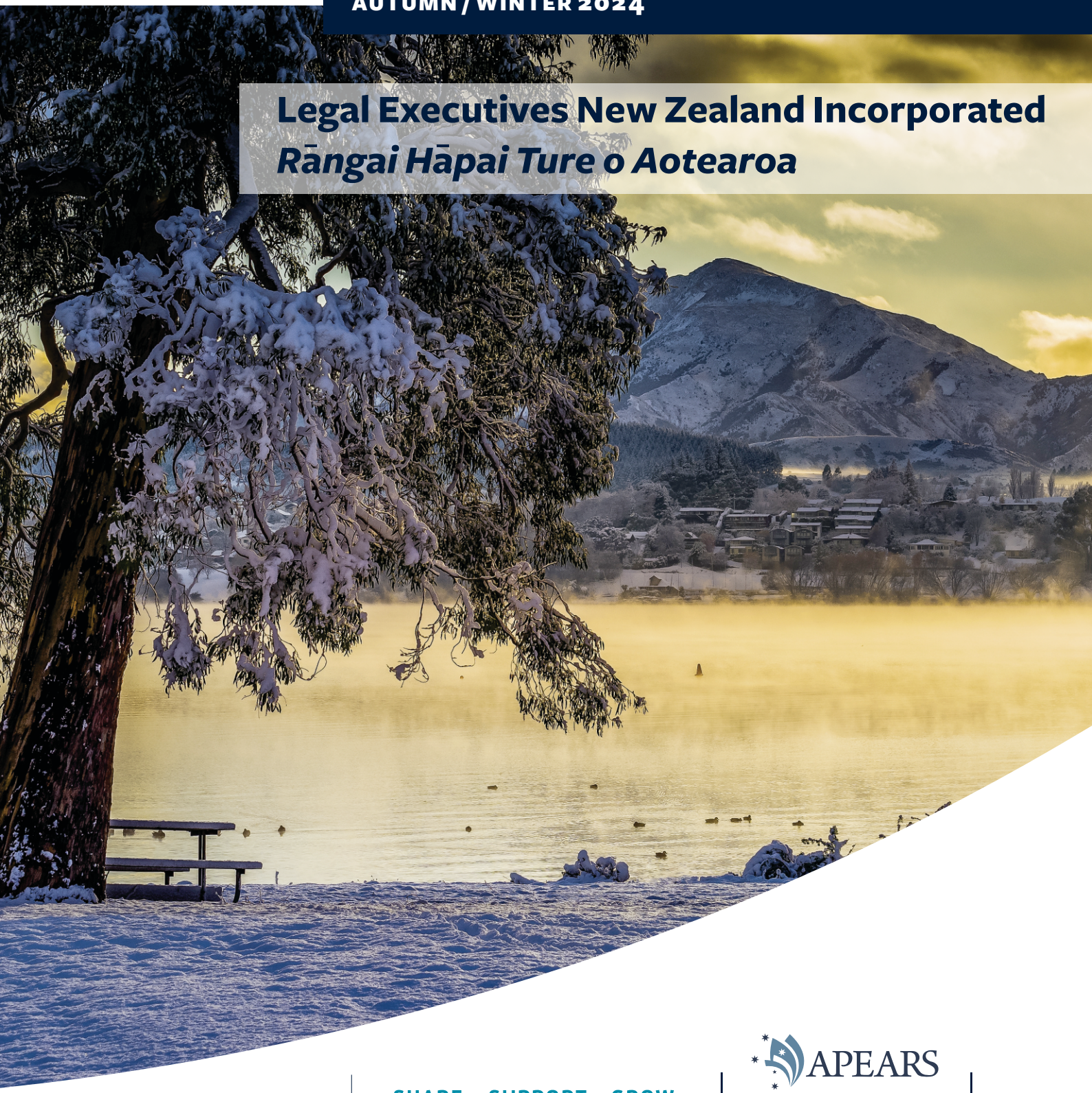
ENVOY

LEGAL EXECUTIVES NEW ZEALAND
RĀNGAI HĀPAI TURE O AOTEAROA

AUTUMN / WINTER 2024



Legal Executives New Zealand Incorporated
Rāngai Hāpai Ture o Aotearoa

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THIS ISSUE.

From the President	2
Branch updates	4
Cases update	10
2023 survey results of Registered Legal Executives' salaries, conditions and rewards – Part 2	**15**
Taxation update	19
Legal Executives New Zealand Incorporated *Rāngai Hāpai Ture o Aotearoa*	**21**
A year off to travel: Twenty land borders crossed on a motorbike adventure	**23**
Credit and consumer law reform changes underway	27
Carol Newton: newest life member for LENZ	**29**
Supreme Court considers who bears the costs of natural disasters	31
$150 million unit title claim results in epic judgment	34
Land and conveyancing update	36
Professional standards: two lawyers censured and fined	38
Lack of capacity in one area does not mean incapacity in all areas	39
Introducing two new branch presidents	42
Relationship property provision: relevance of claimants' financial position	44
Finding the balance between testamentary freedom and family protection	46
Focus on relationship property: the interface between trusts and relationship property	48
Help us solve this puzzle	50
The latest about New Landonline: new features recently introduced	51
Mutual wills and the challenges of enforcement	52
In memoriam: Ivy Pack	54

FROM THE PRESIDENT



I hope you are all well. We had some beautiful winter days and certainly some chilly nights.

Webinars
LENZ has been extraordinarily busy over the past few months. Three webinars were held between March and May; our annual wellbeing webinar on strategies to control stress and feeling overwhelmed, and webinars on bright-line changes and relationship property.

The wellbeing webinar was attended by more than 750 people. It was an important event, not only for the wellbeing component of your CPD, but also because we all experience stress in our lives every day to some degree.

These wellbeing webinars provide us with mechanisms to help cope with everyday demands. It was great to see the attendance and receive feedback, and to know that we all share these experiences. We are not alone in feeling overwhelmed!

Branch committee training
Earlier this year LENZ ran its annual training day for branch committees.

This was a very successful event. It was fantastic to meet so many dedicated and passionate committee members who came together to support, share and collaborate on running successful branches. Providing support from national office to the branch committees is very important, and this event is highly valued by attendees.

Annual renewals
Our annual renewals also kept the staff busy. Thank you to those who completed their forms, provided their declarations and completed renewal early. It makes the process smooth when everything is done correctly.

LENZ digital transformation
I am proud to confirm that the implementation of LENZ's digital

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transformation is almost complete. By the time this bumper edition of *Envoy* is published, you will have explored our new website – www.legalexecutives.org.nz

The new digital platform will allow you to maintain your membership details, your CPD Plan & Record, register for national LENZ webinars and renew your membership/registration - all online.

I would like to particularly thank Jo Buckton for all the hard mahi that she has put into the project. It has taken many many hours of detailed input to ensure the smooth transition to our new digital platform. From data checking, training and practice runs, the transition has been seamless and completed within deadlines. A sincere and heartfelt thank you to Jo from myself and the Council.

Now LENZ Inc

Last but not least, our organisation's name has been formally changed to Legal Executives New Zealand Incorporated. We have used Legal Executives New Zealand for a few years as a communications name but now we have completed the last part of our refreshed identity and updated our registered name as an incorporated society.

Change is inevitable. It is how we embrace and adapt to change that defines our success. Through collaboration and knowledge sharing ,we empower each other to reach new heights and achieve extraordinary results.

Ngā mihi nui



Carmen Franich

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CHANGING THE CULTURE OF A PROFESSION



Roberton Island

Northland

Hello from Northland Branch. The 'winterless north' is not living up to its name right now as winter is definitely making itself felt. I'm sure those of you further south, however, are experiencing much colder weather than we are!

Education
In May, the branch held a seminar on 'The mystique of probate' presented by Registrar John Earles. At the seminar, Registrar Earles announced his upcoming retirement; we were incredibly grateful to have the opportunity of attending one last seminar by him where he imparted his incredible knowledge to us.

We are aware that those watching via livestream had difficulties, firstly with logging in and secondly with the livestream which wasn't great quality. We sincerely apologise for these issues. The seminar was held at the Whangārei Library which has WiFi and recording facilities. The WiFi, however, was clearly not good enough. The branch committee will be looking at other venues for future seminars!

Social events
The branch committee is keen to hold as many social events as possible. We're trying a range of times and venues to make sure as many of our members can attend as possible.

Regular Brain Box meetings are held in different locations in Whangārei to suit a variety of members. The meetings provide an informative and safe space to have a chat about any hurdles/topics/questions you may have relating to your areas of work. The sessions provide a great opportunity for brainstorming and learning from each other.

Our annual Kerikeri Long Lunch, a firm favourite for many of our members, was held on Sunday, 14 July. This event is a great opportunity to catch up with members in the Far North as they are often unable to attend social events held in Whangārei. We had an excellent turnout as always – thank you to all members who gave up their Sunday to come along.

Contact us
Please feel free to contact us at northland@legalexecutives.org.nz



Jennette Overton
Northland Branch President

Auckland Waikato

Hello from Auckland Waikato Branch.

This year is going very fast; it's amazing to be over halfway through the year already! The branch committee and I hope that you are all keeping warm, and enjoying crisp clear days and the chance to stay at home and watch some tv over winter.

Training day
I attended the branch committees' training day at the national office in April; it was very informative and provided lots of ideas for all branches.

Branch meetings
Branch committee meetings have been held regularly this year; mostly via Zoom and a meeting in person in May.

At the May meeting, the committee mapped out the branch's plans and goals for the rest of the year, including our plans for seminars and social events.

The committee is always open to ideas for social events, seminars and webinars, so please don't hesitate to contact us at aucklandwaikato@legalexecutives.org.nz with your suggestions.

Looking ahead
We would love members to think about joining the committee at the branch AGM later this year. The more we have on the team, the more we can do for our members. To find out what is involved you can contact me at aucklandwaikato@legalexecutives.org.nz

Until next time, I wish everyone a happy and healthy winter.



Sarah Blaney
Auckland Waikato Branch President



Raglan Harbour



Whakatāne Heads

Bay of Plenty Gisborne

I can't believe the year is more than halfway through already. The days are short and it seems like it is dark even before we leave the office. The daily temperatures are definitely much cooler. The displays by nature earlier this year of the Aurora Australis (Southern Lights) and some amazing sunrises and sunsets have been simply spectacular.

Government makes changes to real estate sector
It seems the government is giving the real estate sector a shake-up with the sudden end of the First Home Grant and the July reset of the bright-line rules. It will be interesting to see how this will affect the property market in the coming months.

Most members I have spoken with report heavy workloads. No doubt we will all be keen to see how the government's changes affect our work in the second half of the year. Some people may be holding off putting their homes on the market because of the changes to the bright-line rules, or deferring refinancing until the interest rates start dropping a little.

There still seem to be many first home buyers around, however the demise of the First Home Grant came as quite a blow to them. Buyers who received approval from Kāinga Ora before the scheme ended have only six months from approval to find a property, otherwise the approval will lapse and they will miss out.

Rise in threshold for probate?
The Property Law Section and the New Zealand Law Society continue to advocate for an increase in the threshold at which grants of administration are required for probate. Hopefully some changes to the threshold can be made soon to ease the burden on families that have to seek probate or letters of administration for estates that have slightly more than $15,000 in assets.

