



# BarltropGraham LAWYERS Bulletin

AUGUST 2011 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS

## GREETINGS

Our 'winter' edition contains some stories to cheer you up. Hang in there, Spring is just around the corner.

Economists and the press are increasingly optimistic about the New Zealand economy. We are finding this year busier than last but the property market remains subdued and we expect a steady improvement rather than a boom.

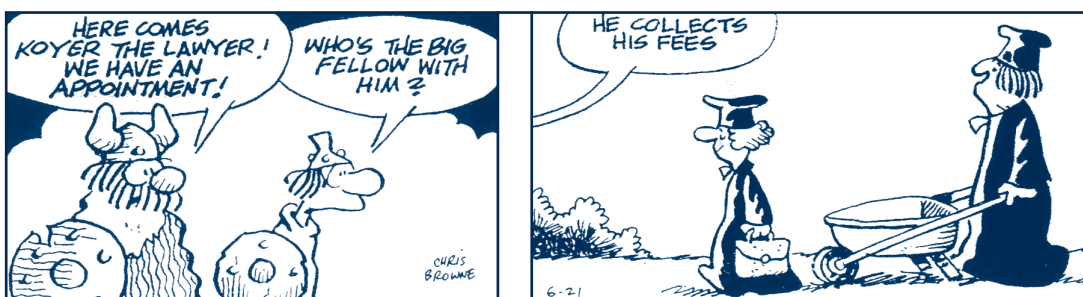
Two areas of law are concerning us at present and they are linked for some clients. The first is the question mark which hangs over the use of Trusts for estate planning. A major review is being undertaken by the Law Commission with its fourth report (of five) just released. By next year the final report will be with Government and a substantial overhaul of Trust law is likely.

The second development is the removal of gift duty on 1 October. From that date it will be possible to make unlimited gifts without incurring gift duty. Many clients have their gifting programmes on hold. When the new regime comes into force on 1 October most will need to review their plans. The removal of gift duty is particularly important in two areas – its effect on creditors and on eligibility for Rest Home subsidies. WINZ's new rules for qualification for Rest Home subsidies are much more stringent than before. The outcome for some clients is that holding assets in Trust will be of limited benefit.

Later this year we will be contacting clients with gifting plans on hold. If you wish to review your situation more urgently please contact us.

**LLOYD EVANS**

*From a grateful client....*



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## PATHS, TERRAIN AND AUTOMOBILES – WHAT IS REASONABLE ACCESS TO LAND?

The Court of Appeal recently considered this issue in the case of *Murray and Tuohy v BC Group (2003) Limited and Ors*. The appellants and their neighbours owned adjoining properties in the Wellington hillside suburb or Ngaio. The properties were created by a subdivision in 1963. The appellants purchased their property in 1989 with the only access to the property via a steep council owned pedestrian footpath.

Twenty years later and suffering health problems, the appellants sought an order under section 129B of the Property Law Act 1952 requiring their immediate neighbours to provide access to their property through a right of way easement, on the basis that their land was landlocked. Section 129B is the remedial provision available to a landowner whose land is landlocked.

Under section 129B a “piece of land is landlocked if there is no reasonable access to it”. “Reasonable access” is defined under section 129B(1)(c) as meaning:

- “physical access of such nature and quality as may be reasonably necessary to enable the occupier for the time being of the landlocked land to use and enjoy that land for any purpose for which the land may be used in accordance with the provisions of any right, permission, authority, consent, approval, or dispensation enjoyed or granted under the provisions of the *Resource*

*Management Act 1991*”.

“It would take approximately one to three minutes to access [the property] when traversing the path from the roadway, although obviously longer if a person was carrying a load,” said the Court. Over the years they had owned the property the appellants and at times also had occasional vehicular access by way of a formed driveway shared by two of their neighbours, with one prior neighbour granting them an informal car park in return for use of the appellant’s clothesline. On 14 September 2003 the tenants in the neighbouring property informed the appellants they could no longer use the driveway in accordance with the old arrangement with the previous owner.

