



BarltropGraham LAWYERS Bulletin

APRIL 2005 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS

GREETINGS

It has been a much better start to the year after the miseries of 2004. The sun has been shining, the real estate markets are still buoyant and we are kept very busy. There are two obvious results of the current economic activity which warrant comment:

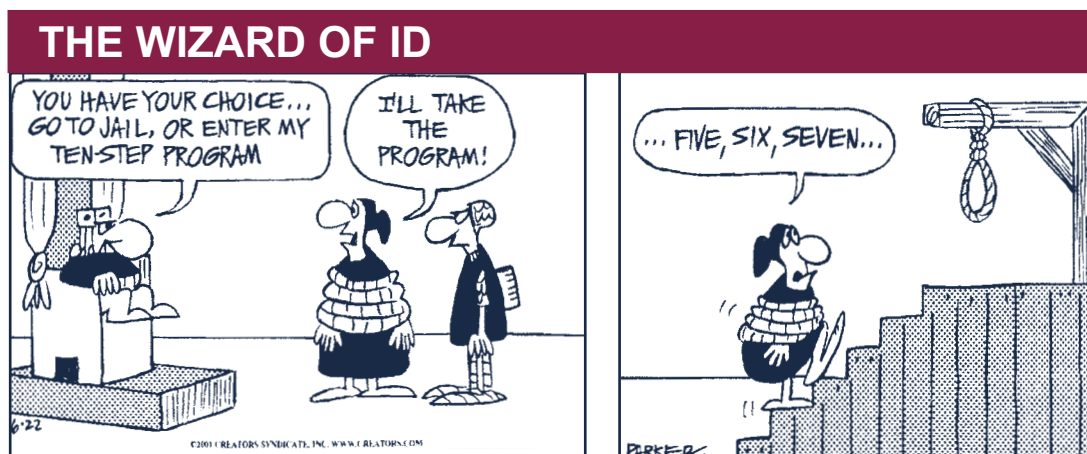
First, the hot residential real estate market has put pressure on purchasers and sensible precautions are often dispensed with. LIM reports are not popular with some real estate agents and the standard Agreement for Sale and Purchase is poorly drafted on this subject. We suggested to a committee looking into improvements to the form, that it be amended to make a satisfactory LIM a condition of the contract. This suggestion was dismissed out of hand. The reasoning was simple – if people choose to sign contracts without legal advice they must accept the consequences! I know it sounds like a broken record, **but let us see contracts before you sign.**

The second effect of the upbeat economy is also becoming more evident. This is the chronic shortage of professional personnel and tradespeople. We are affected by this. We have been attempting to employ a young solicitor with some experience to join our firm. If you know of someone in this category wanting a country lifestyle, please send them in!

Talking of personnel, we reluctantly farewelled Gill Jones before Christmas. We wish Gill and her family all the best with their new life in Taupo. We welcome Fern Pedley who is Gill's replacement as Paul Enersen's secretary, and also Jeanette Wenborn, our new receptionist. We hope they will have a long and happy employment with us.

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KNOWING TRUST “JARGON”

With the rise in use of trusts comes “jargon” that is peculiar to trusts. Increasingly clients ask about trusts and how they operate. Simple explanations follow for words and phrases that are part of trust jargon.

- Trust—a legal relationship where a person or persons (the trustees), hold property for the benefit of another person or persons (the beneficiaries).
- Trustee—the person or persons appointed to look after the assets that belong to the trust. The trustees’ powers are outlined in the trust deed.
- Settlor—the person who creates a trust. The settlor often retains a number of discretionary powers.
- Discretionary beneficiaries—a group of people who have been nominated to share in the trust income and/or in the trust’s capital. The trustees decide who gets what from the trust.
- Final beneficiaries—a group of people nominated to share in the assets left in the trust at the time the trust is wound up.
- Settlement sum—this can be a nominal amount, say \$10.

- Trust Deed—the document creating a trust. Its contents indicate who created the trust (settlor), who the trustees are, what the settlement sum is, the powers of the trustees, the group of people who may be able to share in the income and capital earned by the trust, and the group of people who are to share in the trust assets on wind up.

The creation of a trust can be explained as follows: A person (the settlor) creates a document (the trust deed) which entrusts the management of certain assets (the settlement sum, to begin with) to a person or persons (the trustees) for the benefit of people (the beneficiaries) that the settlor nominates within the trust deed. The ability of the trustees to “grow” the trust is defined within the powers given to them by the trust deed.

The main reason for creating a trust is to set aside and maintain assets for specific people (the beneficiaries). The assets may generate an income that can also be allocated to the beneficiaries.