Social events
The branch held social events in a number of towns within our branch earlier this year that were enjoyed by all who attended. We are in the midst of holding mid-year branch functions. Hopefully you were able to attend an event near you.



I hope you are all managing to remain warm as winter continues; it won't be long before the days are growing longer again.

Cathy Punter
Bay of Plenty Gisborne Branch President

Wellington Central Districts

Kia ora, it's been a while!

Since my last report, the National AGM and face-to-face Council meetings have been held; the next meeting will be in August in Auckland. These are good (and fun) opportunities to catch up with other branch presidents to check in with what's happening in their part of the country, and we all pick up new ideas for branch activities. On the business agenda, important issues are discussed including education, connection and plans for the future.

Social

Committee members and I have visited other areas in the region over the last few months. My trip to Ohakune was delayed by half an hour while a farmer tried to encourage his cows along State Highway 4, wildly but unsuccessfully flapping his hi-vis jacket at them. Fortunately, the Ohakune team are a patient bunch . . . the joys of living in the regions.

I recently visited Masterton where we had a lovely lunch at the local Indian restaurant. The drive is a little over two hours, past the wind turbines at Palmerston North and through stunning scenery. Google Maps took me into Masterton via the heavy traffic route of the industrial area, much to the amusement of the team.

The branch committee is arranging mid-winter dinners around the regions. If you have suggestions for future event, please feel free to contact me or your local representative. These events are for the benefit of all branch members and we welcome your input.

Education

You will all have received emails from National Office with lists of upcoming CPD events. I encourage you to register. Remember to keep good records of your attendance, you never know when you might be audited. You can do this online now via LENZ's new website.

If you've missed a webinar and watch the recording later, then you should note that the activity must be verifiable and must include the potential for interaction if you want to include it in your CPD Plan and Record. My suggestion is that you watch the webinar with a colleague so that you can verify each other's attendance and discuss any learnings. I hope this is useful to those of you in smaller firms; perhaps you could meet with a colleague from another firm so you both benefit?

Branch matters

I thank the committee members for throwing their hats in the ring and giving their time for the branch. Our committee members are:

- President: Stephanie Bishop
- Treasurer: Ashleigh Kilpatrick
- Secretary/Newsletter: Angelene Stephens
- Committee Members: Hayley Furneaux, Maureen Haslett, Jo Reweti and Victoria Walker



Stephanie Bishop
Wellington Central Districts Branch President



Te Apiti Wind Farm



Seaward Kaikoura Ranges from Kaikoura Peninsula

Nelson Marlborough

Greetings from Nelson Marlborough.

The year is flying by - I hope you are all keeping warm and healthy as the days are short and cold, and that you're keeping busy. Unfortunately, in this region the property market is still a bit on the slow side for those of us who work in that area.

Branch meetings

Our branch committee meets throughout the year. New branch secretary, Sophie Ennor, is doing a great job for us in this role. New committee member Natalie Ogden Bell and I both attended the branch committees' training day in Auckland on 6 April (hosted by the national office). The day's programme was very good and most informative.

Education

I hope members found the early May LENZ 'Bright-line taxation changes' nationwide seminar useful. I found it excellent in preparation for the changes that took effect on 1 July; I'm sure many of you felt the same. Likewise, for those of our members who remotely attended Northland Branch's 'The mystique of probate' seminar by Registrar John Earles on 3 May. He is an inspiring speaker.

Social events

It was great to see everyone who attended our branch breakfast at Little Engine Eatery on 9 May; I hope you all enjoyed yourselves.

Branch social events are always a great time to catch up with known faces and meet some new ones, so I encourage members to come out and join us.



Rachael Cooke
Nelson Marlborough Branch President

Canterbury Southern Districts

The weather has certainly taken a turn in the deep south. While we still get the odd (some might say 'very odd') nicer day, the dark nights are well and truly here. My Saturday mornings are now spent on the rugby sidelines cheering on my nephews while trying to keep warm and dry.

I hope that everyone is well and there aren't too many 'winter blues' going on.

Education
I really enjoyed attending the national wellbeing webinar and picked up a few tips. I encourage all members to take a little time just for yourself each day.

A branch seminar was held at the Burnside Bowling Club on 19 June and livestreamed to our regional hubs. The topic, 'Blended family wills,' was popular and the event was well-attended. The last seminar we had scheduled was deferred due to changes going on with the Christchurch City Council and LIM reports, so keep an eye out for this later in the year.

Social
Social events in both Christchurch and the regions are continuing, with mid-winter catch ups in a number of places. I am looking forward to hearing how they went. It is always good for branch members to spend some social time with each other, and hearing both the challenges and triumphs they are experiencing.

Your branch
The committee continues to meet monthly to ensure the smooth running of the branch and its events. Please feel free to get in touch if you have any queries/concerns/suggestions for seminar topics or social events, or if you need any assistance. The branch email is canterburysouthern@legalexecutives.org.nz

On behalf of the branch committee, thank you for your ongoing support. Keep safe and warm everyone.



Andrea Murchland
Canterbury Southern Districts Branch President



Deans House, Riccarton Bush, Christchurch

CASES UPDATE



Estates

Appointment of contradictor directed in complex estate case

In *Hannagan v Hannagan* [2024] NZHC 542 the High Court appointed a contradictor to assist in resolving issues arising in a case in which an entire estate was left to two beneficiaries who had predeceased the will-maker.

Beverley Aitken died in November 2021 leaving an estate of $122,000 and a family trust containing $500,000. Her will bequeathed her estate to her two deceased sisters, with no gift over. Mary Hannagan and Paul O'Neill were trustees of the trust; Associate Judge Lester said that he assumed that the two trustees were named as executors in the will, but he was not clear about this as the will had not been produced.

"The significance is that pursuant to cl 21 of the Trust Deed (dated 20 February 2002), if no-one else named in cl 21 is alive to take up the role of advisory trustee, then the executor of Ms Aitken's Will, if they elect to take up the office, becomes the advisory trustee. The significance of being advisory trustee is that under cl 23 of the Trust Deed, the advisory trustee may appoint additional discretionary beneficiaries. Accordingly, the status of the Will and of the executors is important to whether cl 23 of the Trust Deed can apply."

His Honour noted that the primary beneficiary under the trust was the late Ms Aitken, and the secondary beneficiaries were her two late sisters. Accordingly, there were currently no beneficiaries of the trust or the estate.

"It is clear the situation needs to be resolved. It is equally clear, however, that in the event there is an intestacy which is not resolved in the manner proposed by the applicant, that there are other relatives of the late Ms Aitken who stand to take under the intestacy. However, it does not seem efficient to direct there be a full tracing exercise at this stage and all those potential beneficiaries served."

Associate Judge Lester said it would be better to appoint a contradictor to assist the court with the various issues. A barrister was appointed as contradictor and the court directed that the proceedings were to be reviewed in two months.

Insolvency

Who owns tiny homes after liquidation?

Maginness & Anor v Tiny Town Projects Ltd (in liquidation) [2023] NZHC 494 involved the question of who owned partially constructed tiny homes after the company building them went into liquidation. Tiny Town Projects Ltd constructed and sold custom-built tiny homes. Six homes had been partially completed at the time of the liquidation.

The basis of the agreements between the company and the purchasers was a standard agreement for sale and purchase of a tiny home. The agreement provided for the purchasers to pay the purchase price by instalments. The company used those funds to pay for building materials, labour and other construction costs. The funds received by the company were applied in the ordinary course of business. They were not held in a separate bank account or applied to particular tiny homes.

Three of the purchasers had paid the entire purchase price and their homes were 95% complete at the time of the liquidation. The other three buyers' homes were only 40%-

50% complete, and they had paid only part of the purchase price. One of the couples in the latter category, the Warmerdams, had paid an instalment of $46,430 later in the day of the liquidation.

The tiny homes were the principal assets in the company's liquidation. The liquidators accordingly brought High Court proceedings seeking directions from the court under section 284 of the Companies Act 1993.

Justice Venning held that property in the partly completed tiny homes had not passed. Section 53 of the Personal Property Securities Act 1999 did not apply to the contracts of sale in this case. The individual tiny home purchasers – both fully and partly-paid – were entitled to equitable liens against their partly constructed tiny homes to the extent of the purchase moneys they had paid. The equitable liens were excluded from the operation of the Personal Property Securities Act and the security interests under that Act. There was no constructive trust over the property in favour of the purchasers. The Warmerdams were to be repaid their $46,430.

Property

Court overturns real estate agent's plan to acquire interest in properties

The Court of Appeal has canvassed the circumstances in which vendors can cancel contracts to sell property when the real estate agent acting for the vendor seeks to acquire an interest in the property.

In *Goldline Properties Ltd v Marsh* [2023] NZCA 285, Goldline Properties Ltd agreed to sell four vacant lots to Maree Marsh by way of four separate contracts. Goldline's real estate agent acting on the transaction was Ian Croft, the director of One Agency Counties Realty Ltd.

When Goldline and Ms Marsh entered into the contracts, neither Counties Realty nor Mr Croft had acquired any interest in the properties. However, prior to settlement, Mr Croft entered into a joint venture agreement with Ms Marsh by which he would acquire a 30% interest in the properties at settlement.

Section 134 (1) of the Real Estate Agents Act 2008 prohibits real estate agents, without the consent of their clients, from acquiring land or businesses the agent is commissioned to sell. Subsection (2) bans agents from carrying out, or continuing to carry out, agency work if they know a transaction will result in a person related to the agent acquiring the land or business to which the transaction relates. Subsection (3) sets out steps to be taken by an agent before a client's consent for the purposes of section 134 (1) will be effective. Section 134 (4) permits clients to cancel contracts 'made' in contravention of subsection (1) or 'brought about' in contravention of subsection (2).

There was a dispute about whether Mr Croft told Goldline of his arrangement with Ms Marsh, but there was no dispute that the requirements of section 134 (3) were not met. When it became aware of the joint venture, Goldline purported to cancel the contract pursuant to section 134 (4). Ms Marsh responded by lodging caveats over each of the properties.

The High Court held that the right under section 134 (4) to cancel a contract 'made' in contravention of section 134 (1) or 'brought about' in contravention of section 134 (2) did not arise when the agent acquired an interest in the property after the contract was entered into.

Goldline appealed to the Court of Appeal. The parties agreed that the sole issue for determination was whether the High Court had been correct in finding that a contract was 'made' or 'brought about' for the purposes of section 134(4) only when the contract was entered into.

The Court of Appeal's decision was delivered by Justice Fitzgerald, who said that the overall scheme or purpose of section 134 did not limit the right of cancellation to circumstances in which an agent either acquired or intended to acquire an interest in land or business at the time a contract was entered into.

The concept of 'acquiring' an interest in land or business plainly looked forward to the outcome of the transaction and the identities of those who would take legal or beneficial interests in the land or business at settlement. The use of the term 'acquire' in section 134 of the 2008 Act - rather than the term 'purchase' in section 63 of the 1976 Act – made that conclusion more compelling.