The Court of Appeal said that the approach in section 129B cases is well settled and involves three stages (briefly) stated as :

- Deciding whether the claimant’s land is landlocked within the meaning of the section;
- If yes, determining how the discretion given to the Court by the section should be exercised; and
- If the Court decides to grant access to the landlocked land, to determine the terms of access.

The High Court, from which the appeal came, held in February 2009 that the appellant’s property was not landlocked for the purposes of section 129B (and accordingly there was no need to

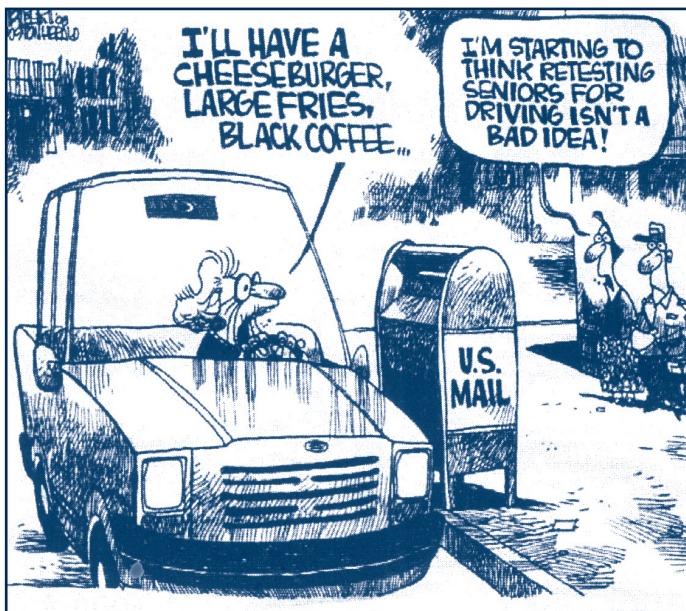
consider the second and third stages).

Under section 129B(1) a “piece of land is landlocked if there is no reasonable access to it”. It was the appellant’s case that, taking into account modern day community expectations and standards, a residential property without vehicular access does not enjoy reasonable access and is therefore landlocked.

In the Court of Appeal, Justice Gendall, who delivered the reasons of the Court, stated “we cannot accept that it is necessarily the case that under modern day community standards vehicular access onto the site of a residential property is necessary for it to enjoy reasonable access”.

Further into the judgement Justice Gendall stated “obviously, if people cannot get onto their property it has no reasonable access. If they can access it from a public roadway or walkway through a suitable pedestrian route then such access may be reasonable, depending on the circumstances”. In this case there was evidence from the respondents that this was typical of access to properties in Wellington’s hilly suburbs.

The Court of Appeal agreed with the High Court’s conclusion that, as a matter of fact having regard to contemporary standards, the present access was reasonable and that vehicular access was primarily a matter of convenience for the appellants. Accordingly the appeal was dismissed.



*An old chap (not in the best of shape) was working out in the gym when he spotted a sweet young thing... He asked the trainer who was nearby, “What machine in here should I use to impress that lass over there?”*

*The trainer looked him up and down and said: “I’d try the ATM in the lobby...”*

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*A doctor, an engineer and a lawyer were arguing over whose profession was the oldest.*

*“On the sixth day, God took one of Adam’s ribs and created Eve,” said the doctor. “So that makes him a surgeon first.”*

*“Please,” protested the engineer. “Before that, God created the world from chaos and confusion, so he was first an engineer.*

*“Interesting,” conceded the lawyer smugly, “but who do you think created the chaos and confusion?”*



## FAMILY TRUSTS – THE NEED FOR REGULAR REVIEW

There has been a great deal written recently regarding the need for regular reviews of Family Trusts. This is particularly relevant for Trusts which have been formed for a number of years. In many cases these Trusts were formed by a married couple and often the health of one or both of them is starting to fail. In most cases our clients have Enduring Powers of Attorney but clients should appreciate that these Powers are not effective for Family Trusts. Accordingly, should a Trustee lose capacity to act, the only way in which

they can be removed as a Trustee is by way of an application to the Court. This is an expensive procedure which is best avoided. The only way in which it can be avoided is by elderly Trustees anticipating failing health and resigning in favour of younger Trustees.

