



BarltropGraham LAWYERS Bulletin

AUGUST 2005 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS

GREETINGS

We are enjoying a busy year and hope things are going well for you. We are currently suffering through a General Election campaign. Thankfully it will soon be over and all the promises can be forgotten (especially by the politicians!)

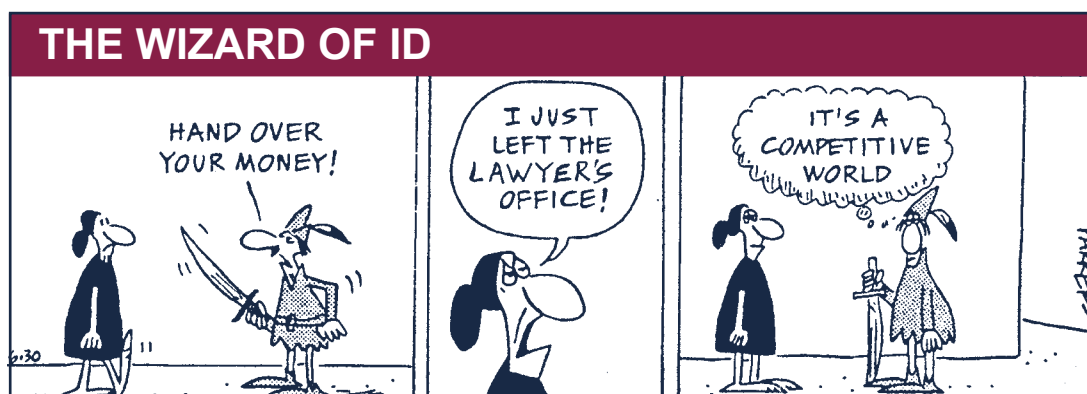
Our usually smooth office systems have been disrupted in June/July by computer bugs. This brought home to us very forcefully how much we rely on the computer. When there is a serious glitch, the entire office largely grinds to a halt! However, nothing that a new server and lots of dollars can't solve. By the time this newsletter is printed we should be back to normal.

One recent item of news which received great prominence in the world press was the case of Terri Schiavo. You will remember that she was the unfortunate woman at the centre of the 'right to die' debate in the USA. We did receive some enquiry from clients about "Living Wills" but few have actually completed such documents. If you are interested in completing a "Living Will" just call our receptionist, Jeanette, and she will send you the form to consider. But please be aware it is only for the guidance of family and health professionals and has no legal status under New Zealand law.

Finally, we were pleased to again be nominated for "Best Professional Business" in the Feilding Business Awards. This is a valued recognition of the work of our entire team.

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BUYING AT AUCTION

There is an increasing trend today for properties to be bought and sold at auction. If you are considering buying at auction for the first time, be aware that there are some matters which differ from the usual 'offer on paper' approach and which require your attention beforehand.

Register your Interest

Firstly, you would do well to advise the real estate agent of your interest. Then, if the vendors are considering a pre-auction offer, the agent will be able to contact you and, if necessary, help you to submit your own offer. Reference to a sale by auction does not prevent the vendors from selling prior to the auction date.

Unconditional Offer

Secondly, all offers at auction must be unconditional. If you require a mortgage to purchase the property, you must arrange finance beforehand. Generally you will be required to pay a deposit of 10% of the purchase price on the day of the auction.

Because you cannot make the agreement conditional on any matters,

it is advisable to ask your lawyer to read and approve the auction contract before the auction. The contract contains the terms and conditions of the sale, legal description of the property and list of chattels. If you wish to change any of the details, eg. the amount of the deposit or the settlement date, you will need approval from the vendors prior to the auction.

If you want to undertake any further investigations of the property you must arrange for those to be completed beforehand. Obtain a LIM report or a building inspection before the day of the auction.

Know the Value and Process

Make sure you have a realistic idea of the value of the property and the amount you are prepared to pay for it. You may need to look at other properties of a similar value or, if in any doubt, obtain a valuation from a valuer.

Talk to the real estate agent so that you know what the auction process involves and, if necessary, enlist his or her assistance on the day. You may like to attend other auctions beforehand to familiarise yourself with the process.

