BarltropGraham Lawyers Bulletin

DECEMBER 2005 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS

Seasons Greetings

In last year's Christmas editorial we wished for a steady, uneventful 2005. The weather gods met our request. After a mild winter and some spring sunshine, we are much happier as we head into this summer vacation.

The year has been a busy one for us. Despite all the efforts by Government to slow the rampant residential property market, the activity has continued unchecked. Whether rising interest rates will finally slow the market next year remains to be seen. On the rural front, surveys and sales figures suggest that the market may have peaked. However, the slow-down seems likely to be gradual and the agricultural industry may benefit from a period of consolidation.

For many years now we have been strong advocates of Estate Planning for our clients. Many of you have settled assets on Family Trusts or Companies, completed Relationship Property Agreements, or revised your Wills to protect those assets for the future. However, some clients find it difficult to commit to such a planning exercise. It can be quite expensive and sometimes requires difficult decisions to be made. We find that most clients who complete an estate plan feel it is worthwhile. Why not make a New Year Resolution to see us to discuss your situation?

Our best wishes for a Merry Christmas and a Happy and prosperous New Year.

LLOYD EVANS

XMAS BREAK

Our offices close at 4pm on **Thursday 22 December 2005** and re-open at 8:30am on **Monday 16 January 2006**

BARCOVAN BUILDINGS,
41 BOWEN STREET
PO BOX 88, DX PA84004
FEILDING, NEW ZEALAND
TELEPHONE 06 323 4034
FACSIMILE 06 323 8757
EMAIL lloyde@barltrops.co.nz
WEBSITE barltrops.co.nz

BUILDING COMPLIANCE AND THE BUILDING ACT

You may recall an earlier article about the Building Act 2004 (“Act”). One of the areas in which its impact is being felt is by vendors selling properties on which building work has been undertaken. Purchasers often require evidence of compliance with the Act.

Building Code

One of the fundamental principles of the Act is that all building works must comply with the building code, whether or not a building consent is required. Even for minor building projects, householders need to check whether or not the building code is relevant and must ensure that the building work complies with the requirements of the code.

Evidence of Compliance

The most common way a building owner may provide evidence that work complies with the building code is by obtaining a Code Compliance Certificate (“CCC”). A CCC is issued where a building consent is applied for before building work is commenced. The CCC is proof that the consent authority is satisfied that the building work complies with the building consent. A building consent will lapse if work does not commence within 12 months of the date of issue. However, it appears that commencement of work within the first 12 months after the building consent is issued preserves the consent indefinitely.

Certificate of Acceptance

Sometimes a purchaser will ascertain that building work for which a building consent and CCC should have been issued, has not been completed in accordance with those requirements. The Act provides that in that situation a building consent authority can issue a certificate of acceptance. This certifies that, to the best of the Council’s knowledge, the building work complies with the building code. Obviously this certificate conveys a far lower degree of quality assurance than a building consent and CCC.

Building Warrant of Fitness

When purchasing a commercial building, a building warrant of fitness may be required. If a building contains systems or services that require ongoing maintenance in order to function at the level demanded by the building code, a compliance schedule must be established in regard to those systems to ensure that maintenance is routinely carried out. The compliance schedule sets out the inspection, maintenance and reporting procedures required to ensure that those systems meet performance standards. The building warrant of fitness confirms that the schedule has been complied with for the foregoing 12 months. There are significant fines for a building owner who fails to obtain a compliance schedule or to display an up to date building warrant of fitness.

If you require further information in regard to a specific building, then please consult us.

Independent Contractor or Employee: Bryson vs Three Foot Six Ltd

Remember Mr Bryson from our August newsletter? He was the onset model technician working in the film industry who was found by the Court of Appeal to be an independent contractor and not an employee.

Mr Bryson appealed that decision to the Supreme Court which allowed the appeal, reinstating the original decision of the Employment Court which found Mr Bryson to be an employee.

The Supreme Court reached its decision on the basis that the Employment Court did not make any errors of law. It had based its decision on the particular circumstances of Mr Bryson’s employment. The decision is, however, not to be treated as affecting the status of any other employee in the film industry. To that extent, the Supreme Court has not provided the clarity hoped for as to whether an individual is an independent contractor or an employee. It appears that the issue is one which will be decided on the individual circumstances of each case rather than on general principles.