We recommend that the entire operation of your Trust be reviewed on an annual basis. Give some thought to possible replacements as Trustees and act more quickly if there is any threat to the health of a Trustee.

## SLEEPING ON THE JOB

In *Idea Services (an IHC subsidiary) v Philip Dickson* the Court of Appeal affirmed the decision of the Employment Court that Mr Dickson was working throughout his sleepover and was therefore entitled to the minimum wage for this period.

Mr Dickson worked for Idea Services Limited as a community service worker providing care and support to people with disabilities who live in community homes. A requirement of his position was that he sleep overnight in the home so that he could deal with any issues that arose during the night and for security purposes. He was paid \$34.00 per sleepover and \$17.66 per hour for any time during which he was required to be actively working and tending to the needs of the residents. If there were no incidents during the night Mr Dickson would receive \$34, which amounted to between \$3.40 and \$4.30 per hour depending on the length of the sleepover.

Mr Dickson claimed that he was entitled to the minimum wage prescribed under the Minimum Wage Act 1983 ('the Act') for every hour of his sleepover. This claim was upheld at both the Employment Relations Authority and the Employment Court. The Court of Appeal was required to consider whether sleepovers constitute "work"

for the purposes of section 6 of the Act which states:

"Every worker who belongs to a class of workers in respect of whom a minimum rate of wages has been prescribed under this Act, shall be entitled to receive from his employer payment for his work at not less than that minimum rate."

The Court of Appeal agreed with the Employment Court that three factors must be considered in order to determine whether the sleepover constituted "work":

- The constraints placed on the employee's freedom to do as he or she pleases;
- The nature and extent of responsibilities placed on the employee; and
- The benefit the employer receives from having the employee perform the role.

Mr Dickson had significant restraints placed on him when sleeping over, important responsibilities that he had to attend to with respect to both the home and the residents, and the employer derived a correspondingly significant benefit. The Court of Appeal therefore agreed that in this instance all of these factors applied to a significant degree and therefore Mr Dickson's sleepovers constituted work for the purposes of the Act.

## ZEN TEACHINGS

*\* Do not walk behind me, for I may not lead. Do not walk ahead of me, for I may not follow. Do not walk beside me, for the path is narrow. In fact, just go away and leave me alone.*

*\* Always remember you're unique. Just like everyone else.*

*\* Never test the depth of the water with both feet.*

*\* If you think nobody cares whether you're alive or dead, miss a couple of mortgage payments.*

*\* Before you criticise someone, you should walk a mile in their shoes. That way, when you criticise them, you're a mile away and you have their shoes.*

*\* If at first you don't succeed, skydiving is not for you.*

*\* If you tell the truth, you don't have to remember anything.*

*\* Some days you are the dog, some days you are the tree.*

*\* A closed mouth gathers no foot.*

*\* There are two excellent theories for arguing with women. Neither works.*

*\* Generally speaking, you aren't learning much when your lips are moving.*

*\* Experience is something you don't get until just after you need it.*

*\* Never take a sleeping pill and a laxative on the same night.*

The Court of Appeal rejected Idea Services Limited's alternative argument that the Act was breached only if the employee's average rate of pay over a pay period was less than the prescribed minimum.

This decision will have a great impact on the disability services sector. Ralph Jones, chief executive of Idea Services Limited, is quoted as saying this decision would cost the organisation about \$176 million in back payments. Idea Services Limited have lodged an appeal against the Court of Appeal decision, and the outcome is likely to be newsworthy.

**DIRECTORS** Section 181 of the Companies Act 1993 allows for a company, subject to its constitution, to appoint one or more people as its attorney—either generally or in relation to a specified matter; this can be used at any time.

The appointment is made by a Deed of Delegation and Power of Attorney (DDPA). This is particularly important for companies with a sole director. Having a DDPA is equally important in family companies where all directors may be absent from New Zealand at the same time. The appointed attorney has full powers to bind the company in contract or deal with other enforceable obligations of the company.