Vendor Bidding

Finally, be aware that, if the property has a reserve price, the vendors may reserve the right to bid themselves. That right is generally assigned to the auctioneer and must be disclosed at the start of the auction.

The High Court last year considered a case where the auctioneer appeared to be taking bids from different parts of the room when in fact he was bidding himself on behalf of the vendor. On receiving a complaint, the Commerce Commission alleged that the auctioneer had engaged in conduct that was deceptive or misleading.

Although there was insufficient evidence in that case to uphold the claim, the Court of Appeal held that the auction must be conducted in a manner which does not mislead or deceive. It would be misleading of an auctioneer to create the illusion of real competition where there is none, and it must be made clear when vendor bids are being made.

So, if you have done your homework and consulted the relevant professionals beforehand, good luck with your bidding!

Changes to Asset Testing for People in Long-Term Residential Care

You may be aware that from 1 July 2005 older people can retain more of their assets while still qualifying for a Government subsidy to help meet the costs of care in a rest home or continuing care hospital.

From 1 July 2005 **you may qualify for the Residential Care Subsidy** if your assets are less than \$150,000.

A Financial Means Assessment will determine the level of Government financial support you may be entitled to. You will first need to have a Needs Assessment, **if you have not already had one**, in order to apply for a Financial Means Assessment. You must continue to pay for your care until it is established that you are eligible for a subsidy.

Overview of changes

The main changes to the asset levels at which people assessed as needing long-term residential care can qualify for Government financial assistance are:

	Previous allowable asset level	Allowable asset level from 1 July 2005
Single person	\$15,000 of assets	\$150,000 of assets
Married couple (where both are in long-term residential care)	\$30,000 of assets	\$150,000 of assets
Married couple (where only one is in long-term residential care)	\$45,000 of assets PLUS house and car	EITHER \$55,000 plus house and car, OR a total asset level of \$150,000

In R v SARARUTN, S (a 27 year old Thai national, resident in NZ for 10 years) was sentenced to 80 hours community work for attempting to take a dangerous weapon on board an aircraft. The 'weapons' were a butterfly knife (a folding penknife) and a scalpel (in a tin of playing cards). Her boyfriend had repacked her bags (moving some items to the carry-on luggage) and she hadn't rechecked them. The High Court accepted that the sentencing goal of making offenders feel accountable and responsible for their actions was largely unnecessary here as S (of good character) had shown deep remorse. But of more significance was the need to protect the community and deter others from this kind of conduct and the maximum **5 years imprisonment** for this offence recognises its potential gravity. However, a custodial sentence was not called for here as the High Court was satisfied that S was an "innocent agent who acted in ignorance of what was there".

The moral of the story (Schapelle Corby take note!) is to always pack and **lock** your own bags.



WORKING FOR THE PEOPLE OF KIRIBATI

The following article took our eye in our Society's 'Law Talk' magazine. It is reprinted here with the permission of Law Talk and of the author, Jennifer Troup. We hope you find it as fascinating as we did!

In April 2004, I became the "People's Lawyer" in Kiribati, a tiny republic in the central Pacific. I work with local lawyers in the Office of the People's Lawyer, providing free legal services to I-Kiribati people. I am here as a volunteer through Australia's international volunteer programme, AVI (the equivalent of New Zealand's VSA). In February this year, another New Zealand lawyer, Glenn Boswell, joined me in the office.

I live on Tarawa, the main island of Kiribati, which is home to roughly half of Kiribati's 90,000 people. I share a concrete house with two other volunteers in the village of Teoraereke. Our house is metres away from the ocean and is shaded by breadfruit trees and coconut palms. My neighbours live in traditional raised platform huts thatched with coconut fronds. Pigs, stray dogs, chickens and children run wild all through the village.

Seen from the air, Tarawa is everything you would imagine a coral atoll in the middle of the Pacific Ocean to be—the reef, the turquoise water, coconut palms swaying in the breeze. Up close, Tarawa has many of the problems that affect other developing countries with little infrastructure. The lagoon is polluted by raw sewage, the streets are strewn with litter and the phone and power can be intermittent. The small stretch of land—in most places under 100 metres wide—is overcrowded.