Unable to fulfil his marital duties, a man visits the doctor. “Drug therapy could help,” says the doctor, “but it’ll cost $10,000. Or we can try surgery but that’s $30,000. Why don’t you go home and discuss this with your wife?”

The next day the man returns. “Well, what did you and your wife decide?”

“We decided to redo the kitchen,” says the man.

THE WIZARD OF ID

RECOGNISING THE RIGHTS AND VIEWS OF CHILDREN

On 1st July this year the Care of Children Act ("Act") replaced the Guardianship Act. The Act extends the principle that children's needs should be of primary importance in proceedings before the Family Court and increases children's rights of participation in those proceedings.

Child's Welfare Paramount

When making a decision under the Act, the Court must ensure that the welfare and best interests of the child are the first and paramount consideration. The Act provides guidelines as to what constitutes the welfare and best interests of a child. Those guidelines are consistent with the principles of the United Nations Convention on the Rights of the Child (UNCROC).

The Act emphasises agreement rather than litigation, with parents encouraged to share responsibilities and to reach agreement as to their child's care, development and upbringing. Emphasis is also placed on the child's right to know and be cared for by both parents.

One of the key aims of the Act is to involve children in decisions that affect them. The child must be given a reasonable opportunity to express his or her views, and those views must be taken into account. Ways in which the Court will achieve this include using a lawyer appointed to represent the child, obtaining a specialist report from a child psychologist, or by the Judge talking to the child.

Parenting Order

The Act also increases the ability of the Family Court to enforce parenting orders. The Court will have the power to admonish the person breaching the order, vary an existing order, require the parties to attend counselling, or order the person in breach to enter into a financial bond to deter further breaches. The Court can also issue a warrant that gives police the power to take possession of a child for the purpose of enforcing an order, but this is considered a last resort.

Parents deliberately breaching parenting orders could face up to three months in prison or a maximum fine of $2500.

Open Court

The previously closed environment of the Family Court will be opened up, although this will still be subject to certain restrictions. The reporting of proceedings, with identifying details removed, will also be allowed. The key principle here is that justice must not only be done, but be seen to be done.

New Terminology

The Act also removes all reference to the terms "custody" and "access". These are replaced with "day-to-day care" and "contact". Contact includes contact by writing, email and telephone as well as direct face-to-face contact. One of the aims of the new terminology is to remove the implications of control and power associated with the term "custody".

Summary

In conclusion, the new Act aims to move the focus away from parental rights, to parental responsibilities, and to recognise the child's right to participate in decisions affecting him or her and to ensure that those views are taken into account. The child's welfare and best interests must be the paramount consideration.

THINKING OF PAYING YOURSELF DIRECTOR'S FEES?

If you are a director of a small or medium sized company, you may be faced with the question of determining what is a reasonable and acceptable level of remuneration for yourself as a director.

Remuneration can take many forms, eg. paying a director a fee in the form of cash, requiring the company to give a guarantee for the director's borrowings, or by the company lending money directly to the director.

The Companies Act 1993 ("the Act") places a restriction on the payment of remuneration or other benefits to a director. All the directors must certify that the remuneration is fair to the company and that they have reasonable grounds for that view. Where the procedures in the Act are not followed, or if there are no grounds for the view that the proposal is fair to the company, each director is personally liable to the company if he or she cannot prove fairness.

The Act does not provide any further guidance as to what is fair remuneration for a director. Fortunately, the New Zealand Institute of Directors has published "Guidelines for Non-Executive Director Remuneration" which sets out guidelines to achieving a reasonable and acceptable level of remuneration for directors.

These guidelines may be purchased online from the Institute's website at www.iod.org.nz.

Directors who are concerned that their levels of remuneration may not be fair would do well to seek advice and help.

All information in this newsletter is to the best of the author's knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information

RELATIONSHIP PROPERTY AGREEMENTS

Gone are the days when a solicitor could ring his/her colleague down the road to ask whether they had ten minutes to witness a pre-nuptial or matrimonial property agreement. Over the last 20 years case law has demonstrated that lawyers certifying agreements under the former Matrimonial Property Act 1976, now the Property (Relationships) Act 1976, have a significant responsibility to their clients. Solicitors must ensure that their clients understand not only the agreement itself, but also its effect and implications.