## DIRECTORS' RIGHT TO RELY ON SPECIALIST ADVICE

The recent 'Feltex Five' decision, *Ministry of Economic Development v Feeney and Others*, demonstrated that directors may avoid being held personally liable in certain circumstances if they have relied on expert advice.

The decision involved the prosecution of five Feltex directors ('Directors') for failing to disclose breaches of an ANZ loan agreement and for classifying this ANZ liability as a current liability in their financial reports. While the Directors did not deny that their reports breached the Financial Reporting Act 1993 ('FRA'), they argued that they had a defence under section 40 of the FRA in that they took all reasonable steps to ensure that the requirements under the FRA had been met. The Directors argued that they relied on expert advice which led them to believe that their reports were compliant.

At the time the financial reports were prepared, the company was transitioning to new financial reporting standards and commissioned a team of accountants to review these standards and the company's financial reports. However, it was reported that the accountants incorrectly advised the company of the requirements under the new standards and their advice led to the breach, and subsequently the prosecution of the Directors. The issue

was whether the Directors could rely on this expert advice or whether they should have taken further steps to meet the requirements under section 40 of the FRA.

The Court held it was necessary to determine whether the Directors had taken all reasonable steps in light of the protections under the Companies Act 1993 ('the Act'). Under section 138 of the Act, directors are able to rely on information and advice from a professional adviser or expert in relation to matters which the directors believe on reasonable grounds to be within the person's professional or expert competence.

This defence applies where it is evident that directors:

- Acted in good faith;
- Made proper enquiries where the need for enquiry is indicated by the circumstances; and
- Had no knowledge that such reliance is unwarranted.

In this case it was found that a reasonable director, having read the accountants' report and having attended their meeting, would have been left with no doubt that the financial statements complied with the new standards. Therefore, the Directors had no knowledge that reliance was unwarranted and were entitled to believe that the work undertaken by

such a highly reputable firm was within their expertise. Furthermore, they were aware that the transition to the new standards was very complex and had put in place a comprehensive strategy to manage it.

Therefore, it was held that the Directors took all reasonable and proper steps to ensure the requirements of the FRA were complied with and there was no evidence of an intention to mislead. Each of the Directors was found not guilty.

### *The Italian Secret to a Long Marriage*

*At St Peter's Catholic Church in Toronto, they have weekly husbands' marriage seminars.*

*At the session last week, the priest asked Guiseppe, who said he was approaching his 50th wedding anniversary, to take a few minutes and share some insight into how he had managed to stay married to the same woman all these years.*

*Guiseppe replied to the assembled husbands, "Wella, I'va tried to treat her nica, spenda da money on her; but besta of all is, I tooka her to Italy for the 25th anniversary!"*

*The priest responded, "Guiseppe, you are an amazing inspiration to all the husbands here! Please tell us what you are planning for your wife for your 50th anniversary?"*

*Giuseppe proudly replied, "I gonna go pick her up."*

*A motorist reported some accident damage to his insurance company, advising that the same vehicle had run into the rear of his car twice within the space of ten minutes.*

*"I stopped at a stop sign," the man said, "and he hit me. There didn't appear to be any damage so I drove away. A couple of minutes later, I stopped for a red light—and he hit me again. This time the back bumper was pretty banged up so I called the police."*

*"Did you say anything to the other driver?" he was asked.*

*"Yes," said the client. "I asked him how he stopped when I wasn't there."*

### **BIG BROTHER MAY BE WATCHING**

The internet is an indispensable tool and social networking sites such as Bebo, Facebook and Twitter are the forum of choice for this generation. Personal comments are often posted with little thought as to who the eventual audience may be. So it is prudent to think twice before posting that derogatory comment about a work colleague or your employer as it may lead to disciplinary action, or at worst dismissal; particularly if the comment was posted during working hours!

The Employers and Manufacturers Association report that they receive a call almost every day from an employer who has found derogatory statements about them on a social networking site. These comments may be viewed by hundreds of people and can damage the employer's reputation.