Before coming to Kiribati, I was working as a solicitor in a corporate law firm in Auckland. It was a big shock to go from a well-resourced firm in Queen Street to a small office near the lagoon containing not much more than some ancient English law reports and a broken fax machine. Kids often peer in the window to get a look at the "imatang" (foreigner) and the neighbour's pigs are housed in pens just beyond the

door. However, I was made to feel very welcome here and it hasn't taken me too long to adjust to the Kiribati way of life.

Many of my clients don't have a telephone at home and there are no street addresses. When clients give me their contact details, they will say, for example, opposite the Catholic Church in Eita village. If I need to see my client, I send one of the court clerks to find him or her. If I can't get hold of a client this way, I place an announcement over the radio (privacy isn't really an issue in Kiribati) and the client usually turns up the next day.

I work alongside an interpreter—as well as interpreting for me when I meet with my clients, she translates I-Kiribati documents into English and my letters to clients into I-Kiribati. She also comes along to court with me when the hearing is to take place in the local language.

There are about a dozen lawyers practising in Kiribati, including four in the Office of the People's Lawyer. Most trained at the University of the South Pacific's law school in Vanuatu and many are fairly recent graduates. The lawyers in our office provide general legal advice, represent defendants in criminal cases and bring all sorts of other claims, including personal injury cases, employment disputes, adoptions and land claims.

Kiribati inherited the common law system from its former British rulers and United Kingdom laws that were in force on 1 January 1961 still apply here unless they have been superseded by the local Parliament. The High Court is conducted in English before the Chief Justice, a retired Australian judge. Wigs, bibs and gowns are still worn in the High Court though these are usually teamed with jandals or, more commonly, bare feet.

The High Court usually sits on Tarawa but also travels to Kiribati's outer islands, visiting each island once in about four years.

In my first couple of months in Kiribati, I travelled with the High Court to the island of Maiana. The court entourage

filled the small Air Kiribati plane and upon arrival we were driven in the back of the island's only truck to the guesthouse run by the island council. As on most outer islands, there is one phone for the whole island and electricity supplied by generator for a couple of hours in the evening. Those with cases had been told over the radio to gather at a large manweaba (meeting house) and we spent the first day of our visit taking instructions. Instead of payment, our clients brought us gifts such as drinking coconuts and fresh crabs. Court was held in the large manweaba and a large crowd came to watch. The court's visit was a big occasion and we were invited to feasts for each of the four nights of our visit.

I-Kiribati is spoken in the Magistrates' Courts. On the outer islands, panels of three or five lay magistrates hear cases, while on Tarawa they are usually before a trained single magistrate. Much of the court time is taken up by land claims and boundary determinations which take place on site. It took me a while to get used to leading evidence from witnesses while standing under a coconut tree.

It has definitely been a challenge to work with limited resources. Instead of citing from a long list of authorities, I often need to argue cases from basic principles. My office does not have a complete set of the legislation that applies in Kiribati and there is no database of Kiribati case law.

Cultural differences are most apparent when I take instructions from my clients. I-Kiribati will often tell their story in a non-linear way and sometimes leave out details that I would consider crucial to the case but which to them are unimportant. I enjoy meeting with clients, though, as it is a great way of getting an insight into the Kiribati way of life.

My colleagues generally work hard but work does not have to the same importance here as it does in western culture and family will always come first. It is acceptable not to come to the office if there is some kind of family or community event taking place.

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INDEPENDENT CONTRACTORS vs EMPLOYEES — THE DEBATE CONTINUES

In New Zealand, workers are divided into two categories—-independent contractors and employees. The distinction between the two is important and is often not easy to decide.

“Employees”

The Employment Relations Act 2000 defines an “employee” as any person ‘employed by an employer to do any work for hire or rewards under a contract of service’.

This definition includes home-workers or persons intending to work. It excludes volunteers who do not expect to be rewarded and do not receive rewards for work done voluntarily.