That approach was also consistent with the section's statutory purpose of consumer protection. The risk of a conflict of interest between a real estate agent and his or her client when the agent was to take an interest in the land or business they were commissioned to sell was no less real when the arrangement by which the agent would acquire the interest came about after the contract had been entered into.

The Court of Appeal said that the requirements of section 134 (3) had not been met and Goldline had accordingly been entitled to cancel the contracts. The appeal would be allowed.

Continued on page 12 ...

...Continued from page 11

Failure to specify price increase for higher spec apartment costs developer dearly

In *Civic Lane Limited v Dibble* [2023] NZCA 582, Civic Lane Ltd was the developer of an apartment project in central Auckland. Mr and Mrs Dibble viewed the development, but none of the apartments suited their needs. Accordingly, Suzie Paine from Bayleys suggested to the couple that two standard apartments could be combined to create a larger home.

The Dibbles were keen to do this and agreed on a floor plan with the developer. An agreement for sale and purchase was signed. Clause 20 contained a vendor warranty to address the need for further agreement on the layout. The vendor warranted that it would work with the purchaser to design an acceptable plan/layout for the apartment.

Subsequently, however, there was disagreement over completion costs. The parties each served settlement notices requiring settlement in accordance with their respective assessments of the amounts payable. Neither was prepared to settle on the basis of the notice served by the other.

Mr Dibble applied for summary judgment, seeking specific performance in accordance with the terms of his settlement notice. Civic Lane counterclaimed for specific performance in terms of its notice.

The High Court granted Mr Dibble's application for specific performance and Civic Lane appealed to the Court of Appeal. The issue was what the price payable for the completed apartment was and, in particular, whether the costs of modifying the standard layout to suit the purchaser's needs were included in the agreed price.

The Court of Appeal judgment was delivered by Justice Gilbert. His Honour said that the issue for the court was to determine objectively what the parties must have intended clause 20 to mean. The clause must be construed in the context of the agreement as a whole and determined by applying the approach to contractual interpretation confirmed by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147.

That approach required an objective interpretation with the aim of ascertaining the meaning which the document would convey to a reasonable person having all the background knowledge reasonably available to the parties at the time of the contract.

The Court of Appeal held that Mr Dibble had not agreed to buy an apartment with the standard layout for two apartments.

"The standard layout is irrelevant, having been replaced by an 'acceptable plan/layout' that Civic Lane warranted it would work with Mr Dibble to design. Agreement having been reached on the design of the final layout without any price adjustment being sought or agreed, Civic Lane was obliged to construct the apartment conforming to that layout and cannot unilaterally impose a price increase for doing so."

Justice Gilbert said that there was no provision in the agreement enabling the price to be adjusted for completing the apartment constructed in accordance with the 'acceptable plan/layout.'

The appeal was dismissed.



Relationship property

High Court finds Family Court judge acted unfairly towards wife

W v W [2023] NZHC 3491 is an extremely unusual case in which the High Court ruled that the 'inescapable' conclusion was that a Family Court judge had acted unfairly in his treatment of the wife in protracted relationship property proceedings.

During the course of the case, Mrs W had two relationship property settlement agreements set aside in favour of Mr W by the Family Court, her home was searched twice by Police at Mr W's behest, she was prosecuted for assault, and she was convicted of, and served, a sentence of 12 months' home detention for perjury. In addition, Mrs W had a quarter of a million dollars in costs awarded against her by the Family Court and had, effectively on Mr W's petition, been adjudicated bankrupt.

Subsequent to those events, however, Mrs W's perjury conviction was overturned on a second appeal and, in 2022, the Court of Appeal granted her leave to appeal the Family Court's 2015 relationship property decision out of time.

The appeal was advanced in the High Court on two separate

grounds: that the decision was wrong on the merits, but also that the hearing before the Family Court judge was so unfair that the resulting decision was effectively a nullity.

Justice Ellis delivered the High Court decision, observing that the appeal was 'a sensitive and important' one as the court was being asked to make a finding of unfair conduct by a judge. She also noted, however, that the question of unfairness was relatively straightforward as it largely turned on the record of the Family Court hearing itself.

Justice Ellis reviewed the hearing and concluded that the number and nature of the judge's interventions and the absence of intervention in the face of unfair questioning by counsel, spoke for themselves.

"Overall, their tone, nature and frequency are indicative of him 'entering the fray.' And by the end of the first day at latest of Mrs W's cross-examination, he was making 'obvious his profound disbelief in the validity of [Mrs W's] case.' All of this suffices to render the hearing unfair.

"There can in my view be little doubt that it was the mistaken belief that Mrs W had committed perjury that was the primary cause of the unfairness; that belief pervaded and tainted the hearing . . .

"The mistaken belief that Mrs W had committed perjury also made it too easy to jump to the conclusion that other minor inconsistencies in her evidence were lies. Similarly, it made it too easy to reject those parts of her evidence where she was confused, could not remember or was otherwise reluctant to answer certain personal questions, on the basis that she was being evasive or manipulative. As well, and in the face of Mrs W's obvious moments of distress during the hearing, the belief that she had committed perjury was used by the Court as justification for her 'robust experience' in the courtroom."

Justice Ellis said that the effect of an unfair hearing was that any resulting judgment could not stand and the judgment was accordingly set aside. The costs judgment was also set aside.

Her Honour said that the parties did not want the matter to be referred back to the Family Court for a rehearing by a different judge. Their preference was for the appeal to be determined on its merits by the High Court. However, Her Honour said she was uncertain whether that was jurisdictionally possible.

The matter was accordingly adjourned for the parties to file submissions.

Court of Appeal says copyrights in artistic property relationship property

In *Alalääkkölä v Palmer* [2024] NZCA 24 Sirpa Alalääkkölä was an artist who created many original artworks during her 20-year marriage to Paul Palmer. Many of the works were sold during the relationship, providing the main source of income for the family.

After the parties separated, Mr Palmer planned to establish a business to commercialise some of the copyrights. Ms Alalääkkölä was concerned that Mr Palmer might flood the market with cheap prints of her works and merchandise without consulting her, as well as selling works she would not want seen, and which were private and sensitive to her.

There was a dispute as to whether the copyrights in the artworks were relationship property or Ms Alalääkkölä's separate property. The Family Court held that the copyrights were separate property, while the High Court[1] ruled that they were relationship property.

Ms Alalääkkölä appealed to the Court of Appeal. The court said that the Copyright Act 1994 conferred the benefits of copyright protection solely on the person whose intellectual and creative efforts had given rise to the protected works. The legislation gave creators the ability to control the output of their creativity and encouraged the creation of new works by ensuring creators could benefit economically from their efforts.

"Here, it is our view that it is consistent with the overall policy objectives of the Copyright Act that Ms Alalääkkölä, as the author and creative force behind the Artworks, be able to continue to control the commercialisation of the Copyrights. It would be inappropriate and unfair to require her to transfer ownership of some of the Copyrights to Mr Palmer."

Reasons for this included that Ms Alalääkkölä could potentially find herself in competition with prints of her own works released by Mr Palmer, and her reputation and future livelihood could be jeopardised if he flooded the market with cheap copies of her art.

Their Honours said that the copyrights were relationship property and therefore subject to the equal sharing regime under the Property (Relationships) Act 1976,

Continued on page 14 ...

[1] *Envoy* reported on *Palmer v Alalääkkölä* [2021] NZHC 2330 in the Summer 2021 edition.

...Continued from page 13

but that regime did not require that each specific item of property be divided equally.

"Rather, the overall pool of relationship property must be divided equally. Here, transferring some of the Copyrights to Mr Palmer would be inconsistent with, and would undermine, the "clean break" philosophy of the PRA. In contrast, allowing Ms Alalääkkölä to retain ownership of the Copyrights would enhance the prospect of the parties being able to move on with their lives (including their financial lives) independently and with a minimum of ongoing conflict."

The court held that the copyrights were property under the Property (Relationships) Act and should be classified as relationship property, but directed that ownership of the copyrights was to remain with Ms Alalääkkölä and Mr Palmer was to receive a compensatory adjustment from other relationship property.

Wills

High Court validates unsigned will drafted shortly before will-maker's death

In *Re Estate of Morehu* [2024] NZHC 777, three weeks before her death , Glenys Morehu, instructed Public Trust to update her will. She went to Public Trust's office and gave instructions as to what the document should contain, and a draft will was prepared.

An appointment was made for Ms Morehu to sign the will but she cancelled the meeting because of a medical issue. Public Trust was not aware that Ms Morehu's death was imminent and suggested that the appointment could be deferred for a couple of weeks.

However, Ms Morehu died two days after the cancelled appointment.



Wellington High Court

Public Trust applied without notice under section 14 of the Wills Act 2007 for an order declaring the unsigned draft will valid. Justice McHerron noted that Public Trust's interview records stated that Ms Morehu appeared to have testamentary capacity at the instructions interview, and she was clear about her wishes.

Each of the will-maker's children was aware of the application and had provided written consent to the validation of the draft will. Justice McHerron noted that the document appeared to be a will but did not comply with section 11 (2) of the Act as it was not signed and witnessed as required by sections 11 (3) and (4).

The High Court declared the draft will valid.

Will witnessed by beneficiaries declared valid

Duncan MacDonald died in November 2022, leaving a handwritten will that did not comply with the requirements of the Wills Act 2007. The trustees named in the document in *Estate of MacDonald* [2024] NZHC 528 applied to the High Court for orders declaring the will to be valid, and for dispositions to two people - who were not only named as trustees but were also beneficiaries and had witnessed the document - not to be void.

Justice Churchman observed that all persons affected by the application to validate the documents had provided affidavits confirming their consent to the orders sought. His Honour said that the affidavits confirmed that the two witnesses had been unaware that beneficiaries should not be witnesses.

The affidavits also explained the circumstances in which the will was made; the court was satisfied that the deceased knew and approved the dispositions to the two individuals and had made them voluntarily. His Honour further noted that all those who would benefit from avoidance of the dispositions had consented in writing to them, and had legal capacity to do so.

The interests of justice would therefore be served by a declaration that the dispositions to the two were not void. The handwritten document was also validated as a will. ■

2023 survey results of Registered Legal Executives' salaries, conditions and rewards

Part 2

In the Summer 2023 edition of *Envoy,* we reported on the first half of the 2023 Registered Legal Executives' survey carried out by gravitasOPG. In this issue, we present more highlights from the second half of the survey.

Associate status in a law firm

Thirteen percent of Affiliate, Associate and Fellow members employed by law firms are recognised as associates of the firm. This figure is up slightly from 11% in 2019.

Forty two percent of members who have a salary of between $100,000-$180,000 are recognised as associates in their firms; 75% of those who earn $200,000+ are associates. These people tend to be Fellow members (28%), LENZ members for 11 or more years (24%), those aged 60 years or older (20%), or working as an RLE for 10 years or more (20%).

Benefits of being an associate

When the 110 associates were asked what benefits, if any, this entitled them to, the key benefits mentioned were:

Financial (37%), including:

- Phone-related expenses paid/reimbursed (21%; 14% in 2019)
- Carpark-related expenses paid/reimbursed or offered (19%; 20% in 2019), and
- Pay increase, profit sharing, bonuses (10%; 7% in 2019)

Status (27%), including:

- Involvement in management decisions (12%; 20% in 2019)
- Recognition of seniority, acknowledgement (13%; 27% in 2019), and
- Representatives of firm – attendance at events/ conference/meetings, partner lunch, etc (10%; no data available for 2019)

Flexible hours (7%; 14% in 2019).