Another area which creates some confusion is the difference between an estate and a trust.

- Estate—when someone dies, all their assets and liabilities go into an estate. An estate is a trust which administers the assets of a deceased person. The estate has a trustee (referred to as an executor) appointed (usually by the Will) to administer the estate. The estate is a special type of trust that is created only at the time of a person’s death.
- Trust—usually an entity that is created by a living person who contributes a sum (settlement sum) as the initial equity.

Who “owns” the trust’s assets? All the assets of the trust are legally held in the joint names of all the trustees. If “A” and “B” are the trustees, then any shares owned by the trust will be in the name of “A” and “B”. However, the assets do not belong to the trustees. The trustees are holding the assets until the time they are distributed to the beneficiaries.

Trustees must act with diligence and prudence. This means that they must act in a manner that any prudent person would, if dealing with his/her own assets. Trustees are personally liable for their actions.



Grenade testing testing ... Oops ...

A drunken German recently drew attention to himself by testing a hand grenade he had bought in a flea market in Bosnia, by throwing it out the window.

Returning from a holiday in Bosnia, the German took three new grenades home to Frankfurt and popped them in a desk drawer for safe keeping. They stayed there for ten years and were disturbed only recently after the owner had been out drinking with friends.

Returning home after what must have been a pretty darned big night, the Frankfurter decided to show off his long-kept souvenirs. It seems one thing led to another and, when his friends didn’t believe they were real, a pin of one was removed and the weapon was thrown out the window. The grenade then exploded between two buildings.

Of course, police traced the explosion back to the man’s house, where they found the remaining two grenades. He was released after he had sobered up and now faces charges of illegal possession of explosives.

Legalised divorce meets frantic couples

Commentators are saying that Chile’s legal system could collapse due to an expected onslaught of divorce proceedings now that the country has made it legal. Millions of divorce proceedings are expected after a few thousand were issued within the first few hours of the new law being passed, according to Estado de Sao Paulo newspaper. Former justice minister Jose Antonio Gomez said the courts will not be able to cope with the expected market for divorces. Having taken ten years to be passed by the country’s parliament, it appears couples have been quite anxious to finally be allowed to part ways.



ENDURING POWERS OF ATTORNEY

The Law Commission's Report, *Misuse of Enduring Powers of Attorney*, referred to anecdotal evidence of abuse of enduring powers of attorney. Problems referred to included high-handedness, bullying and failure to consult, embezzlement of moneys and theft of goods.

Do the duties applicable to the attorney's exercise of such powers create an obligation to consult with the donor prior to exercising the power, particularly in circumstances where the donor lacks some mental capacity? The Law Commission's report recommended various changes to the Act including provisions requiring the attorney to consult the donor and to encourage the donor to exercise such competence as the donor has to manage his or her own affairs. These requirements now apply to welfare guardians and property managers but do not expressly apply to attorneys.

An enduring power of attorney in relation to personal care and welfare only takes effect once the donor is mentally incapable. By contrast, an enduring power of attorney in relation to property can take effect immediately upon execution. It can apply to at least two additional situations: (a) where the donor has full mental capacity; and (b) where the donor has reduced mental capacity, but is not mentally incapable in terms of the Act.

Expectation of consultation?

The manner in which the attorney exercises the power will differ in each of these situations and the level of consultation with the donor expected of the attorney will also often differ. Where the donor has full mental capacity, the attorney would not usually exercise the power without specific instructions from the donor. Where the donor lacks some mental capacity, it will be more common for the donor to give the attorney greater discretion in exercising the power. Where the donor is mentally incapacitated, the final decision rests with the attorney.

Fiduciary relationship

A power of attorney is a bare authority granted by the donor for the attorney to act on behalf of the donor. The attorney

is in essence the donor's agent. There is therefore a fiduciary relationship between the attorney and the donor. Principles include obligations to obey instructions; to take care of the principal's property and to avoid conflicts of interest.

The attorney also owes a duty of care imposed by the tort of negligence. In assessing whether this duty has been breached, the court is likely to consider what skill and care a person would ordinarily exercise in their own affairs in respect of the action taken. The duty on the attorney is to act reasonably in the circumstances. The attorney also has a duty to keep accounts and be ready to produce them on request at any time.

Duty to avoid conflicts

An attorney must not abuse the power to make a profit and must avoid conflicts of interest. In *Powell v Thompson* the Judge commented:

"Powers of attorney are specifically directed at the management of the principal's affairs; it is not open to attorneys to either obtain an advantage for themselves or to act in a way which is contrary to the interests of their principals."