The legal requirements of certification are set out in section 21F of the Property (Relationships) Act 1976 which provides:

- The agreement must be in writing and signed by both parties.
- Each party to the agreement must have independent advice before signing the agreement.
- The signature of each party to the agreement must be witnessed by a lawyer.
- The lawyer who witnesses the signature of a party must certify that, before that party signed the agreement, the lawyer explained to that party the effect and implications of the agreement.

Solicitors certifying agreements must pay careful attention to these requirements.

It is suggested that the certifying lawyer must have undertaken the following:

1. Obtained a history of the relationship, eg. date of commencement, number of children, employment, contributions, etc.
2. Identified the assets and debts.
3. Obtained valuation evidence.
4. Classified the property under the Property (Relationships) Act.
5. Calculated the client's entitlement under the Property (Relationships) Act and under the agreement.
6. Considered whether the client is under a disability, undue pressure or duress.
7. Advised the client on the effect and implications of the agreement and whether to sign.
8. Advised the client on the difficulties in setting aside the agreement at a later date.

These are not tasks that can be undertaken quickly. If a solicitor is advising a client properly, then this is unlikely to be done in one day or at the first meeting with the client.

If the quality of advice given is not clear, emphatic and of a high standard, this could result in the agreement being set aside, as was the case in *Russell v Russell where the Judge said: "It is not the fact of advice but the quality and depth of the advice which is the important factor."*

While independent advice is essential, it is not the only factor to be considered when certifying an agreement. In *West v West* Judge O'Regan upheld the tests enunciated in the well-known Court of Appeal cases of *Coxhead* and *Odlum*, that the advice given must include a professional opinion as to the fairness and appropriateness of the agreement and an assessment of the client's entitlement under the Act. The client must be actually advised of this.

Solicitors are advised to explain at the first meeting with a client, the depth and quality of the advice which is required so that the client is aware of what is involved and is not later surprised by how long it takes to resolve the matter, or by the size of the account. The certifying solicitor could face a negligence claim from not only his or her client, but also the other party. A disclaimer signed by the client is not sufficient to protect the solicitor if the advice given is inadequate.

It is for the above reasons that at Barltrop Graham we refer such matters to David Walker who is widely experienced in this area of law.

On their way to get married, a young couple are involved in a fatal car accident. The couple find themselves sitting outside the Pearly Gates waiting for Saint Peter to process them into Heaven. While waiting, they begin to wonder: could they possibly get married in Heaven?
They ask Saint Peter. St Peter says, "I don't know. This is the first time anyone has asked. Let me go find out," and he left. The couple sit and wait for an answer … for a couple of months. While they wait, they discuss that IF they are allowed to get married in Heaven, SHOULD they get married, what with the eternal aspect of it all.
"What if it doesn't work?" they wondered. "Are we stuck together FOREVER?"
After yet another month, St Peter finally returns looking somewhat bedraggled.
"Yes," he informs the couple. "You CAN get married in Heaven."
"Great. But we were just wondering … what if things don't work out? Could we also get a divorce in Heaven?" St Peter, red-faced with anger, slams his clipboard onto the ground.
"What's wrong?" ask the frightened couple.
"OH, COME ON!!" St Peter shouts. "It took me three months to find a Priest up here! Do you have ANY idea how long it'll take me to find a Lawyer?"

Rugg's "Rat" Gets Away
A man in the US has miraculously escaped charges after he shot his girlfriend while trying to shoot a mouse.
Donald Rugg, 43, reportedly spotted the mouse in his home and decided the best method to catch the rodent was to shoot it with a handgun. As he aimed and pointed, his girlfriend walked into the line of fire and was hit in the arm by the bullet. The mouse presumably escaped unharmed.
Rugg has escaped blame (at least under the law, if not by his girlfriend). Police officials said that, "While it's not against the law to discharge a weapon in a home, police advise against it."
Rugg's girlfriend is said to be in a stable condition. The report did not indicate whether Rugg or his girlfriend had been disarmed.