It is interesting to note that 34% of these associates could see no benefit in being recognised as an associate (21% in 2019). A further 10% answered 'don't know', indicating they could not see benefits in being an associate.

Workplace bullying and harassment

Awareness of policies and procedures

The share of members aware of their organisation's policies and related procedures to deal with workplace bullying and harassment has increased significantly since 2019, up 24% to 82%.

Another positive result in this 2023 survey notes there is notably less regional variation in awareness of workplace bullying than in 2019.

Location	2019	2023
Auckland region	54%	81%
Wellington region	60%	84%
Rest of North Island	54%	83%
Christchurch	64%	79%
Rest of South Island	66%	82%

Awareness of workplace bullying and harassment policies and procedures

Comfort making a formal complaint under the policy

While the level of awareness of workplace bullying and harassment policies has improved over the last four years, the share of those who would feel comfortable making a formal complaint has declined over that period, from 89% in 2019 down to 78% in 2023. Only 23% would feel *very comfortable* making a complaint, compared with 41% in 2019.

Level of comfort with making a complaint is related to age, with members aged younger than 30 years most likely to feel comfortable (82%) while older members (those aged 50 years or older) are least likely (74%). Wellington-based members are most likely to report feeling comfortable (86%); comfort levels are lowest among North Island members outside Auckland and Wellington (75%).

Members working full-time are significantly more likely to feel *very comfortable* making a formal complaint (23%) than those working part-time (13%).

Continued on page 16 ...

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Reasons for discomfort in making a formal complaint

Reasons given by 80 members who reported they would not feel comfortable laying a complaint include:

- Concerns about job security, lack of confidentiality and future working relationships within the office (56%)
- Designated person is not approachable – seniority, lack of trust, not independent (for example, they are friends or family of the perpetrator), no HR or designated staff, the designated person is the perpetrator (23%)
- Do not think the complaint would make any difference; nothing was/would be done (15%), and
- 'My personality' – do not like to be involved in conflicts (11%).

Working hours

Contracted hours

The greatest share of RLEs (63%) are contracted to work between 30-39 hours a week. This share has gradually increased since 2011. A further 19% are contracted to work 40 hours or more. Seven per cent have contracts that don't stipulate the actual number of hours – this share has remained stable over the last 12 months after notable declines in 2013, 2019 and in 2022.

Auckland RLEs continue to be over-represented among those contracted to work 40 hours a week or more (30%; 31% in 2022). Other North Island RLEs (excluding Auckland and Wellington) are significantly less likely to work 40 hours a week or more (13%). In contrast, other North Island RLEs are over-represented among those contracted for 30-39 hours a week (70%), while Auckland RLEs are significantly less likely (50%).

Legal executives aged between 40-49 years are over-represented for having 20-29 contracted hours (16%, 10% overall).

Actual hours worked

Consistent with previous years, the greatest share of RLEs (56%) work between 30-39 hours a week. A further 30% work 40 hours a week or more, including 2% who work 50 hours a week or more. Similar to the 2022 results, the number working 40 hours a week or more continues to decline.

RLEs based in the metropolitan areas - Auckland (38%), Wellington (37%) and Christchurch/Canterbury (31%) - are over-represented among those working 40 hours a week or more. This compares with 21% for rest of the North Island and only 17% for the rest of the South Island.

Contracted v actual hours worked

The greatest share of RLEs who have contracted hours (82%) work a similar number of hours to what they are contracted to do (stable from 83% in 2022).

Thirteen percent work more hours than contracted (compared with 12% in 2022); 4% work less (5% in 2022).

Additional hours worked

Three in five legal executives (60%) receive no compensation for additional hours they work over those agreed or stipulated in their contract. This share has remained consistent over the last decade.

Notable regional differences exist; 70% of Auckland members and 65% of those in Wellington receive no compensation for additional hours worked compared with 50% of South Island members living outside Christchurch/Canterbury.

RLEs on salaries between $80,000-$100,000 (66%) and those working full-time (64%) are over-represented among those not compensated for additional hours.

Where compensation is offered, it is a mix of:

- Time in lieu (18%) – especially among Fellows (28%), and
- Payment (20%) – particularly for RLEs working part-time hours (44%), and those earning less than $60,000 a year (43%).



Signed employment agreement

In 2023, almost all surveyed members (93%) reported having a signed employment agreement. This share has been increasing steadily since 2011 (76% in 2011, 85% in 2015 and 91% in 2019).

Seven percent of members either do not have a signed employment agreement (5%) or are not sure (2%). Those without a signed agreement are more likely to be:

- Aged 60 years or older (17% without an agreement)
- Working as a RLE for 20 years or more (13%)
- Wellington-based members (12%), and
- Working part-time (10%).

Leave entitlements

Annual leave entitlement

Annual leave entitlements (excluding statutory holidays) have remained stable since 2011, with 84% of members in 2023 receiving the statutory minimum of four weeks' annual leave per year. Just 1% are entitled to more than five weeks' leave.



Level of LE Experience	Annual Leave Entitlement	
	4 weeks	5 weeks+
0-4 years	92%	8%
5-9 years	87%	13%
10-19 years	86%	14%
20-24 years	79%	21%
25 years +	70%	30%

The above table clearly indicates that, consistent with previous years, leave entitlements increase with experience.

Additional leave

One in five respondents (21%) reported having been offered additional leave in the last 12 months (other than health, bereavement or parental leave). This share continues to increase over time – up from 17% reported in 2022.

Members working part-time are significantly more likely to be offered additional leave (29%) than their full-time counterparts (20%).

Long service leave entitlements

In 2023, around two in five respondents (38%) said their employers do not offer long service leave. This share is down from 2022 (41%) but consistent with 2019. North Island RLEs are over-represented among this group (42%, in comparison to 28% of South Island RLEs), as well as Fellows (46%) and those who have been working as RLEs for 10 years or more (41%).

Another two in five RLEs (40%) are unsure whether their employer offers long service leave. This includes 51% of those who have less than five years' experience as an RLE.

Fifteen percent of RLEs are entitled to long service leave after up to 12 years of service with their employer; a further 5% are eligible after up to 15 years of service.

Two percent of RLEs are required to work for their employer for more than 15 years before being entitled to long service leave.

Among those whose employer definitely offers long service leave entitlements:

* 58% offer five days or less
* 20% offer between six and 10 days
* 10% offer 11 days or more, and
* 12% are unsure how much leave they are entitled to.

Employee benefits

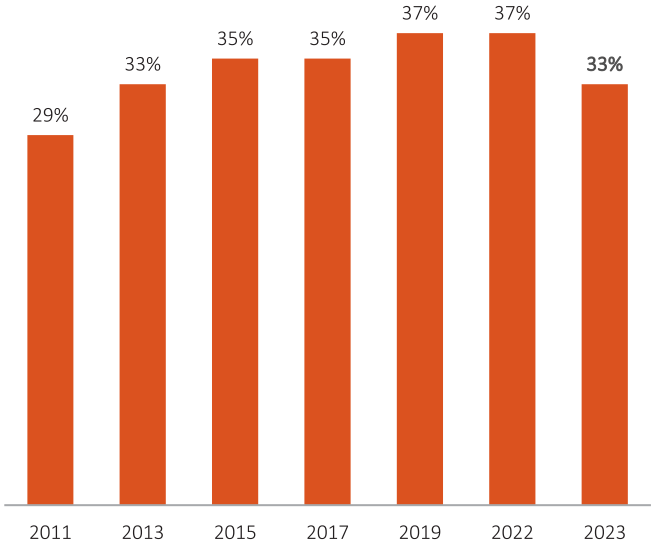
Bonus pay

In 2023 a third of RLEs (33%) reported that their employer has a bonus pay system, paid either as dollars or as rewards such as gifts and holidays. This share is down slightly from 2022 (37%).

Bonus pay systems are most common among RLEs who have been LENZ members for 16 years or more (49% for memberships between 16-20 years; 41% for more than 20 years). Fellows are also significantly more likely to

Continued on page 18...

...Continued from page 17



Existence of bonus pay system

have a bonus pay scheme (39%) than other member types.

Basis of bonus pay system

As in previous years, bonus pay systems are most likely to be based on the individual's performance (15% of all members, down from 19% in 2022), the firm's performance (13%) or fee budgets being exceeded (12%).

KiwiSaver

In 2023 participation in KiwiSaver was stable from 2022, with 93% of LENZ members having opted into the scheme.

For the greatest share of KiwiSaver participants (79%), their employer contributes the minimum 3% to the scheme. The number of employers contributing 4% continues to decline (from 17% in 2017 to 7% in 2023). Stable from 2022, 1% of employers are contributing 6% and a further 1% contribute 8%.

In 2023, another 4% of RLEs said contributions are grossed into their salaries.

Other employer benefits

Using the survey prompts, 52% of RLEs reported they have flexible hours and/or the ability to work around family needs (55% in 2022, 35% in 2013). Laptop computers were provided to 51% of respondents, parking to 46% and mobiles to 37% in 2023.

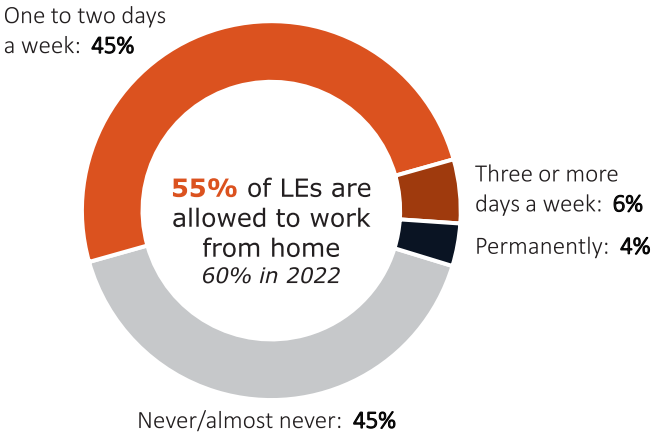
Unprompted benefits were noted as being the ability to work from home, home office set up and free food at work (1% each).

Working from home

In 2023, 55% of members reported that they could work from home (WFH) at least occasionally, down significantly from the 60% reported in 2022. While the share of members working from home permanently (4%) or at least three days a week (6%) has remained unchanged, the share allowed to WFH one or two days a week has declined – down from 50% in 2022 to 45% in 2023.

In 2023, South Island members were over-represented among those who are not able to WFH (55% compared with 41% of North Island members). Auckland members are over-represented among those who can WFH for three or more days per week (12%, rest of the country 4%).

RLEs aged 60 years or over are more likely to report not being able to WFH (54%) compared with those younger than 50 years (41%). Members with an income of $50,000-$80,000 are also over-represented among those not able to WFH (56%).



Extent to which employer allows working from home

Flexible hours

Respondents were asked what impact Covid had had on their flexibility of working hours. In response, 43% reported that, since the pandemic, their employer had allowed them to work flexible hours – this result is consistent with 2022 (41%). A third of RLEs (31%) report not having flexibility in their working hours either before or after the pandemic.