*A mother and her daughter were travelling in a taxi through a seamy part of the city when the daughter noticed some scantily clad women loitering on a street corner.*

*"Mummy," she asked, "what are all those ladies doing?"*

*Thinking quickly, the mother said, "They're waiting for their husbands to come home from work."*

*"C'mon, lady," the cabbie interjected. "Tell her the truth. They're hookers!"*

*"Mummy," the daughter continued, "do hookers have children?"*

*"Why yes," the mother replied. "Where do you think taxi drivers come from?"*



## THE EARLY BIRD CATCHES THE WORM – TIME LIMITS IN CIVIL CLAIMS

Imagine that 2010 was just not your year.

It began with the discovery that your home, bought four years ago, is a leaky home and needs major repairs that will cost over \$200,000.00.

A short time later your widowed mother died, leaving her entire estate worth several million dollars to your siblings because of a recent falling out with you—and that after years of living with you and your family. Then, two months ago, you lost your job because you stood up to your manager who is a workplace bully.

The final straw came when your plasma TV died last night during a test match, after having intermittent problems since you bought it 18 months ago.

You decide it is time to right some wrongs and go to see your lawyer. One of the issues that will be raised with you is limitation periods, which are time limits within which certain claims must be brought.

Some of the limitation periods that might apply in the present scenario include the following:

You believe that the real estate agent who sold you the house misled you and you would like to bring a claim under the Fair Trading Act 1986. However your claim might be barred because applications under that Act must ordinarily be made within three years of the date of the event.

You then consider bringing a claim through the Weathertight Homes Resolution Service against the architect, the developer, the builder, the roofing company and the Council that issued the code compliance certificate. Unfortunately the house is 11 years old and section 393 of the Building Act 2004 prevents claims being brought ten years or more after the date the work was carried out.

You may have better luck bringing a claim against your mother's estate pursuant to the Family Protection Act 1955 (or on the basis of a testamentary promise if you had been led to believe that you would inherit some of the estate). The general rule for bringing such claims is that they must be filed within 12 months of the date that

administration or probate is granted. However, in certain circumstances you need to be even quicker because the estate may be distributed after six months.

What about your case for unfair job dismissal? If you wish to bring a personal grievance under the Employment Relations Act 2000 against your employer, it must be submitted to the employer within 90 days from the date you were dismissed.

Surely the Consumer Guarantees Act 1993 won't let you down. However the Act provides that you must reject goods "within a reasonable time" and what is reasonable will depend upon the type of goods and how they were used. You might not be entitled to compensation if it turns out that the minor problems you have been having with the TV have been there from the beginning.

So beware! See your lawyer as soon as a problem arises.

*A woman sitting at home drinking a wine on the porch with her husband says, "I love you."  
He asks, "Is that you or the wine talking?"  
She replies, "It's me... talking to the wine."*

*A lady was picking through the frozen turkeys at the grocery store, but couldn't find one big enough for her family.  
She asked a stock boy, "Do these turkeys get any bigger?"  
The stock boy replied, "No ma'am, they're dead."*

*A husband told his wife, "A bloke at the club reckons our milkman has seduced every woman in our street except one."  
His wife thought for a moment, then said, "I'll bet it's that snooty Mrs Smith in Number 47."*

*"How many more surprise witnesses do you have?"*



### **The Italian Elbow**

*An Italian grandmother is giving directions to her grown grandson who is coming to visit with his wife.*

*"You comma to de front door of the apartmenta. I am inna apartmenta 301. There issa bigga panel at the front door. Witha you elbow, pusha button 301. I will buzza you in. Come inside, the elevator is on the right. Get in and witha you elbow, pusha 3. When you get out, I'mma on the left. Witha you elbow, hit my doorbell."*

*"Grandma, that sounds easy but why am I hitting all these buttons with my elbow?"*

*"What... You acomin' empty handed?"*



## CONSUMER LAW UPDATE

A Consumer Law Reform Bill (“the Bill”) will be introduced to Parliament later this year to update and simplify consumer law. The Bill will reform the Consumer Guarantees Act, the Weights and Measures Act, the Layby Sales Act, the Fair Trading Act, the Door to Door Sales Act, the Auctioneers Act and the Unsolicited Goods and Services Act. Each Act has been reviewed taking into consideration:

- Its history, original purpose and ongoing relevance; and
- Any gaps in the law and the effectiveness and overall enforceability of the Act.

