



# BarltropGraham LAWYERS Bulletin

MARCH 2008 • NEWSLETTER FROM BARLTROP GRAHAM LAWYERS

## GREETINGS

The year has started well for us. We enjoyed a wonderful, sunny holiday and now are back at our desks and busy. We expect a quieter year as the property market slows but it isn't obvious yet. As this newsletter goes to print the Manawatu is slowly recovering from its worst drought in many years. Feilding's prosperity rests largely on its rural base so that bad news for farmers ultimately becomes bad news for the town. A long, warm, moist Autumn is called for.

It will be business as usual for us this year. However, we do have two development plans. An upgrade of our entrance is under way and should be completed mid-year. Secondly, our search for a young solicitor will be intensified. If you know of any personable young solicitors with a couple of years' experience, please point them in our direction. The clients are wonderful, the bosses superb and the prospects excellent!

Quite a mixture of articles this issue. Also the customary mix of cartoons and jokes plagiarised from many sources. Our thanks to clients who send in material – it really does help. Comments (complimentary and critical) are also appreciated.

LLOYD EVANS

### THE WIZARD OF ID



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## THE NEW PROPERTY LAW ACT

On 1 January 2008 the Property Law Act 2007 came into force, replacing the 1952 Property Law Act and several other related Acts, including a number of old English ones going back as far as 1257.

It has been described as the largest single change to property law in the past 55 years and is the culmination of a project that took over 16 years.

When the Act was passed last year, the Associate Justice Minister, Clayton Cosgrove, noted that the aim of the Act is to create modern, more user-friendly legislation for people buying or selling property, mortgaging their property to raise finance, or entering into commercial leases of land.

Not everything in the Act is new; some parts of it repeat or codify the existing law. The following highlights some of the changes that have been introduced.

### Landlord's Consent

If a tenant asks a landlord for permission to transfer or sublease premises to a third party, or to change the permitted use of the premises, the landlord must not unreasonably withhold consent. The landlord must respond in writing within a reasonable time. If consent is given subject to conditions, or is withheld,

the landlord must give written reasons for its decision, if asked to do so by the tenant.

A range of parties affected by the decision may claim damages from a landlord if they suffer loss as a result of the landlord unreasonably delaying or withholding the landlord's consent.

### Insurance Protection for Tenants

If the premises are damaged by an insured risk (eg, fire, flood, explosion) the landlord and its insurers may not require the tenant to pay for the repairs. This is so even if the damage was caused by the tenant's negligence.

### Distrain

The Distress and Replevin Act 1908 enabled a landlord to enter the premises and seize certain chattels of the tenant, if the rent was in arrears. This self-help remedy has been abolished.

### Sale and Purchase – Return of Deposit

A purchaser of land now has a statutory right to apply to a court for the return of the purchaser's deposit. The surrounding circumstances must be such that a court would not order the

purchaser to perform the contract and also that the purchaser has no right to cancel the contract.

An example could be where there is a defect in the property that the purchaser was not aware of until after signing the contract and paying the deposit.

The court is also given the power to cancel the contract and declare that the purchaser has a lien on the land to secure payment of the refund.

### Conclusion

The new Act affects many facets of the law relating to property. It includes leases, sales and purchases, mortgages, access to land and special powers of the court.

Chances are, if you are dealing with land in any way, the new Act will affect what you are doing. With such a major law change, it is more important than ever to obtain proper advice at the outset of any transaction.

*She was in the kitchen preparing to boil eggs for breakfast. He walked in. She turned and said, "You've got to make love to me this very moment." His eyes lit up and he thought, "This is my lucky day." Not wanting to lose the moment, he embraced her and then gave it his all. Afterwards she said, "Thanks," and returned to the stove. More than a little puzzled, he asked, "What was that all about?" She explained, "The egg timer's broken."*

## SNIPPETS

### Consumer Guarantees Update

A recent High Court decision has finally answered a long-standing question arising from the Consumer Guarantees Act 1993: can consumers take it upon themselves to arrange for the repair of defective goods and then claim the full cost back from the supplier; or, must the consumer first give the supplier the opportunity to provide a remedy?

The decision is unequivocally clear—the consumer must first afford the supplier the opportunity to remedy the defect. This is in line with the general policy of the Act that the suppliers of goods are liable to provide remedies as they, and not the consumer, should bear the risk of defective goods.

### Estate Planning

Dan was a single guy living at home with his father and working in the family business.

When he found out he was going to inherit a fortune when his sickly father died, he decided he needed a wife with which to share his fortune.