RLEs aged younger than 30 years are over-represented among those reporting having no flexibility in their working hours (37%) while those aged 30-39 years are more likely to report having been given flexible working hours since Covid (55%, compared with 43% of all members).

Those working as RLEs for 10+ years are over-represented among those reporting having had flexible working hours since prior to Covid (31%). ■

Members can read the survey results on the LENZ website (www.legalexecutives.org.nz). Log in and go to My LENZ > Resource Library.

Taxation update



Interest deductibility and two-year bright-line test reintroduced

A reintroduced two-year bright-line test, replacing the five and 10-year tests, took effect from 1 July 2024 for residential land sales in which the bright-line end date was on or after that date. Legislation implementing that change and restoring interest deductibility for residential investment property was passed in March.

Minister of Finance, Nicola Willis, said that making investment in residential property more attractive would place downward pressure on rents by providing renters with more options.

An amendment paper accompanying the Taxation (Annual Rates for 2023-24, Multinational Tax, and Remedial Matters) Bill said that the change would return the bright-line test to its original purpose of ensuring land speculators paid their fair share of tax on gains from property sales.

Other policy settings would also be returned to those existing when the original two-year bright-line test was introduced. In particular, it was proposed that the complex apportionment rules for the main home exclusion would be removed.

This would mean that the main home exclusion would apply if the land had been used predominantly, ie: more than 50% of the land area, for most of the time the person owned the land, that is more than 50% of the period, for a dwelling that was the person's main home. The main home exclusion would also be modified so that the period when a dwelling was being constructed on the land was ignored in determining whether the land had been used predominantly as a main home for most of the period.

Consistent with the objective of simplifying the rules, it was also proposed to extend the rollover relief rules.

The document said that the ability to claim interest deductions would be phased back in, with 80% of deductions allowed from 1 April 2024 to 31 March 2025, and 100% from 1 April 2025 onwards. The phasing back in of interest deductibility would be allowed for all taxpayers, whether they acquired their property or drew down lending before or after 27 March 2021.

The paper said that the rules determining who and what types of land the interest limitation rules applied to would continue to apply. Any taxpayers or types of land exempt from the interest limitation rules would continue to be exempt. The interest limitation rules would be repealed from 1 April 2025 once all taxpayers were entitled to full deductibility.

Fringe benefit tax: Inland Revenue provides guidance

The Commissioner of Inland Revenue has issued guidance about when employers who provide fringe benefits to employees may have to pay fringe benefit tax (FBT). There is information about the following specific benefits:

- Allowances
- Brokerage fees
- Carparks
- Cryptocurrency
- Insurance

Continued on page 20 ...

...Continued from page 19

- Motor vehicles, and
- Transport.

The guidance also deals with charities and donee organisations, as well as health and safety exemptions.

Issues discussed include how to determine the value, for FBT purposes, of brokerage services provided by sharebrokers to their employees, as well as the on-premises exclusion from FBT of car parking provided to employees in car parks owned or leased by an employer, or on the premises of a company that is part of the same group of companies as the employer.

Other matters examined include the income tax and FBT treatment of personal sickness or accident insurance policies taken out by an employer for the benefit of an employee, and the FBT treatment of discounted premiums on life insurance policies received by life agents and associated persons from the life agent's employer.

Discounted goods provided by third party

Technical Decision Summary 24/03 dealt with an employer introducing a staff discount scheme for its employees, with the employer contracting a third party to provide the items. The employer would then reimburse the supplier for the costs incurred in providing the discounts.

The issues were whether the discounted goods provided by the supplier would give rise to a fringe benefit as defined in section CX 2 of the Income Tax Act 2007 and therefore any such fringe benefit would be excluded income to the employees under section CX 3, and the value of the fringe benefit.

The decision concluded that the discounted goods would give rise to a fringe benefit under section CX 2 and any such benefit would be excluded income to the employees under section CX 3. The value of the fringe benefit would be determined by the Commissioner under section RD 27.

The Tax Counsel Office said that the offer of discounted goods satisfied the requirements in section CX 2. The benefit in the arrangement was not one referred to in sections CX 6, CX 9, CX 10 or CX 12-16 and therefore it would be an 'unclassified benefit' under section CX 37 unless it was excluded under subpart CX.

Consultation on Exposure Draft on income tax treatment of partnerships

Inland Revenue has consulted on an Exposure Draft on income tax and partnerships – PUB00367. The document provides general guidance on the tax treatment of both general and limited partnerships. Comments on the draft closed in late April. An additional paper on withholding tax obligations for payments made to partnerships will be issued at a later date. ■

my trove

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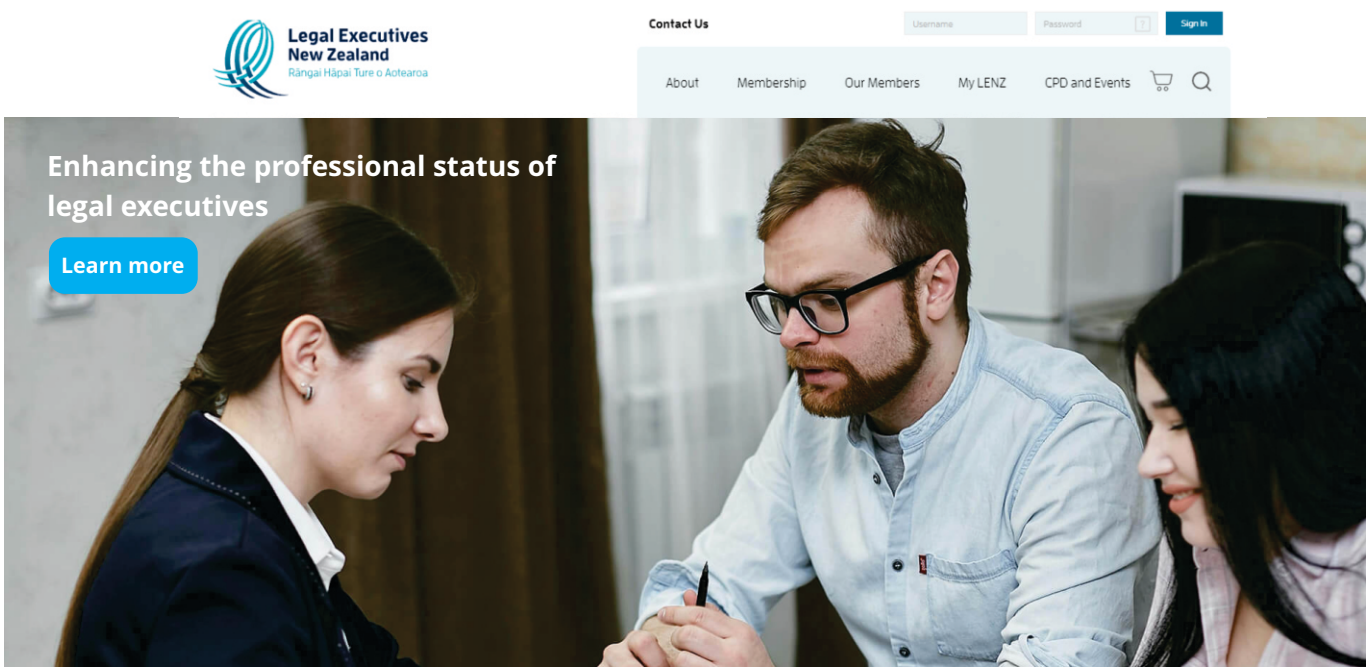
Notify multiple organisations electronically from one place

Provide the needed information and documents once

Then let the organisation contact you to close the account

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Legal Executives New Zealand Inc
Rāngai Hāpai Ture o Aotearoa

In July our name was formally changed in accordance with the resolution passed at the 2023 AGM to Legal Executives New Zealand Incorporated *Rāngai Hāpai Ture o Aotearoa*

Although we adopted 'Legal Executives New Zealand' (and 'LENZ') as our communication name in 2020, it is only now that it can be used formally.

As LENZ members will know, the name change resolution was adopted at the NZILE AGM in November last year to come into effect in July 2024, the beginning of the 2024-25 financial year.

National president, Carmen Franich, says the new name better acknowledges the nature of the organisation. "National council was also keen to acknowledge that te reo is a very much part of New Zealand. Te reo is one of our three official languages, and the inclusion of a te reo name reflects who we are and the environment in which Registered Legal Executives operate.

"The name change also aligns us with the New Zealand Law Society Te Kāhui Ture o Aotearoa, and Land Information New Zealand Toitū Te Whenua and many other professional bodies with which we work closely."

New website

LENZ is also celebrating a refreshed and updated website. "We are delighted with the new site. It has been designed to reflect the vibrant LENZ branding that was introduced four years ago. The new site is easier to navigate, much more user-friendly, has many new features, and its look and feel is more contemporary.

New website features already available, or to come, include:

- Online membership applications
- Event registration
- Online payments
- Specific member benefits
- Personalised member portal
- CPD log (CPDPR), and
- Access to webinar recordings.

Improved features are:

- Links to external providers' events, and
- Resource library.

Transferred to the new site are:

- The public register of Registered Legal Executives
- The current *Envoy* edition, as well as back issues, and
- Results of the gravitasOPG survey of members' salaries and working conditions.

Continued on page 22 ...

...Continued from page 21

Fellows' stamps to change

With the change of name to Legal Executives New Zealand Incorporated, stamps used by Fellows also need to change. If you haven't already done so, please arrange for your stamp to be styled as below:

[Name]
Fellow, Legal Executives New Zealand
[Name of firm], [location]
Authorised to take statutory declarations

For example:
Jane Doe
Fellow, Legal Executives New Zealand
XYZ Lawyers, Wellington
Authorised to take statutory declarations

Updated constitution to be adopted

Following the official name change in July, at the AGM in November 2024, the national council will present an updated constitution to be adopted at the meeting. "This will bring us in line with the Incorporated Societies Act 2022's deadline of 5 April 2026 to re-incorporate," explains Carmen.

Thank you

All of these changes haven't happened by themselves. There's been a huge amount of work (and hundreds of extra hours) that have gone into the new website, its functionality and to have it live on time. Additionally, there has been the work on the new draft constitution to ensure that it complies with the new Act.

"Thank you to national council members for their work on and support for these projects.

"We also want to acknowledge our digital transformation partner, Causeis, for the website framework and the grunt work that goes on behind the scenes to make everything function the way it should.

Carmen says that above all Jo Buckton deserves special mention for her work on the website development and her amazing attention to detail. "The reason the website functions so well is because of Jo's hard work, massive hours (emails at 3am!) and tenacity on doing a job to the highest standards. Thank you Jo for your leadership in what turned out to be an enormous project." ■

Legal Executives New Zealand
RĀNGAI HĀPAI TURE O AOTEAROA

Kaiārahi (mentor) service



The term *kaiārahi* means 'someone who guides; leader, mentor, counsellor.'

LENZ has long acknowledged the importance of providing a support network for its members in both professional and personal capacities. We are pleased to have a national Kaiārahi service to supplement the ongoing informal support offered through our branches via their networking events and seminars.