PROTECTING YOUR IP

What is Intellectual Property?

Intellectual property consists of intangible property assets, such as concepts, goodwill or trademarks.

A business's intellectual property ("IP") will often comprise a mix of trademarks (either registered or unregistered), patents (which protect a novel concept or idea and the application of such ideas), copyright in particular text or drawings, registered designs, business know-how, trade secrets and information such as customer lists.

Have you identified your IP?

Your business may have a considerable amount of IP that is not being adequately safeguarded or utilised. Assets such as your trademarks, customer lists and general business know-how can be critical to the success or failure of your business by giving you the competitive edge that you need over your competitors.

If you think that you may seek investment in your business, or that you may look at selling your business in the future, be aware that any potential investor or purchaser will want to know:

- What IP the business owns;
- What steps you have taken to protect the IP; and
- How such IP will give your business the edge over your competitors.

You should take steps to identify your intellectual property and ensure it is protected. This could be as simple as having adequate confidentiality agreements in place with your staff and contractors, or may involve obtaining registration of any trademarks, designs or concepts that your business has developed.

You should look at doing this sooner rather than later—once a concept is in the public domain it will not be patentable.

We will focus on one common type of IP—the trademark. When you think of trademarks, several well known brands will probably jump to mind.

Most businesses will have a trademark or trademarks that they use in the operation of their business. It may be a name, a catchy phrase or a distinctive logo.

What is a Trademark?

A trademark is a brand or sign that has distinctive qualities. It can be a name, signature, word, colour, logo or even a sound or smell. It must be capable of being represented graphically and distinguishing the goods or services of one person from that of another.

Your business may have a trademark or brand that it is using, that you have not considered obtaining protection for.

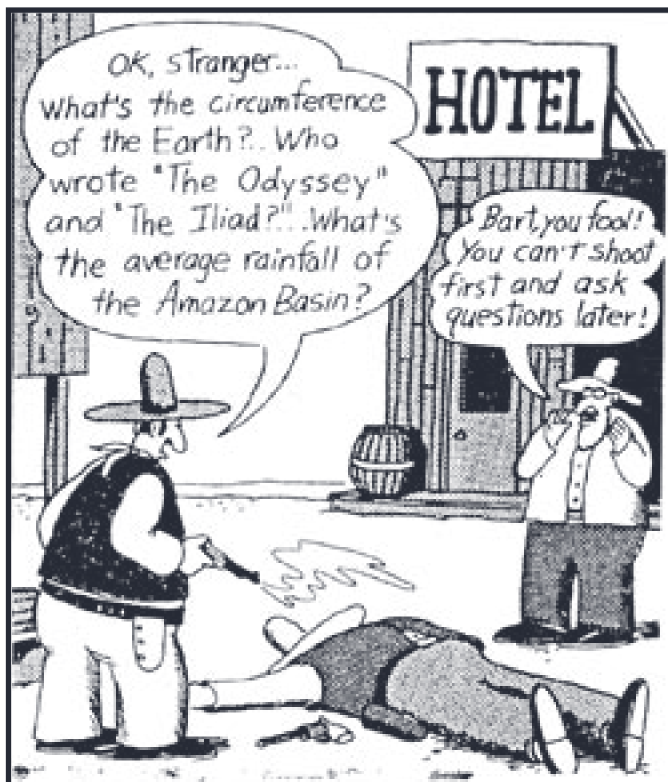
Why register your Trademark?

You may consider that registration of your trademark is not relevant to your business. However, a registered trademark means that you are in a better position to enforce your rights against others who may try to use it. Registration prevents a competitor from using or obtaining rights to use a brand or distinctive name that you have developed. A registered trademark should add to the value of your business and be an asset in any sale.

On the other side, you run the risk that your brand, or even your company name, may infringe that of a registered trademark, so a check of the register may be in order.

Don't Wait!

Registration may not be as costly as you think. The filing fees are not excessive and legal fees for obtaining the registration may be less than you anticipate. If you are interested, consult us and we will recommend a specialist in this field.