Obligation to obey instructions

The use of a power of attorney by the attorney contrary to the known wishes and directions of the donor is a breach of trust. To the extent that the donor has given the attorney explicit instructions, the attorney is bound not to exercise the power of attorney in a manner inconsistent with those instructions.

Consultation where the donor has mental capacity

Where the donor has mental capacity, it will be implicit in most cases that the power is only to be exercised in consultation with the donor, or after the donor becomes incapacitated.

For example, it is common to execute an enduring power of attorney in favour of a friend or family member prior to taking an overseas trip. In those situations, for reasons of flexibility the power of attorney will be broadly worded but it is understood that the attorney will only use the power while the donor is out of the country and after consultation with the donor. Once the donor returns to

New Zealand, the enduring power of attorney is filed away until the next time the donor needs to make use of it.

Consultation where the donor lacks some mental capacity

Where the donor lacks some mental capacity, it will be more common for the donor to give the attorney greater discretion in exercising the power. The following scenario is given as an example for consideration.

The donor is 22 years old. He suffers some mental disability but not sufficient, in the view of his GP, to be categorised as "mentally incapable" in terms of the PPPR Act. He lives in a special care facility and has recently executed a broadly worded enduring power of attorney for property in favour of his sister. Previously, his parents managed his financial affairs.

The sister is concerned about a strong friendship the donor has recently formed with an ex-employee from the care facility. She has heard through the grapevine that the friend was made redundant from the facility after it was discovered he had accepted some substantial gifts from some of the residents. She is concerned that the donor's savings may be at risk. Can she act to protect the donor's savings? What obligations does the attorney have to consult with the donor before dealing with the savings?

Here there is no obstacle to consultation with the donor, but the attorney will no doubt be concerned that the donor is unable to properly assess the "threat" posed by the friend. Where the donor suffers from a limited mental disability, it is desirable that the donor be encouraged to participate in the decision-making process. However, while this is desirable, it is not mandatory unless to do otherwise would be a breach of an obligation owed by the attorney to the donor.

Clearly, the attorney must act in a manner that furthers the donor's interests. The attorney must be able to account to the donor in relation to actions taken by the attorney in relation to the donor's assets.

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KEY AMENDMENTS TO THE EMPLOYMENT RELATIONS ACT

On 1 December 2004 amendments to the Employment Relations Act came into force. The amendments aim to better support the key objectives of collective bargaining and good faith and provide effective processes for resolving relationship problems. It also protects employees, by including a requirement for an employee protection provision, if their job is affected by the sale or transfer of their employer's business or if their work is contracted out. The four main areas are summarised below:

1. **Collective bargaining** is actively promoted rather than simply permitted. Parties negotiating for a collective agreement must now conclude one, unless there is a genuine reason, based on reasonable

grounds, not to. The Employment Authority can now facilitate collective bargaining in specified circumstances. Bargaining fee clauses are deemed to apply unless the employee notifies the employer in writing that the employee does not agree to pay it. Bargaining fees are to be deducted from wages and paid to the union concerned.

2. **The duty of good faith** – the meaning has been widened and there is now a legislative requirement for good faith behaviour. There are now penalties for failure to comply. Employers and employees need to be active and constructive in establishing and maintaining a productive employment relationship. This includes being responsive and communicative. There is a statutory requirement on an employer to consider any issues that employees (and prospective employees) raise in relation to bargaining for an individual agreement or any variation of one, and to respond to them.

3. **The processes for resolving employment relationship problems** now include:

- Providing dispute resolution services through the Department of Labour to independent contract situations.
- Procedures that allow mediators to address any party to a matter without any representative of that party being present and to express their views to one or other party with or without their representative being present, on the substance and process of the matter.

c) Allowing employers to pay by way of instalment, if financial circumstances require it.

d) Ensuring that any payment goes straight to the other party and not to their representative, unless their representative is a solicitor.

4. **Providing protection to employees in situations where business undertakings are sold, transferred or contracted out.**

From 1 December 2004 all new employment agreements must contain an 'employee protection provision' which meets the requirements of the Act. For existing agreements these new provisions need to be included at the earliest of:

- 12 months after 1 December 2004;
- when the agreement is next amended;
- if the employer's business is restructured, before that restructuring occurs.

This clause is not required if the employees fall within the definition of 'vulnerable employees', namely those providing cleaning, food catering, caretaking or laundry services in specified sectors (ie. schools, hospitals or residential care sectors, airports, public service). These types of employees have special protections set out in the Act in the event of a restructuring.

Your solicitor will be able to provide you with further information on the amendments to the Employment Relations Act, and how they may affect you.

