from Company A to sub-licence the intellectual property to clients.

All ownership of the intellectual property assets is vested in Company A, and Company B at no stage actually owns the intellectual property. In the event that Company B becomes insolvent, its creditors are not able to lay claim to the intellectual property assets by virtue of them being owned by a separate legal entity, Company A.

This model is particularly suited to software companies as they don't sell their products, but rather license them by granting a customer non-exclusive rights to use the software. The actual software remains the property of the original owner. The separate-ownership model can also be tailored to suit most business genres.

Although appropriate licences and insurance policies are worthy components of risk management, many policies do not guard against insolvency of a company or bankruptcy. As a consequence, while some effort may be required in setting up an appropriate structure, separating valuable intellectual property could be well worth the time and money.

DOES NEW ZEALAND'S JURY SYSTEM WORK?

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Besides, he says, "If jurors had to justify their decisions, no one would ever serve on them and I wouldn't blame them."

Henaghan's comments point to a paradox within some criticisms of the jury system. Complaints tend to arise when juries make decisions that deviate from our own.

"We all think we know the answer. Of course, a system that recognises that ordinary people from all walks of life can appraise guilt by reasonable

standards and under certain rules is precisely what a jury is all about.

"Our finances have been brought into grave disorder. No British government in peace-time has ever had the power or spent the money in the vast extent and reckless manner of our current rulers... No community living in a world of rapidly competing nations can possibly afford such frantic extravagances... the evils which we suffer today are inevitable progeny of that wanton way of living."
Winston Churchill in the Conservative Party Manifesto for the General Election of 1951.

Life in the Australian Army

(Text of a letter from a country kid to Mum and Dad)

Dear Mum and Dad,

I am well. Hope youse are too. Tell me big brothers Doug and Phil that the Army is better than workin' on the station—tell them to get in bloody quick smart before the jobs are all gone! I wuz a bit slow in settling down at first because ya don't hafta get outta bed until 6am. But I like sleeping in now cuz all ya gotta do before brekky is make ya bed and shine ya boots and clean ya uniform. No bloody horses to get in, no calves to feed, no troughs to clean—nuthin'!! Ya haz gotta shower though but its not so bad coz there's lotsa hot water and even a light to see what ya doing!

At brekky ya get cereal, fruit and eggs but there's no kangaroo steaks or goanna stew like wot Mum makes. You don't get fed again until noon and by that time all the city boys are buggered because we've been on a 'route march' - geez its only just like walking to the windmill in the bullock paddock!!

This one will kill me brothers Doug and Phil with laughter. I keep getting medals for shootin' - dunno why. The bullseye is as big as a bloody dingo's bum and it don't move and it's not firing back at ya like the Johnsons did when our big scrubber bull got into their prize cows before the Ekka last year! All ya gotta do is make yourself comfortable and hit the target. You don't even load your own cartridges, they comes in little boxes and ya don't have to steady yourself against the rollbar of the roo shooting truck when you reload!

Sometimes ya gotta wrestle with the city boys and I gotta be real careful coz they break easy—it's not like fighting with Doug and Phil and Jack and Boori and Steve and Muzza all at once like we do at home after the muster.

Turns out I'm not a bad boxer either and it looks like I'm the best the platoon's got and I've only been beaten by this one bloke from the Engineers—he's 6 foot 5 and 16 stone and 3 pick handles across the shoulders and as ya know I'm only 5 foot 7 and 8 stone wringin' wet but I fought him till the other blokes carried me off to the boozier.

I can't complain about the Army—tell the boys to get in quick before word gets around how bloody good it is.

Your loving daughter, Susan.



LADIES AND THE LAW

For the right to become lawyers, Western women had to fight the standard belief that entry to the profession would cause the fairer sex's demise.

In an article in *Lawtalk*, Rachael Breckon recalls that New Zealand's Ethel Benjamin was among the first women in the world to practise law. Ethel Benjamin was the second woman in the Commonwealth to graduate with a law degree (Canadian Clara Brett Martin beat her to it by a few months). In 1897 her acceptance to the bar made her the first to practise.

In the United States Myra Bradwell from Illinois was accepted to the bar in 1894 after a 20 year struggle. In 1872, after successfully passing the Illinois bar examination, Ms Bradwell, publisher of a leading legal newspaper, was denied a licence to practise law. Like any good litigator she took the matter to court. Initially she lost.

In *Bradwell v Illinois* United States Supreme Court Justice Bradley said:

"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of

womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to women adopting a distinct and independent career from that of her husband."

Not to marry would not solve this issue. "The paramount destiny and mission of women is to fulfil the noble and benign offices of wife and mother," Justice Bradley said.

Fortunately for the women of Illinois Ms Bradwell continued to fight for the right to practise. In 1890 she was the first woman admitted to the bar and two years before her death in 1894 she was licensed to practise before the US Supreme Court.

Back in New Zealand in 1896 (just before Ms Benjamin graduated) Parliament had passed the Female Law Practitioners Bill. At the time New Zealand politician, Sir George Stoddard Whitmore, was afraid the Bill would cause "a number of females to unsex themselves and to neglect the ordinary female duties."

Ms Benjamin was not deterred by existing gender stereotypes. Around the time of Sir George's comments she spoke positively and romantically about the future for women in society.