Whilst our members can access the professional counselling service provided by the New Zealand Law Society, we also saw a need for LENZ to provide members with direct and personal support on every level.

We have senior members who are approachable and empathetic, and members who have specific technical knowledge that they are prepared to share.

If you would like to talk with a kaiārahi, please look at the contact list in the members' section of our website, or contact the national office (enquiries@legalexecutives.org.nz)

A year off to travel

Twenty land borders crossed on a motorbike adventure



Loaded up in coffee growing region in Colombia

Taking a year off work to travel the world? That's almost everyone's idea of bliss.

This came true for New Plymouth Registered Legal Executive and LENZ Fellow, Leanne Young, who with her husband Mike, took off in May last year to travel by motorbike in America (yes, from the USA to Chile), with a sweetener of a visit to Southern Africa and Zurich on the way.

Leanne says that she and Mike had always wanted to have a grand tour of sorts. "We've had motorbikes for many years and a long trip such as this was always on our radar. In 2014 we had taken our motorbike to Europe and Morocco. That whetted our appetite for something bigger. Last year, we decided to stop talking about a long trip and just get on with it."

Long-held dream

Travelling to South America was a long-held dream, but it took some planning in all manner of things. They had to pack very lightly, although Leanne managed to sneak in a pair of high heeled shoes ("well you never know!") and it was quite convoluted organising the shipping of their motorbike to America. "As the shipping would take some time, we organised a 22-day tour around Southern Africa on a hired motorbike. Having this time in Namibia, Botswana, Zimbabwe and South Africa was very special and quite luxurious in having all arrangements made for us – unlike what was to follow in the Americas," recounts Leanne.

"Registering with a US-based adventure bike website was a good move. Bikers offer their apartments or garden space for a tent – and everything in between - to fellow bikers to use on their travels. After our South African experiences, we flew to the USA via a few days of sightseeing in Zurich. In New York City we were hosted for five nights by a wonderful couple – we went to a Yankees' game, to Broadway and did all the wonderful New York things.

Continued on page 24 ...

...Continued from page 23

"We flew to Los Angeles to collect our bike from the shipping agent, and did a 'test run' across to Arizona and the Grand Canyon – best done in an English-speaking country!



Brooklyn Bridge,NYC

"Mike was the driver and I was the paperwork expert – essential for all the borders we crossed. Then we were off south to Mexico where it was stupidly hot (46 degrees) so we hightailed it to the mountains where we hoped the temperature would be 'cooler.' During our two months in Mexico, which we loved for the wonderfully kind people, we had some intensive tuition in Spanish – much needed if we were to better enjoy our adventure down to the far south of South America."

Ironically, after their Spanish course, they then rode to Belize where English is widely spoken! This was useful, as Mike became very unwell with food poisoning. After Mike recovered, they travelled through Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica to Panama. With no safe road south, they decided to fly over the infamous Darien Gap (the main 'escape' route for northward heading immigrants) to Bogotá, the capital of Colombia.

South America

A highlight in Columbia was picking coffee beans. "This was something we particularly wanted to experience as, after all, a lot of New Zealand's coffee is grown in Colombia! Dressed in our 'coffee-picking' clothes, we enjoyed doing this and 'talking' with the locals," says Leanne.

Even with the language school course in Mexico, Leanne admits their Spanish proficiency was limited. "People were very helpful though, particularly at the borders – we crossed 12 land borders on our American travels. Even though we were travelling lightly (minimal clothes) we still had our bike and all the documentation for that to contend with at each frontier. We would allow at least two hours aside at each border to get us and our bike into a new country."

From Colombia they travelled south through Ecuador to Peru. Leanne admitted they didn't spend as much time in Peru as they'd expected (corrupt police and diabolical driving didn't help), although they enjoyed going over 4000 metres altitude in the mountains, where the scenery was stunning, and venturing into the Peruvian desert.

Experiences in Chile were amazing, says Leanne. "The infrastructure was excellent and the people very friendly. We thought the capital, Santiago, was beautiful, and we felt safe.

"We spent last Christmas in the Atacama Desert where the humidity was less than 2% and the temperatures 30+ degrees. As it hadn't rained in the desert for 15 years, drinking water was piped down from the Andes. There is a lake that's like the Dead Sea!"

Chile was the last stop on Leanne and Mike's American adventure. "We returned home after 10 months as we were tired, and it had become 'unfun' sorting out where to stay, what route to take and so on."

Highlights

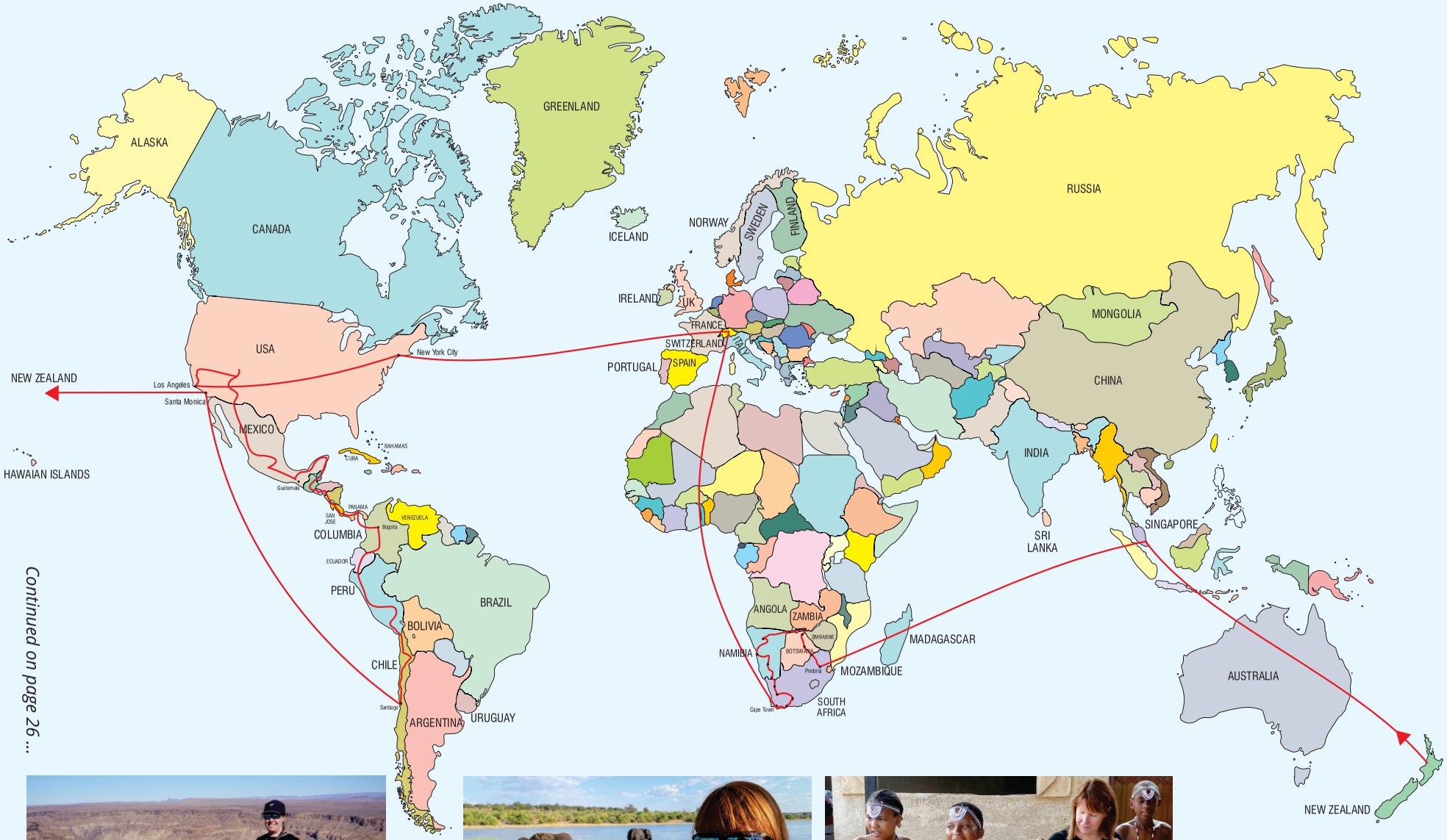
Looking back on their travels, Leanne says it was a very enriching experience. "We learned a lot about ourselves – that material possessions don't count for anything, for example, and we discovered our physical and emotional limits."

"People were so interested in what we were doing and incredibly helpful, particularly at the borders, even though their English was very limited and our Spanish was most rudimentary!

"We experienced so much kindness. For example, in Guatemala, when crossing a river on our bikes, the car behind kept tooting at us and we realised through lots of sign language that they didn't want me to get my feet wet. I hitched a lift with them so I had dry feet (Mike still got wet!), and this lovely family then gave us bananas. How generous is that?"

Challenges

Leanne said there were some hair-raising experiences on their motor bike – many roads were dangerous and in very poor condition and they were knocked off their bike by a bus in Quito. "It was harder with two of us on the large bike; it took a lot of strength. Thank goodness for Mike being the driver."



Continued on page 26 ...



Fish River Canyon, Namibia



Chobe River, Botswana



South African traditional dancers at a 'shebeen'



Elephant orphanage, South Africa

...Continued from page 25

Many people they met were living at the subsistence level. When people asked how they could afford to do such a trip, Leanne and Mike always answered with "We've been saving to do this for a very long time." She said it sounded rather flippant and entitled to say, "We just wanted to do it."

Back to work

Leanne returned to work at Connect Legal Taranaki earlier this year, although in a different role from her previous job. Unable to take a year's leave, Leanne had resigned from the firm. "Luckily, another role was created and I'm back working for a director in the elder law area," adds Leanne. "It's not quite what I used to do, but I'm pleased to have a job and be back in the day-to-day routine.

"Mike is happy to be home, at the end of our travels he was hanging out for Vogels and Marmite!"

And the future? More travel is on the cards, particularly to return to Chile and ride their bike to Patagonia. But for the meantime, Leanne and Mike are happy to have the same roof over their heads each night after their 10 months away. ■

Motorcycle
Husqvarna Norden 901
adventure bike 900cc

Distance
29,000km with 121 stops

Duration
10 months

Border Crossings
20



Christmas in the Atacama Desert



Grand Canyon



Heading into Canon del Pato, Peru



Near Antofagasta, Chile

To read more detail about Leanne and Mike's fascinating trip, their blog is here: https://advrider.com/f/threads/1-bike-2-kiwis-3-continents.1639011/

Credit and consumer law reform changes underway

Affordability regulations introduced into the Credit Contracts and Consumer Finance Act 2023 (CCCFA) in December 2021 have been revoked.

Strict loan affordability requirements and arduous, overly prescriptive checks are a thing of the past, said Commerce and Consumer Affairs Minister Andrew Bayly and Housing Minister Chris Bishop in a news release at the end of July.

Effective from 31 July 2024, 11 pages of affordability regulations are no longer part of the CCCFA, a move that "will enable New Zealanders to access finance with greater ease and confidence," said Mr Bayly.

The affordability regulations stipulated very specific requirements customers needed to satisfy before being able to take out a loan, resulting in a confusing and stressful process and a substantial increase in the time it took to process loans.