...POWERS OF ATTORNEY (cont'd)

However, provided that the value of the assets is maintained for the benefit of the donor, it is arguable that these obligations are met by the attorney's actions.

It is intended that the attorney will exercise her discretion in managing the donor's investments. Provided that this is done and no loss is incurred, surely the attorney has not breached an obligation to the donor.

Conclusion

The common law and equitable principles applicable to enduring powers of attorney provide some protection for donors. The attorney must not act contrary to the donor's instructions, must be able to account for his or her dealings with the donor's property and must avoid conflicts of interest in relation to the donor's affairs. The attorney also owes a tortious duty to act as may be reasonably expected in all the circumstances.

There is, however, no express requirement to consult with the donor once the power has been given. This may be an implicit condition of the granting of the power, but not in all cases. It is of course courteous and wise to consult where possible. This may avoid bad feelings caused by a lack of communication.

A new monk arrives at the monastery. He is assigned to help the other monks in copying the old texts by hand. He notices, however, that they are copying from copies, not the original manuscripts.

So, the new monk goes to the head monk to ask him about this. He points out that if there were an error in the first copy, that error would be continued in all of the other copies.

The head monk says, "We have been copying from the copies for centuries, but you make a good point, my son." So, he goes down into the cellar with one of the copies to check it against the original.

Hours go by and nobody sees him. So, one of the monks goes downstairs to look for him. He hears sobbing coming from the back of the cellar and finds the old monk leaning over one of the original books crying. He asks the old monk what's wrong and, in a choked voice, comes the reply... "The word is ... 'celebrate'."



WHAT HAT SHALL I WEAR?

How about a shareholder's hat?

Most businesses in this country are small in size and trade as closely held companies. Often, directors and shareholders of these companies also work in their businesses. The lines between acting as director, shareholder or manager get very blurred. Owners of a business definitely wear more than one hat. To ensure that directors/shareholders act appropriately, there are a number of legislative obligations that directors and shareholders must fulfil. Let's look at the shareholder ones.

Power behind the throne

The directors of a company make the day to day decisions. Section 104 of the Companies Act 1993 (Act) restricts shareholder power, and the exercising of it, to the annual meetings and special meetings of shareholders (or a resolution in place of an actual meeting, which is often the preferred option). It must be remembered that a director may be linked to another entity which is a shareholder in the company, such as where a director is trustee and/or beneficiary of a family trust, holding shares in the company. In that situation, the role of independent trustees in those trusts becomes important in ensuring

that the interests of the shareholders are met and that the shareholders do not simply rubber stamp the directors' wishes.

Shareholder power

The Act prescribes that certain powers must be exercised only by the shareholders of a company. These powers include adopting, altering or revoking a constitution (s32), altering shareholder rights (s119), approving a major financial transaction (s129), appointing and removing directors (s153), approving an amalgamation (s221) and putting the company into liquidation (s241). While the appointing and removing of directors is usually done by an ordinary shareholders' resolution (simple majority vote), the other powers require a shareholders' resolution to be passed by a majority of 75% (or higher if required by the company's constitution) of those shareholders entitled to vote, and voting on the decision.

Sometimes all or nothing

There are instances where unanimous resolutions from shareholders may circumvent the requirements of the Act. Under s107 of the Act shareholders acting unanimously may authorise a

dividend, approve a discount scheme, allow a company to acquire or redeem its own shares, provide financial assistance to purchase its own shares and sign off on benefits, guarantees, remuneration packages and the like for the company's directors. These unanimous resolutions however do not override the requirement for the solvency test to be met by the company and for the related directors' solvency certificate under s108.

Role at meetings

Annual meetings are the most usual ones for shareholders to turn their minds to. Business carried out in such a meeting may be limited to receiving and adopting financial reports, election of directors, appointment of auditors, any other business requiring a special resolution and general business. Special meetings can be called at any time to discuss a specific resolution provided the calling procedure has been adhered to.

In signing a resolution in lieu of a meeting, each shareholder must ensure that all the requirements are included in the resolution and all matters to be resolved are clearly stated—if there is any doubt seek clarification, have it rectified or have the actual meeting.

LEGAL PRIVILEGE

It has long been settled in New Zealand that, when legal advice is sought, the confidential communications between client and lawyer are privileged. Their production may not be compelled in litigation or demanded by officials. The privilege is a substantive right based on an important public policy. In November the House of Lords strongly reinforced this long-standing principle.

Lord Scott restated the policy behind legal professional privilege: "It is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility

of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else ... notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material. Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

Lord Rodger went back to a 17th century Scottish legal commentary for the proposition that, in the context of testamentary matters, the public interest has long been recognised as being "not to unseal the Secrets of private Persons and thereby to render all Trust and Commerce suspect."