"New Zealand has her lady butcher, her commercial traveller, optician, dentist,

watchmaker, even her lady blacksmith," she said. "It is well that women should make such an inroad into the fields of labour. We should come to a position where women should be economically independent of men and should marry for love and not just for a home."

Over in the United Kingdom, the first woman to be called to the bar was Dr Ivy Williams in 1922. However, never satisfied, that same year Welsh politician Viscountess Rhondda had the nerve to argue that, due to her blood-line, she was eligible to sit in the House of Lords. This resulted in the unsuccessful *Viscountess Rhondda's claim*.

Comparing a woman to a minor or a bankrupt, Frederick Edwin Smith, the Lord Chancellor Birkenhead, said that while a minor could grow up and a bankrupt be discharged, a female must remain a female till she dies.

Unfortunately, Viscountess Rhondda was not alive to see her battle won. Under the Life Peerages Act 1958 females were accepted into the House of Lords—less than a month after her death.

**CREDITORS HAVE
BETTER MEMORIES THAN
DEBTORS**

The Mexican maid asked for a pay increase. The wife was very upset and asked: "Now Maria, why do you want a pay increase?"

Maria: "Well, Señora, there are tree reasons why I wanna increase. The first is that I iron better than you."

Wife: "Who said you iron better than me?"

Maria: "Jor hozban he say so."

Wife: "Oh yeah?"

Maria: "The second reason eez that I am a better cook than jew."

Wife: "Nonsense, who said you were a better cook than me?"

Maria: "Jor hozban did."

Wife, increasingly agitated: "Oh he did, did he???"

Maria: "The tird reason is I am better at sex than jew in the bed."

Wife, really boiling now and through gritted teeth: "And did my husband say that as well?"

Maria: "No Señora.... The gardener did."

Wife: "So, how much do you want???"





TRUST MATTERS

A common structure of Family Trusts is that of husband and wife trustees with a lawyer as the independent trustee. Many Trusts have been operating for 20 or 30 years, with the trustees now in their twilight years. Inevitably some will lose mental capacity and we are then left to deal with the removal of that trustee in order to deal with the Trust property.

Removal

The best method is to anticipate the need for the replacement of the trustee. That is often easy in hindsight but a regular annual review of trustees' general health, together with legal and financial matters is most important.

Current Law

General consensus is that an enduring Power of Attorney (EPA) cannot be used by trustees to appoint an attorney.

The primary authority of this view is section 95(4) of the PPPR Act which provides as follows:

A power of attorney delegating trustee powers, authorities and discretions under section 31 of the Trustee Act 1956 shall not have effect as an enduring power of attorney."

A plain reading of this provision suggests that a section 31 Trustee Act power of attorney cannot be used as an EPA and supports the view above that it will be revoked by loss of mental capacity.

The traditional method of recourse to the High Court upon loss of a trustee's mental capacity is really the only safe method for relief in such circumstances. It is, of course, expensive!

Summary

1. Discuss your situation with your solicitor. He will check the Trust Deed

in relation to powers of delegation generally.

2. Ensure regular contact (at least annually) with your solicitor.

3. While the general rule is that trustees are not allowed to delegate their responsibilities, there are exceptions where a trustee is going overseas or is temporarily incapable of performing their duties due to physical sickness. But these special powers of attorney cannot be used where a trustee has lost mental capacity.

4. If there is potential for loss of mental capacity, act quickly to carry out a retirement and appointment of a new trustee and ensure all requisite Authority and Instruction forms are signed so that the Trust property can be transferred to the new trustee/s.

5. If mental capacity is lost, a court order is the only safe way to ensure a legally robust solution, albeit at a substantial cost to the Trust.

SNIPPETS

SUPREME COURT GOES LIVE

As of 16 May 2011 public access to Court proceedings took on a whole new meaning as the United Kingdom Supreme Court made history by launching its first live coverage of proceedings. It is the only British Court to televise proceedings, with four cameras installed in each of its three Courts.

The broadcasting of proceedings will make it easier for legal professionals, students and members of the public to gain access to Supreme Court proceedings without travelling to London.

It is envisaged by the Supreme Court's Chief Executive Jenny Rowe that the live streaming of proceedings will help the legal profession and inspire and

educate the next generation.

Although it is intended that all proceedings will be televised, on occasion there will be cases where the nature of the proceedings means that live streaming is suspended.

Live coverage of hearings can be viewed at <http://news.sky.com/skynews/Supreme-Court>.

WEDDINGS AND WILLS

Death and Wills! This generally is not a typical topic of conversation when you are preparing for your wedding. But due consideration should be given to documents such as Wills and Contracting Out Agreements (ie. Pre-Nuptial Agreements) as marriage imposes significant obligations in relation to property division and the allocation of assets.

If a person dies intestate (without leaving a Will), the allocation of their assets is determined by legislation such as the Property (Relationships) Act 1976 and may be divided differently to the way the person had envisioned it would be.

The advent of a marriage also automatically invalidates most Wills made prior to the date of the marriage.

A review of a person's estate planning should also be undertaken prior to marriage as it too will be significantly affected. Consideration must be given to those who will benefit from a person's estate. Failure to execute the requisite documents to reflect one's wishes can have negative consequences for all concerned.