In R v Cave*, Cave appealed unsuccessfully from the District Court and High Court rejection of his defence to a drink driving charge that, when driving on a privately owned farm paddock which, on the day in question, was used as a carpark for persons attending an agricultural show, he did not realise that what he had driven on was "a road" for the purposes of the Land Transport Act 1988. The Court of Appeal held that it is no part of the offence or what the police had to prove that the defendant knew that what he was driving on was "a road". The police had to prove that Cave was driving "on a place to which the public have access, whether as of right or not". Cave's only mistake was one of law. (He did not realise that the drink drive laws applied other than on roads as normally conceived.) It is well established that the defence of total absence of fault cannot extend to pure mistakes of law.*

OUCH — THAT HURT!

What do you do when you think your lawyer has charged you too much? What if the amount of the bill is more than you were led to believe it would be? What if an estimate was given and has been exceeded?

First Steps

The first thing you should do is talk to your lawyer. Lawyers are bound by their rules of professional conduct to charge a fair and reasonable fee. Your lawyer should provide you with an explanation for the bill and should clarify the basis on which the fee has been calculated, especially if that has not been discussed in the past. If you are not satisfied with the explanation, or cannot negotiate a reduction to what you believe is a fair and reasonable fee, then the next step is to make an application to the District Law Society for a cost revision.

Cost Revision

The Law Practitioners Act 1982 provides a framework for each District Law Society to assist in a dispute by reviewing and, if appropriate, revising the bill. A request for a cost revision must be made within six months of receiving the bill. To apply, you simply need to write to the District Law Society and it will appoint a senior lawyer to conduct a cost revision. That reviser may obtain time records and the lawyer's file, and may call a meeting between you and your lawyer to discuss the complaint.

The reviser will give a decision as to whether the fee is justifiable. The time taken to arrange and conduct the hearing and deliver a decision will vary depending on the availability of the parties involved and the complexity of the matter.

Billing is a Complex Matter

There are a number of factors that will be taken into account by your lawyer when setting a fee and rendering a bill. These factors include:

1. Whether any specialised knowledge is required
2. The results achieved and the importance to you of those results
3. The urgency and the circumstances of the matter
4. The value of the property or money involved
5. The complexity of the matter
6. The reasonable costs of running a practice
7. The time spent in undertaking the work.

Be aware that an estimate is not binding, nor will the bill be revised simply because an estimate has been exceeded. To avoid any surprises or disputes, you should discuss the method of billing and the basis for the fee with your lawyer before any work is undertaken. We are happy to discuss the likely costs of any work you have in mind. A pamphlet setting out our charging rates is available at Reception.

SMOKING GUN FOR SMOKING GRANDMA?

They may be the most accessible babysitters you have, but that does not mean they are necessarily the best. A babysitting grandmother has been arrested for smoking cannabis while driving and while her grandchildren were sitting in the back seat. Canadian Press reports that the 43 year-old woman from Ontario was pulled over in a routine police check and was caught with a joint in her hand. To add insult to serious injury, the children, aged one and four, were not wearing seatbelts!

Grandma was taken into custody while the children were returned to their mother. We expect that the grandmother will be begging to stay in jail rather than be released to her, no doubt seething, daughter.

RECORD FEE

German lawyers are facing tough times but at least one of them has reason to be cheerful after earning a world record of over NZ$800,600 for under an hour's work.

A pensioner from Bonn visited his tax office, entered €11,000 as his annual earnings and then amended it to €17,000. With less than teutonic efficiency the clerk logged the figure of €1,100,017,000. When the pensioner received a tax bill for €287 million he instructed Dr Jurgen Graefe to write a standard letter pointing out the error.

Under German law, legal fees can be set as a proportion of the reduction and must be met by the taxman. Graefe promptly put in a fee of €440,000 (NZ$800,610) and a German court ruled that he was entitled to the money and the government should cough up.

Graefe was unrepentant about blatantly ripping off the German tax authorities. A spokesman for the lawyer pointed out that "the taxman follows up every little mistake, squeezing every penny out of the good citizens of Germany". It was nice to have the boot on the other foot for once.

In addition to having a very happy New Year, Graefe now merits an entry in the Guiness Book of Records *for the highest hourly rate ever recorded.*