One evening at an investment meeting he spotted the most beautiful woman he had ever seen. Her natural beauty took his breath away. "I may look like just an ordinary man," he said to her, "but in a few years my father will die and I'll inherit \$20,000,000."

Impressed, the woman obtained his business card and three days later she became his stepmother.

Women are so much better at estate planning than men.





## DON'T GET CAUGHT NAPPING – CHANGES TO THE PERSONAL INSOLVENCY REGIME

For the past 40 years personal insolvency has been governed by the Insolvency Act 1967. That is about to change. A new Insolvency Act has been passed and is likely to come into force (at the time of writing no date has been set by the government).

According to the Insolvency and Trustee Service (the government agency which administers insolvent estates) there has been a change in the nature of people going bankrupt since the 1967 Act was passed. Now, unlike then, almost two-thirds of bankruptcy estates involve debtors with few, if any, assets that can be sold for the benefit of creditors. Similarly, these debtors seldom have sufficient income to make any meaningful contribution to the creditors during the three years of bankruptcy.

One of the changes to the personal insolvency regime aimed at addressing this problem is the “no asset procedure” (NAP). This is a new addition to insolvency law in this country.

### NAP

If a person satisfies the five criteria set out in Section 363 of the new Act, they may apply to the Official Assignee to be accepted for the NAP. To qualify, the debtor must have:

- No realisable assets (excluding certain necessities of life);
- Not previously been admitted to the NAP;
- Not previously been adjudicated bankrupt;

- Total debts (excluding any student loan balance) of not less than \$1,000 and not more than \$40,000; and
- No means of repaying any amount towards the debts.

Once a person is accepted into the NAP, they are protected from creditors for 12 months, during which time creditors may not begin or continue any recovery or enforcement action against them.

The debtor is automatically discharged after 12 months. At that time, the debtor's debts are cancelled and the debtor is not liable to pay any part of the debts. However, some important exceptions to note are: fines, maintenance obligations, child support and student loans. These remain payable.

During the 12 months it operates, the NAP may be terminated for a number of reasons. These include the debtor misleading the Official Assignee or concealing assets, or a change in circumstances which enables them to repay part or all of the debt. Upon termination, all of the debtor's debts become enforceable.

### Summary Instalment Order

At present, there is a limited right for a debtor to apply for an order that they pay their debts over time. If an SIO is made, it prevents creditors from taking action to recover their debts provided the debtor makes regular payments.

Under the existing legislation, SIOs are made by a District Court, generally operate over a three year period and are

only available if the debtor's total debts are \$12,000 or less.

Under the new Act, the application will be made to the Official Assignee and the debtor's total debts may be up to \$40,000 (excluding any student loan balance). The time frame for repayment may be extended for up to five years. The Official Assignee will have discretion to determine whether the debtor must repay all, or just a part, of their debts. There will be a public register of NAP and SIO debtors.

### Conclusion

In general, if the debtor is in a position to pay money towards their debt, then the SIO procedure is available as an alternative to bankruptcy. If the debtor is not in a position to make any payments to creditors, then the NAP may be more appropriate.

*An Amish boy and his father were in a mall. They were amazed by almost everything they saw, but especially by two shiny, silver walls that could move apart and then slide back together again.*

*The boy asked, “What is this Father?” The father (never having seen a lift) responded, “Son, I have never seen anything like this in my life, I don't know what it is.”*

*While the boy and his father were watching with amazement, a fat old lady in a wheelchair came up to the moving walls and pressed a button. The walls opened and the lady rolled between them into a small room. The walls closed and the boy and his father watched the small numbers above the walls light up sequentially. They continued to watch until it reached the last number and then the numbers began to light in the reverse order. Finally the walls opened up again and a gorgeous 24 year old blonde stepped out.*

*The father, not taking his eyes off the young woman, said quietly to his son, “Go get your mother.”*

*George Phillips of Meridan, Mississippi, was going to bed when his wife told him that he'd left the light on in the garden shed, which she could see from the bedroom window. He opened the back door to turn off the light but saw that there were people in the shed stealing things. He phoned the police, who asked, “Is someone in your house?” and he said, “No”. Then the officer said that all patrols were busy and that he should simply lock his door and an officer would be along when available.*

*George said, “Okay”, hung up, counted to 30 and phoned the police again. “Hello, I just called you a few seconds ago because there were people stealing things from my shed. Well, you don't have to worry about them now because I've just shot them.” Then hung up the phone.*

*Within five minutes three police cars, an Armed Response Unit and an ambulance showed up at the Phillips' residence and caught the burglars red-handed.*

*One of the policeman said to George, “I thought you said that you'd shot them!” George replied, “I thought you said there was nobody available!”*



## GUARANTEES ARE DANGEROUS DOCUMENTS

Clients tend to take Guarantees too lightly but they can and do cause problems and should be taken very seriously.