"Not only was it inefficient and frustrating for customers, but it also significantly increased the burden of compliance, leading to increased costs for lenders. This had a particularly chilling effect on lenders' ability to offer small loans of under $5,000."

"Many Kiwis who applied for home loans while the regulations were in place will remember the immense stress caused by the screeds of information and disclosures they had to provide," said Mr Bishop.

The regulations required lenders to do such things as check whether the information provided by an applicant about their personal expenses was in line with information held by Stats NZ about the cost of living.



Minister of Commerce and Consumer Affairs, Andrew Bayly

Customers had to justify their spending, explaining why they bought an occasional coffee, or takeaways, even if it was clear they could afford to do so.

Removing the CCCFA affordability regulations fulfils part of the National-ACT coalition agreement which commits to rewriting the CCCFA to protect vulnerable consumers without unnecessarily limiting access to credit.

"In place of the prescriptive requirements, we have updated the Responsible Lending Code to provide guidance for lenders on how to make reasonable inquiries to assess the affordability of a loan," Mr Bayly said.

"The updated Responsible Lending Code manages the risk of unaffordable lending while providing lenders with flexibility to assess affordability on a case-by-case basis, taking into consideration individual circumstances.

"Lenders must continue to properly assess affordability and we expect failure to do so will be appropriately enforced. The CCCFA includes clear penalties for lenders who fail to make reasonable inquiries that the loan is likely to be affordable.

"Lenders and budgeting services were consulted as part of the changes; many lenders were supportive, having seen firsthand the perverse outcomes that the requirements had.

"It is in no one's best interest to loan money to people who cannot afford to pay it back."

Mr Bishop said, "Today is all about restoring flexibility and freedom to Kiwis who are working hard to get ahead and just want to the government to get out of the way so they can get on with their life."

Continued on page 28 ...

...Continued from page 27

Improved dispute resolution process will aid consumers

In addition to revoking the affordability regulations, the government has made regulations that:

- Improve dispute resolution to better protect consumers to include aligning the rules of the four approved financial dispute resolution schemes (the Banking Ombudsman, the Insurance and Financial Services Ombudsman, Financial Services Complaints Ltd and the Financial Dispute Resolution Service). The maximum amount the schemes can award has increased to $500,000, meaning that more consumers will be able to settle financial disputes without going to court
- Exempt councils from the CCCFA so that they can offer low-risk financial products to help households improve their energy efficiency by installing heat pumps and insulation, and
- Remove duplicate reporting requirements.

Phase two reforms

The next stage of reforms comprises:

- A review of the CCCFA to address areas of under-performance, including liability settings and disclosure obligations
- Reviewing the Act's high-cost credit provisions to ensure there is adequate regulation surrounding those lending practices, and
- Clarifying the requirements of the Financial Markets (Conduct of Institutions) Amendment Act 2022 and reviewing the conduct licensing framework in the Financial Markets Conduct Act 2013 to ensure there is balance and flexibility.

Public consultation on phase two closed in June and submissions will be published in due course.

CCCFA to be overseen by FMA

Earlier this year, the government announced that responsibility for overseeing the CCCFA would be transferred from the Commerce Commission to the Financial Markets Authority (FMA).

Proposed merger of IFSO Scheme and FSCL

The government would also support the proposed merger of the Insurance & Financial Services Ombudsman Scheme (IFSO Scheme) and Financial Services Complaints Ltd (FSCL) from 1 July 2025. That would help to streamline services, create operational efficiencies and remove duplication. ■

FAQs – JobLink

What is JobLink?
JobLink is a members-only service. Its purpose is to assist our members with finding employment as Registered Legal Executives. JobLink is available to all members and their employers.

What positions can be advertised on JobLink?
JobLink is only for Registered Legal Executive positions or roles that will help junior members into legal executive positions. We do not assist with filling secretarial positions or other roles.

How does it work?
Prospective employers email their advertisement (as a PDF please) to joblink@legalexecutives.org.nz

We offer a two-pronged approach:

- Free listing on our website for three weeks or until the closing date, whichever is later
- Email distribution to members (once only).

What information should be included in the job advertisement?

- The firm's logo
- A description of the position
- Contact details and a closing date for applications.

What are the charges for JobLink?
Employers:
The fee is $180.00 + GST, payable on receipt of invoice.

Members:
There is no charge for members to receive JobLink emails and/or view job advertisements on our website. However, you need to log-in to your website portal (www.legalexecutives.org.nz) to see JobLink advertisements.

How do I register to receive JobLink emails?
All new members are automatically added to the JobLink database using the email address on their application form. Please contact us if you would prefer to use a different address for JobLink emails.

If you do not want to receive JobLink notifications, please 'unsubscribe' via your website member portal AND (as insurance in the early days of our new website!) email joblink@legalexecutives.org.nz with 'JobLink - Unsubscribe' in the subject line.

If you have any additional queries regarding JobLink, please contact us on (09) 250 1630, or email joblink@legalexecutives.org.nz

Carol Newton

Newest life member for LENZ

It is fair to say that Carol Newton's involvement with the New Zealand Institute of Legal Executives (now Legal Executives New Zealand) is pretty much up there.

Awarded life membership of LENZ at last year's national AGM, Carol's contribution spanned two decades in a wide variety of roles – including being founding editor of *Envoy*.



Carmen Franich, LENZ President presenting Carol Newton with flowers at the 2023 AGM to mark her life membership of Legal Executives New Zealand Inc. On Carol's left is her husband, Neil Connolly.

Carol was a National Councillor from 1989-2008, during which time she served two terms as Vice President (1993-95 and 2000-04) and was National President in 2004-08. From 1990, she was convenor of the institute's public relations/marketing committee that established *Envoy,* was instrumental (with others on the council) in building the brand and reach of Registered Legal Executives, established the regular legal executive conferences, employed the institute's first (and only) executive officer (and Jo Buckton is still in that now vastly expanded role) and much more.

Establishment of *Envoy*

Carol admits that establishing *Envoy* was a bit like giving birth. "I had absolutely no background in publishing and, at the time, I didn't know enough about the institute either! I definitely felt the pain - I had little idea of where to start and how publishing worked.

"Getting enough content was a problem in those early days as few people were willing to write and everyone was busy. Luckily, in the mid-2000s, we found Catriona MacLennan who is a tremendous legal journalist and I know she is still writing for *Envoy* today. I managed to get Craigs Investment Partners on board as a sponsor early on, which paid for the not insignificant postage costs in the days that *Envoy* was sent in hard copy to all members. Craigs was so supportive of NZILE in many other areas too – a big shout out to them."

Growth of LENZ

As the membership of the institute grew in the 1990s, attempting to run the institute in councillors' spare time became untenable. "It was a huge workload", explains Carol. "However, the institute had sufficient funds in hand to pay an executive officer and Jo Buckton came on board in 2001 – initially part-time. Jo's role quickly grew to full-time and LENZ now has three additional staff to support Jo."

In the 1990s there was a need to market the role of legal executives and the institute itself. "We held retreats to draft a strategic plan, worked on the institute's brand values, had a logo designed and we did a nationwide roadshow to help build the brand. And we needed to establish the institute's branches. It was a tremendously busy time, but hugely rewarding. As there'd been some criticism that NZILE appeared too Auckland-focused, we held meetings throughout New Zealand to showcase the organisation and to meet members all over the country. Sally Mountfort, national president at the time, was amazing in supporting these marketing and brand-build initiatives."

How did it all start?

For such a focused person, Carol admits that she simply fell into the legal sector – there was no plan. "I was living in Te Aroha, was a shorthand typist, had always been interested in the law and wanted a 'professional' job, and

Continued on page 30 ...

...Continued from page 29

a law firm took me on. Two years later when we moved to Auckland, I got a job at Chapman Tripp - even though my legal knowledge wasn't great, nor did I know much about the role of a legal executive. I called myself a 'law clerk' and no one seemed to mind.

"After a few years I studied for the Certificate of Attainment, at the same time establishing *Envoy* (including proofreading on the bus on the way to work) and publishing that quarterly, as well as my NZILE Council responsibilities. I was very busy with my day job working in Chapman Tripp's banking and finance team. More latterly I moved into trusts and estates work."

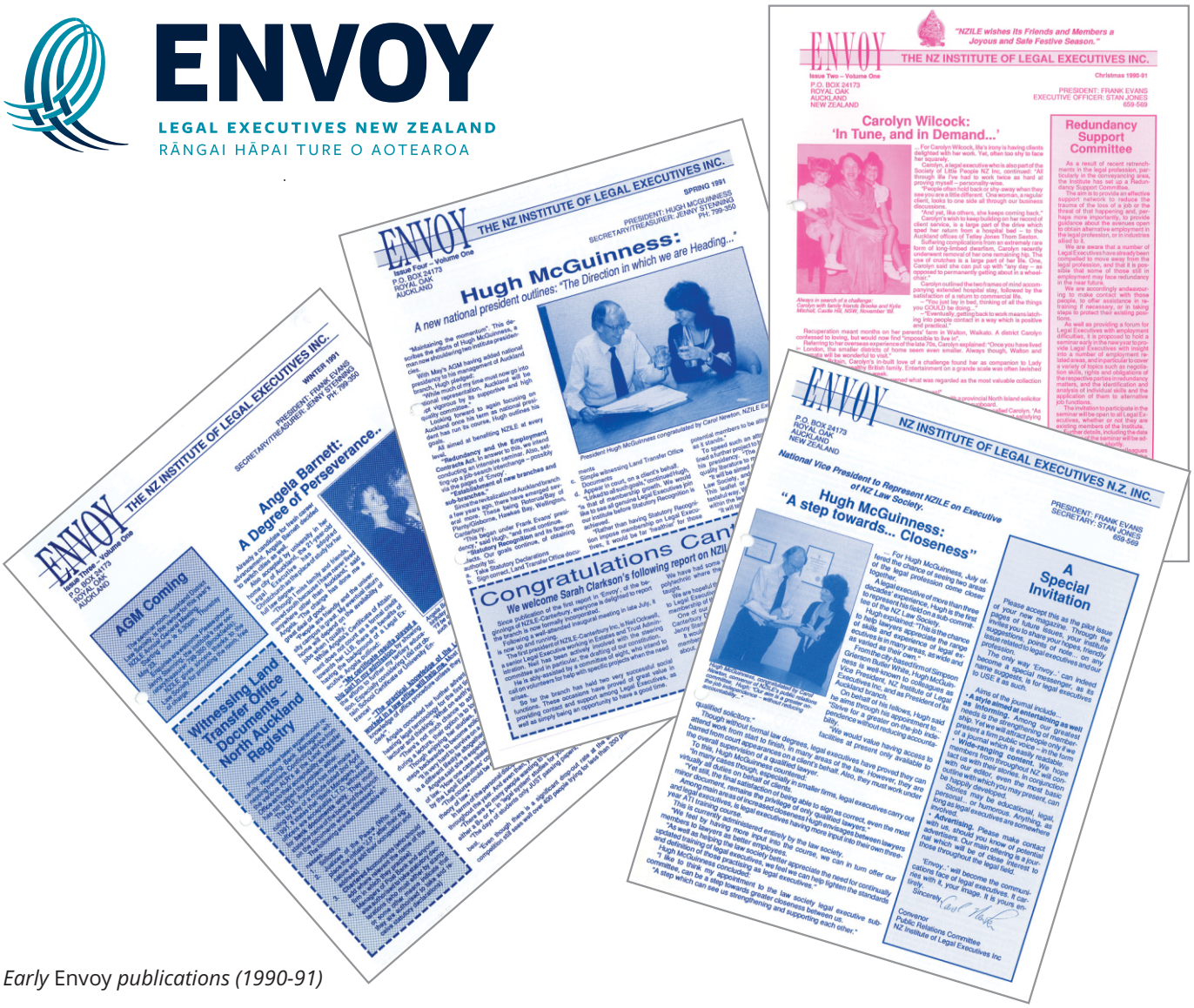
Carol acknowledges the huge support that Chapman Tripp gave to NZILE. "The firm let NZILE use its premises for meetings and supported me when I was so busy on institute affairs. I retired from the firm in May 2023 after working there 40 years, and 49 years in the workforce."