It is beyond the scope of this article to describe all of the reforms proposed, however listed below are some that may be of interest:

- The Fair Trading Act will be amended to update and simplify consumer law related to layby sales, unsolicited goods and services, door to door sales and the regulation of auctioneers. It is proposed that infringement notices for minor breaches of the Fair Trading Act

will be issued by the Commerce Commission.

- The Consumer Guarantees Act will be amended to require greater disclosure to consumers on express warranties and give consumers who take up cover under express warranties a statutory cooling off period.
- The Minister will be empowered to issue Government Product Safety Statements that will provide some guidance on acceptable product safety. Notification of product safety recalls will be published on the Ministry website. Goods that are recalled may be required by the Ministry to be destroyed and a supplier may be asked by the Ministry to stop selling a product if it has been implicated in a serious incident.
- The law related to auctions will be updated. The Consumer Guarantees Act “acceptance quality” provisions will apply to goods sold at auction, online or by tender. The Auctioneers Act will be repealed and minimum

standards will be set for the registration of auctioneers and the conduct of auctions.

- Unsubstantiated claims about products will be prohibited under the Fair Trading Act. This measure should assist the Commerce Commission in enforcing the Fair Trading Act and improve consumer confidence and good market conduct.
- The jurisdiction of the Disputes Tribunal will be extended to cover complaints about deceptive and misleading conduct with a full range of remedies available under the Fair Trading Act.

To keep up to date with the Bill and the proposed changes, readers may wish to visit the Ministry website [www.consumeraffairs.govt.nz](http://www.consumeraffairs.govt.nz).

**So you think Big Brother can't see you...**

Visit [www.gigapixel.com/image/gigapan-canucks-g7.html](http://www.gigapixel.com/image/gigapan-canucks-g7.html) and view the crowd before the Vancouver riots. Then zoom in...

## SNIPPETS

### EMPLOYMENT LAW UPDATE

In the case of *Costley v Waimea Nurseries Limited [2011] NZERA Christchurch*, the employment Relations Authority (‘ERA’) found that Mr Costley was unjustifiably dismissed for using drugs at work because Waimea did not disclose to Mr Costley information that was relevant in reaching their decision to dismiss him.

It was reported to Waimea’s nursery manager, Mr Jameson, that Mr Costley and another employee (Api) may be consuming drugs during their lunch breaks. Mr Jameson met with each employee separately and told them of his suspicions. Api confessed that he and Mr Costley were smoking marijuana at lunch time. Mr Costley was not told about Api’s admission or the identity of the person who raised concerns about their suspected drug use.

The ERA found that, by not disclosing Api’s admission to Mr Costley, Waimea had withheld the piece of information

that was most relevant to the decision to dismiss and that this was a breach of section 4(1A)(c) of the Employment Relations Act 2000.

This decision serves as a timely reminder that employers must follow a fair procedure when disciplining or dismissing employees, including providing the employee with any relevant information that may be relied on by the employer in reaching their decision.

### A KING OR A QUEEN – THE LAW OF SUCCESSION

Following the recent marriage of Prince William and Kate Middleton, the expectation of children in the future raises the question of succession for the future King or Queen of New Zealand. Succession to the British Throne is passed on by “male-preference primogeniture”. The rule has been in place for over 300 years and means

male children are preferred over female children. and an older child is preferred over a younger child of the same gender. The British Government is currently consulting with Commonwealth countries about changing the laws on Royal Succession to enable an older sister to succeed over a younger brother. Recently our own Prime Minister, Hon. John Key, has said he agrees that the current rules, which could block the succession of a first born daughter of Prince William and Kate Middleton, are “old fashioned”. However, because the British Monarch is also head of state of Canada, Australia, 9 countries in the Caribbean, 3 in the South Pacific, as well as New Zealand, it would have to be approved by all these countries.