“Independent Contractors”

In contrast, “independent contractors” work for “principals” under contracts for service and are typically seen as autonomous commercial operators.

Independent contractors are responsible for paying their own taxes.

Statutory Protections

Employees enjoy statutory protections contained in the Employment Relations Act 2000. Independent contractors do not, and their relationship with a principal is governed by contract law. There is limited statutory protection for independent contractors contained in the Health and Safety and Employment Act 1992 and in the Human Rights Act 1993.

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It is also acceptable for children and other family members to come and spend time in the office. The work culture is very egalitarian. When we have work celebrations, the cleaner’s husband is often invited to give the first speech as he is the oldest and therefore most respected male.

I am now almost halfway through my two-year assignment in Kiribati. While I have become used to the heat and to some of the daily sights and sounds, I am still learning new things every day about this fascinating place.

The underlying philosophy behind this is that the bargaining position of an independent contractor with a principal is considered to be equal and it is assumed that independent contractors have the ability to take care of themselves in the market environment.

How to Tell the Difference

On occasion the Court must determine which category an individual belongs to. In doing so, it must consider all relevant matters—including those that are indicative of the parties’ intentions. The Court cannot treat any statements made by persons that describe the nature of the relationship as determinative. Essentially, this means that a written contract that labels a party an “independent contractor” will not on its own determine the matter and the Court will look to other relevant matters to make a final determination.

Recent Case Law

In *Three Foot Six Limited v Bryson*, the Court of Appeal had to decide the relationship between the parties. In mid-2000, Mr Bryson was seconded from Weta Workshop to Three Foot Six Limited and was engaged to work as an Onset Model Technician. Mr Bryson’s conditions of employment were written and the written document took the form of a tax invoice. The conditions of Mr Bryson’s employment described him as an independent contractor. Over a year

later, Mr Bryson was informed that his services were no longer required as Three Foot Six Limited had made the decision to downsize its miniatures unit. Mr Bryson argued that he was unjustifiably dismissed but he had to first establish that he was an “employee” and therefore entitled to bring a claim under the Employment Relations Act 2000. The Employment Court agreed with him that he was an “employee”.

In analysing one of the tests commonly applied by the Courts, the Court of Appeal noted that while Mr Bryson may appear to be an “employee” (as found by the Employment Court) insufficient weight had been given to other relevant factors—specifically, the form of the contract and film industry practice. The Court of Appeal held that he was an independent contractor.

Mr Bryson appealed to the Supreme Court who disagreed with the Court of Appeal and confirmed the original decision of the Employment Relations Authority. The Supreme Court found that Judge Shaw was not wrong in stating that industry practice, on the facts of the case, was of little use in establishing the intentions of both parties as it was clear that Mr Bryson’s working conditions were not typical of the industry.

It was open to Judge Shaw to find on the facts that the invoicing of Mr Bryson’s services and the taxation arrangements were little more than the consequences of the contractual label of ‘independent contractor’.

It was reasonable for the Judge to reach the overall conclusion that Mr Bryson was an employee under a contract of service.

This judgment is most significant for its decision to overturn the Court of Appeal judgment and reinstate the Employment Court decision. Does this reflect the Supreme Court’s willingness to rap the Court of Appeal on the knuckles for overturning Employment Court judgments where there is no error? Only time will tell.

What is more certain is that the distinction between “employees” and “independent contractors” will continue to be blurred.

A young couple had the two most beautiful children, a boy and a girl, so when the wife got pregnant again they were eagerly awaiting the result. At last one day, the husband was phoned at work and told that his wife had given birth to a baby boy at the local maternity home. He rushed in to see the new member of the family. Imagine his disappointment when he realised that his newborn boy was the most ugly baby he had ever seen. “Have you been messing about?” he said accusingly to his wife. “No”, she answered. “Not this time”.


POT POURRI

Riding under the influence

It's just not worth drinking these days unless you're going to get a taxi. Authorities in Alabama were charging people with driving under the influence even if they were asleep in their vehicle with the keys in their pocket. Now we hear that a man has been arrested in Kentucky for 'driving' his horse while inebriated.