The following is a summary of the obligations placed on solicitors by one Trading Bank when witnessing one of its Guarantees. It is a concise summary which is relevant to Guarantees in favour of any lender:

“Where it is apparent that any Guarantor may not receive any benefit from the transaction, or otherwise may be at a disadvantage in relation to the Borrower (ie. there is a non-commercial relationship between the Guarantor and the Borrower), the Bank requires the Guarantor to obtain legal advice. Unless you are aware that the Guarantor is actually under the undue influence of the Borrower, or that the Borrower has made misrepresentations to the Guarantor, you may provide the necessary legal advice. The minimum legal advice you must give the Guarantor is as follows:

1. You must meet the Guarantor, face-to-face, in the absence of the Borrower.
2. You must explain the nature of the security documents (including the Guarantee) and the practical consequences these will have for the Guarantor if he or she signs them

(eg. A wife could lose her home if her husband’s business does not prosper or she could be made bankrupt).

3. You must point out the seriousness of the risk involved, including:
  - The purpose of the proposed facility;
  - The amount and principal terms of the new facility;
  - That the Bank might increase the amount of the facility, or change its terms, or grant a new facility, without reference to the Guarantor;
  - The amount of the Guarantor’s liability under the Guarantee, if it is limited; and
  - Discussing the Guarantor’s financial means, including the Guarantor’s understanding of the value of the property being charged and whether the Guarantor or the Borrower have any other assets out of which repayment could be made if the Borrower’s business should fail or the Borrower is otherwise unable to make required payments under the facility.
4. You must state clearly that the Guarantor has a choice. Explanation of the choice facing the Guarantor will require some discussion of the present financial position, including the amount of the Borrower’s present indebtedness to the Bank.
5. You must then check whether the Guarantor wishes to proceed. The

Guarantor must be asked whether he or she is content that you confirm to the Bank that you have explained to the Guarantor the nature of the security documents and the practical implications they may have for the Guarantor, or whether for instance the Guarantor would prefer you to negotiate with the Bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to the Guarantor’s liabilities. You must obtain the Guarantor’s authority before giving the Solicitor’s Certificate.

If you are aware that the Guarantor is, or may be, under the undue influence of the Borrower, or the Borrower has or may have made misrepresentations to the Guarantor, you must tell the Guarantor that:

- You cannot advise the Guarantor;
- The Guarantor must obtain legal advice from another lawyer if the Guarantor wishes.

Where the Guarantor obtains legal advice from another lawyer, you must contact that lawyer, ask him/her to provide the advice set out above and obtain written confirmation from that lawyer that he or she has provided that advice.”

### NZ LAW WELCOMES LAW FIRM 56 TO ITS FOLD

A Panmure law firm, DG Law, has joined the membership of NZ LAW Limited bringing the total number of firms in the NZ LAW network to 56 and the number of its Auckland-based firms to nine.

A spokesman for the firm said, “Membership of NZ LAW will enable the firm to share ideas and information with other firms of a similar size and outlook. Ultimately, our clients will benefit from our involvement in the group.”

We endorse these remarks. Our membership has given us a number of benefits but perhaps the most valuable has been the strength which comes from sharing and the camaraderie that results.

### PALMERSTON NORTH CITY COUNCIL REPORTS

The Palmerston North City Council has recently changed their system relating to checking the records on residential properties. The new system is much more efficient. If you want to view the records on a particular property, you go into the Council and order the file. It takes approximately four hours for the Council to obtain the information for you. You can elect to view at the Council for a cost of \$15, or you can buy it on CD, which is what most purchasers are doing, for a cost of \$20.

### Education Update— Violent Students

A school principal has successfully defended a judicial review of her decision to stand down a 7 year old student with ADHD for five days after a violent incident in the classroom.

The Education Act 1989 provides that a principal may stand down a student if there has been gross misconduct that is a harmful or dangerous example to others, or the behaviour is likely to cause serious harm to the student or other students. Upon standing down a student, the principal must immediately notify the Ministry of Education and the parents, and give reasons for the decision.

The High Court reviewed the circumstances surrounding the decision and found that the principal acted within the law.



## THE DISPUTES TRIBUNAL

Last year Edith, an elderly widow, paid a local painting contractor \$7,000 to paint part of her house. After only 12 months the house looks terrible and needs to be painted again. The painting contractor has refused to fix the work and Edith has found another more reputable painter who will redo the work for a further \$7,000.