Lord Brown emphasised that this area is one "where clarity and certainty are at a premium."

Is this important to you? We believe it is! It is vital that New Zealanders can approach their solicitor knowing that their privacy is protected.





SMOKEFREE LAW

The recent amendments to the Smokefree Environments Act 1990 have generated a lot of interest in the media over the past few months. Although the impression sometimes conveyed by the media is that a new law has come into effect, the amendments to the 1990 Act were actually passed at the end of 2003 and provided for progressive changes over a two-year period.

The most significant are as follows:

- Imposition of a ban on access to smoking products for those aged under 18 years of age effective from 10 December 2003.
- Buildings and grounds of schools and early childhood centres became smokefree with effect from 1 January 2004.
- Licensed premises (including bars, restaurants, cafes, sports clubs and casinos) became smokefree indoors from 10 December 2004.
- All other work places became smokefree indoors from 10 December 2004.
- Restrictions on the display of tobacco products in retail outlets apply from 10 December 2004.

Retailers

There are a number of restrictions on retailers who sell tobacco products.

A man gets into the shower just as his beloved wife is getting out. Suddenly the doorbell rings. There is a debate over who should answer the door. The wife relents, wraps herself in a towel and runs downstairs. She opens the door and there is the next-door neighbour Bob. "I'll give you \$800 if you drop the towel you have on," said Bob. She pauses a moment reflecting on matters of risk and ethics—and shopping—then drops her towel and stands naked. Bob hands her \$800 and leaves. Confused, but a little excited about her good fortune, the woman retires upstairs. "Who was that?" asks the husband. "It was Bob." "Oh, Bob," says the husband. "Did he say anything about the \$800 he owes me?"

These include:

- A prohibition on the promotion of the sale of tobacco products with other products.
- A prohibition on promotional schemes for the sale of tobacco products.
- Restrictions as to the manner in which tobacco products can be displayed.
- Appropriate signage warning of the dangers of tobacco use which must be displayed where tobacco products are sold within 200 metres of the point of sale.
- Strict marketing directives aimed at enforcing the prohibition on the sale of tobacco or herbal products to persons under the age of 18 years.

Sports Clubs

All clubs or sporting organisations which are licensed for the sale of alcohol must comply with the new smokefree law. In particular, such organisations should be aware of the following:

- The fact that the premises are not open to the general public does not mean that compliance with the Act is not required.
- A club must take "reasonably practical steps" to ensure that it complies with the Act. Failure to do so could result in a fine.

Although the Act does not define what "reasonably practical steps" are, the Ministry of Health has issued guidelines which include the formulation of smokefree policies, displaying appropriate signage and prohibiting the sale of tobacco products on the club's premises. Further information can be obtained from the Ministry of Health. The underlying objective in making these changes is to protect the public from the harmful effects of smoking and to further promote a smokefree lifestyle as the norm.

The changes to the law have not been welcomed by everybody, particularly some hotels and bars where employers and customers have voiced resentment at what they perceive as undue Government interference.

There are significant penalties whereby failure to comply can result in fines of up to \$4,000 in respect of each offence for companies and up to \$400 for each offence in respect of individuals. As some licensees of licensed premises (particularly hotels) have stated their intention to flout the law by continuing to allow smoking on their premises, presumably it will not be long until we have an indication as to the penalties likely to be imposed by the Courts in practice.

Things you Don't Want to Hear During Surgery:

- *Oops!*
- *Has anyone seen my watch?*
- *Come back with that! Bad dog!*
- *Wait a minute. If this is his spleen, then what's that?*
- *Hand me that ... uh ... that uh ... thingy.*
- *There go the lights again ...*
- *Everybody stand back! I lost my contact lens!*
- *Well folks, this will be an experiment for all of us.*
- *What do you mean, he's not insured?*
- *FIRE! FIRE! Everyone get out!*

A man enters a barber shop for a shave. While the barber is foaming him up, he mentions the problems he has getting a close shave around the cheeks.

"I have just the thing," says the barber taking a small wooden ball from a nearby drawer. "Just place this between your cheek and gum." The client places the ball in his mouth and the barber proceeds with the closest shave the man has ever experienced. After a few strokes the client asks in garbled speech. "And what if I swallow it?" "No problem," says the barber. "Just bring it back tomorrow like everyone else does."

A farmer took his family to the Beehive to see how parliament worked. They entered a sitting just as prayers were being said. "Daddy," asked his daughter, "does the speaker pray for the parliament?" "No," said the farmer. "He comes in, looks at the politicians, then prays for the country."