Millard Dwyer, from Pulaski County, must have been struggling, as he was pulled over while attempting to steer his horse Prince around a street corner. The 42-year-old was three times over the limit and admitted he had drunk a 12-pack of beer, however, he is determined to fight the charge.

We don't think he'll get too far though—a horse is classed as a vehicle under Kentucky state law.

Ultimate Mothers' Day

Some mums know what's best for them. Maria Brunner, a mother of three, has chosen to spend three months in jail rather than paying a parking fine in order to get a well-deserved rest from her children and husband. Brunner apparently happily waved goodbye to her neighbours when she was arrested in lieu of a \$122 parking fine that had increased to \$6,055 because it had been left unpaid.

One of the arresting officers, from Poing in Germany, said Brunner seemed "really happy, if not relieved" to see the police and said she'd had enough of trying to eke out a living for her family from her wages as a cleaner, while her "lazy husband sits on his backside doing nothing".

She said as long as she got food and a hot shower every day, she wouldn't mind going to jail and was actually looking forward to not having to cook and clean for everyone. Her holiday might be short lived, however. Apparently her husband has finally gotten off his backside and is madly trying to raise the money to pay off the fine.



It's back to school for lawyers

A federal judge in California has ordered an entire 80-lawyer firm to go back to school for a lesson or two in ethics. The request came after apparently repeated misrepresentation of facts and the law in a dispute over aid for a child with learning difficulties.

District Judge Oliver Wanger said the firm, Lozano Smith, which represents many of the State's school districts in special education cases, "engaged in repeated misstatements of the record, frivolous objections to plaintiff's statements of facts and repeated mischaracterisation of the law".

So now every one of the firm's lawyers has to undergo six hours of ethics training. Its lead attorney in the case, Elaine Yama, has to take 20 hours. As well, the firm and Yama must personally pay \$US5,000 each for the inconvenience and delay and their "role in obstruction".

The firm's managing shareholder, Peter Fagen, said that when they were warned of potential sanctions a year ago, the firm "immediately engaged an expert in legal ethics to assist us in improving our quality control protocols and to advise us on augmenting our training". As well, the entire firm will "take the case apart from start to finish ... to look at what went wrong and to put procedures and mechanisms in place to make sure it won't happen again".

Witness demeanour not a reliable guide

John Mortimer in his latest collection of reminiscences, *Where There's a Will*, touches on the time-honoured conception that a witness's demeanour is a most reliable guide as to whether the witness is telling the truth or not. He notes: "Many unreliable witnesses are convinced that the version of events most favourable to themselves must be the truth. It's for this reason that false witnesses in court can sound so convincing. Appeal courts often defer to trial judges who, they say, "have seen the witnesses and can form a view as to their credibility". Often seeing a witness is a poor, even misleading, guide. The worst liars may remember to wear ties and suits, speak considerably in time with the judge's pencil, call him "My

Lord" and survive a scorching cross-examination. Those who stammer, contradict themselves, take offence at hostile questions and come to court looking like an unmade bed, can often be telling nothing but the truth."

This echoes comments of Chester Porter QC, a formidable Sydney silk, in his autobiography, *Walking on Water*. Chester Porter had a reputation as a very effective cross-examiner. He was known as "the smiling funnel-web". In his book he strikes a similar theme: "I believed then and I believe now, that a witness's evidence is best tested against the known facts and it's inherent probability and consistency. As for demeanour, good demeanour is as likely as not to be the characteristic of the confidence trickster or a bent policeman. Bad demeanour is likely to be caused simply by nervousness or a wandering mind."

Below the belt

Just when you think you can relax back on the private throne and possibly read a mag while the world leaves you alone, someone reaches under the cubicle door and snatches your wallet. And what can you do about it?

German police are warning the populace that toilet goers are the new victims of pickpockets, who are stooping to new lows by reaching under the doors of public loos. In a recent case, a man aged 32 was using a public toilet when a thief, believed to be female, slipped her hand under the door and removed the wallet from the man's trousers, which were quite appropriately around his feet. About \$200 went with the wallet, but the man was unable to put up much of a fight, given his situation.