Edith's lawyer has advised her that she can sue the first painter in the District Court but that the cost of doing so may make it uneconomical for her. Fortunately for Edith, she can bring a claim in the Disputes Tribunal.

### What Types of Claims are Covered?

The Tribunal is very versatile and can hear claims about almost anything, from car repairs to grazing stock, from a faulty new computer to hair dressing for a wedding gone terribly wrong.

There are some limitations. There must be a dispute—you can't file a claim if someone simply refuses to pay a bill when there is no argument about whether they owe the money. The Tribunal is also limited in terms of disputes concerning employment, land sales, wills, rates, taxes and other statutory amounts.

For most disputes the Tribunal is an informal, inexpensive, quick and private way to resolve the disagreement.

If the dispute relates to something worth up to \$7,500, a claim can be filed as a matter of right. If the value

is between \$7,500 and \$12,000, both sides must consent for the matter to be heard by the Tribunal. The Tribunal has no jurisdiction to hear a claim over \$12,000.

### Procedure

The Tribunal is much more flexible than a District Court. No one is allowed to be represented by a lawyer and the rules provide that the Tribunal shall determine disputes "according to the substantial merits and justice of the case". In doing so, it is not bound to give effect to strict legal rights or obligations. This emphasis on what is fair and just, rather than the letter of the law, allows a referee to take matters into account that a judge in a District Court may be prevented from considering.

In Edith's case, she may have signed a contract with a clause prohibiting her from claiming compensation more than six months after the work was completed. The referee is not bound by that provision and may award her \$7,000 if that seems to be fair and just. The referees are also not bound by the evidential rules of a court.

### Preparation is the Key

Probably the single most important aspect of bringing (or defending) a claim in the Tribunal is preparation. Make sure that you have copies of any important documents such as bills, receipts, photographs or reports. Ensure that any important witnesses can attend.

If they cannot do so in person, they may be able to attend by telephone and support a written summary of what they saw or know. Review each step of your claim (or defence) thoroughly before the hearing so that you can anticipate any challenge that the other party might make and anticipate any concerns that the referee may have.

### Conclusion

Long memories of the problems associated with the Disputes Tribunal's predecessor, the Small Claims Tribunal, mean people sometimes assume the Tribunal is only suitable for the most basic disputes. In fact, if you prepare your claim carefully and thoroughly, it can be an excellent forum to resolve a dispute of up to \$12,000.

*A girl asks her boyfriend to come over on Friday night to meet, and have dinner with, her parents. Since this is such a big event, the girl announces to her boyfriend that after dinner she would like to go out and make love for the first time.*

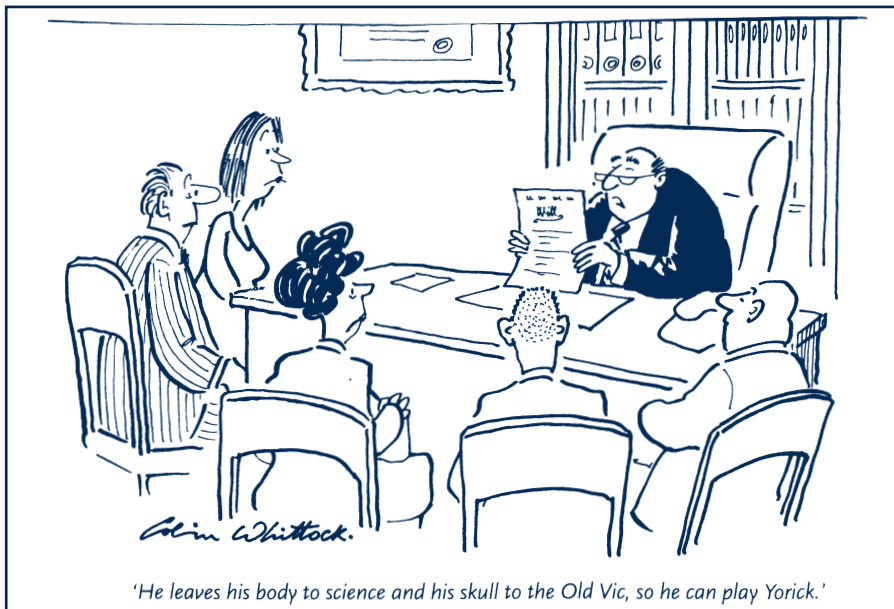
*The boy is ecstatic, but he has never had sex before so he takes a trip to the pharmacist to get some condoms. He tells the pharmacist it's his first time and the pharmacist helps the boy for about an hour. He tells the boy everything there is to know about condoms and sex.*

*At the register, the pharmacist asks the boy how many condoms he'd like to buy, a 3-pack, 10-pack or family pack. The boy insists on the family pack because he thinks he will be rather busy, it being his first time and all.*

*That night, the boy shows up at the girl's parents' house and meets his girlfriend at the door. "Oh, I'm so excited for you to meet my parents, come on in!" They go to where the parents are seated. The boy quickly offers to say grace and bows his head. A minute passes and the boy is still deep in prayer with his head down.*

*10 minutes pass and still no movement from the boy.*

*Finally, after 20 minutes with his head down, the girl leans over and whispers to the boy, "I had no idea you were this religious." The boy turns and whispers back, "I had no idea your father was a pharmacist."*



'He leaves his body to science and his skull to the Old Vic, so he can play Yorick.'



## INTERNET BANKING FRAUD – ARE YOU PROTECTED?

### Code of Banking Practice

If you do your banking on the Internet, then you should be aware that the risk associated with Internet banking increased as of July 2007. The New Zealand Bankers Association (of which all the main trading banks are members) has introduced a new Code of Banking Practice which includes a section on Internet banking.

If an Internet banking user becomes the victim of fraud and has contributed to that fraud by either:

- having a computer or device that does not have appropriate protective software and operating systems installed and up to date; or
- failing to take reasonable steps to ensure that the protective systems such as virus scan, firewall, anti-spyware, operating system and anti-spam software on the computer are up to date; or
- failing to follow reasonable security warnings about the appropriate processes and safeguards to follow when using Internet banking;

then the bank is not liable for any loss. The Code provides for the bank to have the right to request access to the user's computer in order to verify all reasonable steps to protect the computer were taken. If access is denied then the user may be held liable.

The effect of the new Code is that the onus to safeguard a computer has been shifted to the user, although the banks retain the responsibility to inform the user of the best way to do so. The Code has been criticised for not being specific enough as to what constitutes adequate protection. However, as matters now stand, users are obliged to update their computer security systems in accordance with their bank's recommendations. Failure to do so means that the Internet user will be liable for losses up to their overdraft limited.

The bank is responsible for fraudulent transactions that are not caused by the user if they are promptly advised of the fraud or advised that the customer ID, password or other security information is, or may be, known to another person

or that there has been unauthorised access to the bank's site for Internet banking information or accounts.

### Remedies

If you become involved in a dispute with your bank over liability for Internet fraud, then you should initially attempt to resolve the matter through the bank's internal complaints procedure.

If this is unsuccessful, a complaint may be made to the Banking Ombudsman provided the amount at issue is less than \$200,000. The Banking Ombudsman in turn can refer complaints to another party such as the Insurance and Savings Ombudsman, the Privacy Commissioner or the Human Rights Commissioner. Banks are bound by recommendations made by the Banking Ombudsman.

If a claim is unsuccessful with the Banking Ombudsman, or it is for an amount exceeding \$200,000, then an application will have to be made to the Court. Either way, it would be advisable to consult your lawyer at the outset.

## ROOM WITH A VIEW

### Introduction

You want to buy an apartment in the heart of Auckland City, a perfect base, a long term investment! The city has many beautiful views so you want one. You spy a brochure which covers the key aspects of your search. The apartments are not built yet but the glossy publication promises classy central city living, and that view. Once you have signed up and the building has been constructed, you walk in and discover that a roof is obstructing your priceless view!

### A Misrepresentation

The key question for the Court in the case that followed this disappointing discovery by the purchaser was whether the misrepresentation made in the brochure meant that the Agreement could be cancelled. Alternatively, would the Court require the purchaser to pay over the purchase price and buy an asset that did not live up to the initial expectations? The Court said settlement must proceed.

### The Agreement and Plans/ Specifications

After the "tease" in the original brochure, came the actual Agreement for Sale and Purchase with detailed plans and specifications. These, when taken as a whole, showed the existence of the roof in front and fully disclosed the exact situation. The Agreement included the standard provision that, once signed, the Agreement was the binding and complete legal arrangement between the vendor and purchaser.

In other words, the brochure was not to be taken into account when finally deciding what the terms of the contract were. As the purchaser had the opportunity to take any legal or other advice available prior to signing, there was no reason, in the Court's view, why the contract should not stand.

### Conclusion and Warning

In the excitement of the purchase, who would have given a thought to the roof next door, particularly as nothing was constructed at the date of signing. In

hindsight, the warning is clear and the principle applies to every Sale and Purchase Agreement. Before you sign, obtain all the advice you can because prior representations will usually not be a relevant factor. In this instance not only legal advice was required but specific architectural advice regarding the plans and specifications.



*'...and it has the added advantage of being close to the motorway'*