MORE POT POURRI

Long winded lawyer record

Nicholas Stadlen, a lawyer representing the Bank of England, has spent the past few months delivering his opening speech—which lasted 119 days—in the bank's defence of a massive compensation claim by creditors to collapsed bank BCCI, the *Guardian* reported.

His opponent in the same case, Gordon Pollock, spent 73 days opening his client's case in London's Royal Courts of Justice, the newspaper said.

It also reported that a mountain of files has built up on the desks of the opposing legal teams so neither can see the other.

Criminal by heart, Santa by nature

People all over the world are already preparing for Christmas, it seems. Not only have we been inundated with candy sticks and spray-on snow in our supermarkets, but people seem to be mentally preparing for the silly season by, well, being silly.

But one man in Argentina took the Christmas preparation a little too far when he tried to enter a house he was planning to rob through the chimney. Much to 21-year-old Jorge Rolando's chagrin, however, he had put on too much weight to make it all the way down. Fire fighters eventually broke open the chimney to let poor Jorge out. Judges have now ordered that Jorge rebuild the chimney himself. Their reasoning for giving him a chance was that he had been abandoned as a child and had a difficult upbringing.

Being a builder, Jorge has been ordered to fix the damage himself. And—in a penalty that might provide some explanation for his ridiculous crime—Jorge must also give up alcohol for four years.



Conspiracy to murder lands mad Lord before Magistrate

A former Scottish Lord, who sought to have the mother of his child and her de-facto partner whacked by a hitman, is seeking an order to force a Magistrate to re-hear his bail application, according to reports in *The Daily Telegraph*. Malcolm Huntley Potier, 52, is more than half way through a six-and-a-half year jail term for two counts of conspiracy to murder. But he faces a third after an undercover police sting busted him for offering up to \$20,000 to again have his former de-facto knocked off between conviction and sentencing. Potier, who represented himself and spoke in the third person, said: "His view may well be that Mr Potier is not to be granted bail but he should listen to the evidence before he makes his conclusion" when Magistrate Allan Moore rejected his bail application.



Stuck in the mud

A man conceded he could probably get on the TV show *The World's Dumbest Criminals* after he stole a fire engine while drunk and then rang for help when it got stuck in mud.

The Californian man had stolen the small 4WD fire truck, crashed it through the fire station door and then swerved it straight into heavy mud. He then called for a tow truck to come and get him out of the mess, only to be attended by police cars and fire fighters wanting their truck back. He admitted his thinking was not too clever, being intoxicated and emotionally distressed. He had been on a 2-day drinking binge after a fight with his wife. To top it off, the clutch of his 1983 Chevrolet gave out. When he couldn't find a phone to get help, he decided to steal the fire truck to get to his car. He was apparently only 20 feet from his car when the truck ran into mud. If only he'd thought to walk instead of calling for help.

Share scams

A new website—www.sharescams.org.nz—explains how international fraudsters con New Zealanders into buying or selling worthless shares in little known overseas companies. It has been set up by the Securities Commission, which has begun a campaign alerting New Zealanders to the share scams by people who telephone from overseas.

The Commission estimates that at least \$30 million has been lost by people who have told the Commission about their experiences but Director of Enforcement, Norman Miller, says this will be just the tip of the iceberg.

Oh, wet pet

They may only have a three second memory, forgetting what they have already seen as they swim round and round the bowl, but goldfish have rights too, new British laws say.

Although they are unlikely to hold a grudge against owners who treat them badly, goldfish are to be afforded new rights that could leave their owners facing prosecution if they don't change their pet's water regularly or find them floating upside down in the bowl.

In the strengthening of animal protection laws, goldfish, pond carp and farmed salmon are to gain unprecedented legal protection from neglect and maltreatment, *The Independent* reports. "It's the way you are looking after the fish that matters," a spokesperson for the Department for the Environment, Food and Rural Affairs said in *The Independent* report. "People will need to think of the way they are treating them." The laws are not unreasonable, a spokesperson seemed to suggest—"We don't want to say their goldfish bowl must be 100 metres by 50 metres."