Carol says she looks back with great affection at her career. "We were so busy, but I thrived on it. Working with the institute to promote the role of Registered Legal Executive was an amazing experience – even stuffing hundreds of *Envoys* into envelopes over pizza on four Friday nights a year!"

Retirement

For such a livewire, what is Carol up to now that she has some time on her hands? Last year she and her husband had a long overseas trip ("it will be much longer next time, and we are recent grandparents"), she is a keen gardener, has a walking group and is a yoga enthusiast. "I love retirement, but do miss the social side of being in a workplace. Chapman Tripp was a wonderful firm to work for, and I loved my clients and miss them very much. But it was about time I put down my pen to spend a bit more time with my husband and family," says Carol. ■

Thank you, Carol, for your strong commitment to NZILE (and now LENZ). We wish you all the best for a continued long and happy retirement.



Early Envoy *publications (1990-91)*



Redcliffs landslide, Christchurch

Supreme Court considers who bears the costs of natural disasters

Floods, earthquakes and droughts are some of the disasters faced by landowners in New Zealand. And now, the impact of such hazards is being magnified by the escalating consequences of climate change.

A key issue arising in the wake of such events is who should pay for the recovery, with landowners, insurance companies, local authorities and the Crown all being in the frame. There may also be situations in which private landowners might be considered liable for damage to an adjacent property.

However, it is not merely responsibility for remediation that can be at stake. A 2023 Supreme Court case also examined the concept of a defendant being liable to take positive steps to avoid risks from a natural nuisance – even where the defendant had not created the nuisance.

Rockfalls presented ongoing risk to property

In *Young v Attorney-General* [2023] NZSC 142 Steven Young owned land lying beneath cliffs damaged by the 2010 and 2011 Canterbury earthquakes. The cliffs sat across the boundaries between Mr Young's land and the cliff top properties above. The earthquakes compromised the cliffs, leading to rockfalls on Mr Young's land and presenting an ongoing risk of further collapse onto his property.

Continued on page 32 ...

...Continued from page 31

The neighbouring clifftop properties were treated as being within the red zone under the Canterbury Earthquake Recovery Act 2011; the Crown acquired them between 2012 and 2015.

The ongoing instability of the cliffs meant that Mr Young's land was unsafe. His property was also red zoned. Accordingly, under the Act, the Crown made an initial red zone offer to buy Mr Young's property, followed by an improved red zone offer. The offers were rejected and Mr Young instead brought court proceedings against the Crown in trespass and nuisance.

To the High Court

Initially, the primary remedies sought were, firstly, a declaration that the Crown should be required to remove existing rockfall and remediate the risk of further rockfall and/or cliff collapse so that Mr Young could return to, reoccupy and restore his property. Secondly, and alternatively, damages were sought reflecting the value of the lost property.

The High Court dismissed the claim, holding that the rockfall risk was an actionable nuisance and there was accordingly a 'measured' duty on the Crown to do what was reasonable to prevent or minimise that risk. The High Court found that the Crown's later offer meant that it had done all it needed to do to meet the duty. There was no obligation to compensate Mr Young fully for his loss.

This was for three reasons:

1. A claim in nuisance did not necessarily translate to a duty to fully compensate a plaintiff for loss. The judge thought it was unlikely that private owners of the clifftop properties would have been obliged to meet the more than $1 million cost of compensating Mr Young for the lost value in his property. The High Court did not consider that the Crown should be required to meet a higher standard than that imposed on private landowners.
2. More significantly, the High Court said that the nuisance that caused the current damage did not emanate solely from the clifftop properties owned by the Crown. Placing the entire burden of rectification on the Crown would accordingly be inequitable.
3. In deciding what was reasonable to expect of the Crown, it was necessary to have regard to the Crown's broader responsibilities undertaken following the Canterbury earthquakes. In that context, the court considered that the Crown was entitled to ration its resources to do the greatest good for the greatest number.

Final appeal to the Supreme Court

Mr Young appealed from the High Court decision to the Court of Appeal, which also dismissed his claim. He then appealed to the Supreme Court, by which time the only remedy he sought was damages reflecting the value of his lost property.

The Supreme Court's reasons were delivered by Justice Ellen France. Her Honour said that the primary issue was whether the Crown had met its duty to do what was reasonable to prevent or minimise the harm from the rockfall risk.

Mr Young had put forward a plan – called the Davis Ogilvie plan – that involved scaling the rock faces, removing an extensive amount of fallen rock and debris, benching the cliff face and building an extensive bund, at an estimated cost of $4 million plus GST. The Crown had a less comprehensive plan – the Kupec plan – prepared, with an estimated cost of $1.6 million plus GST.

Justice Ellen France said that there was no challenge to the High Court finding that the risk of rockfall was a nuisance, and no dispute over the nature and extent of the natural hazards threatening Mr Young's property. The key geohazards included cliff collapse, fly rock, rock fall and mass movement.

The court said that there were hazards both on Mr Young's property and on the properties now owned by the Crown. The tension cracking primarily relied on by Mr Young was mainly on the Crown's land. That cracking was identified as a significant risk in the event of an earthquake or heavy rainfall. However, mass movement areas existed on both sides of the boundary. The cliff faces were a source of rockfall and Mr Young owned a good proportion of the cliff

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Damaged railway track after Kaikoura earthquake

face. There was also a pre-earthquake existing risk of rockfall on Mr Young's property.

Her Honour accordingly said that the risk was a shared risk. It was common ground between the parties that there could be liability in private nuisance for harm originating in some natural condition of the land – in this case the instability of the cliffs – as opposed to the effect of human activity. It was also common ground that the standard imposed on the Crown in terms of abating that risk is 'what is reasonable.'

Justice Ellen France said that the case law showed that there could be liability in private nuisance arising from a natural hazard if a defendant knew or ought to have known of it, but did not take reasonable steps to prevent it.

"Where the defendant did not create the private nuisance but rather continues it, that gives rise to fault-based, rather than strict, liability. There is, as the respondent submits, an overlap with negligence in this area."

The court went on to state that what was 'reasonable' required a factual assessment, but the duty was 'measured' – meaning that the obligation was both tailored and restricted. Imposing too onerous or disproportionate a burden on a defendant to mitigate risk would not be 'measured.'

Her Honour said that obliging the Crown to implement the Kupec proposal – which by then was the only option under consideration - would go beyond what was reasonable in the circumstances, due to the disproportionality between the cost of remediation and the value of the land, the difficulties of implementation and the location of the hazard. Further, the Kupec proposal would not enable full use of the land or restore the prior visual amenity.

Crown had met its measured duty

This was a case in which nothing further was required than to warn of the risks and assist with access to the property. The Crown had done both of those things and for that reason had met its measured duty. There was no basis to make an award of damages to Mr Young. The appeal was dismissed.

This judgment is likely to be followed by future proceedings in which landowners seek to require neighbours and authorities to take steps to ameliorate risks from natural hazards, particularly as the impacts of climate change become starker.

The Supreme Court did not reject the notion of liability on the part of neighbouring landowners in such cases, but perhaps showed that the courts will be very cautious in imposing remediation burdens in the wake of natural disasters. ■

$150 million unit title claim results in epic judgment



A dispute over 13 alleged defects in an Auckland apartment building has led to High Court proceedings seeking more than $150 million in remediation costs and damages, as well as a judgment running to 469 pages incorporating 1,654 paragraphs. The proceedings are the largest residential building defects claim in New Zealand's history.

The hearing lasted five months and more than 55 experts provided thousands of pages of technical material, while the notes of evidence ran to over 5,000 pages.

Alleged structural defects

Body Corporate 366567 v Auckland Council [2024] NZHC 32 involved a 40-level apartment building in central Auckland. The body corporate and the unit owners alleged that the structure had defects falling into four categories: internal moisture, external moisture, structure and fire.

Court proceedings launched in 2014 claimed that the parties involved in the construction of the building had breached duties of care to them, and that the predecessor to Auckland Council had failed to exercise reasonable skill and care in the performance of its three regulatory functions under the building regime.

Multiplex Construction Ltd, which was the principal contractor, went into liquidation prior to the issue of proceedings. As the years went by, some defendants settled claims and others went into liquidation, until only Auckland Council and a membrane supplier were left defending the claims.

Auckland Council accepted that it owed a duty of care to the unit owners but not to the body corporate and denied any breach of its duty. It disputed that all of the pleaded defects existed and denied that the building did not comply with the Building Code. Its affirmative defences included the 10-year statutory time-bar under section 393 of the Building Act 2004 in relation to some of the defects. The membrane supplier, Equus Industries Ltd, accepted that it had a duty of care, but also denied any breach of the duty.

Judgment issued

In the judgment issued in January, but then reissued in late March with a four-page summary of the findings and a detailed press release to make the decision more accessible, Justice Walker noted that the building had been the tallest residential building in the country when it was constructed.

The owners had thought they were buying into a well-constructed building of solid concrete, but in fact the structure suffered from extensive building defects. As a result, the residents had been confronted with never-ending problems and potential health and safety risks, and faced enormous costs to remediate the building. The plaintiffs sued in negligence, arguing that the defendants must meet the cost of repairs as well as consequential losses.

Her Honour said that the simplicity of the plaintiffs' proposition belied the complexity of the case, a palpable feature of which was the breadth of divergence between the parties' respective experts. That divergence had persisted even after the experts had caucused in a bid to reach common ground.

The High Court held that Auckland Council was jointly and severally liable to the body corporate for damages in relation to claimed defects 1 (limited to beams B4 and B5), 7,8 (limited to the types of balconies defined in the judgment), 10, and 11; and to the second plaintiffs in respect of claimed defect 13.

The claims against Equus were unsuccessful, but four other defendants were held jointly and severally liable to the body corporate for damages in relation to defects 1, 7 and 8. Justice Walker held that some defects were time-barred and dismissed affirmative limitation defences to some claimed defects.

Her Honour held that the second plaintiffs were entitled to awards of general damages in accordance with the claims set out in their written submissions. However, the court said it would hear further from the parties as to whether any contributory negligence offsets should be deducted from the award of general damages.

The court said that the plaintiffs had approached the question of remediation and reasonable costs of repair on a global project basis, rather than a defect-by-defect remediation basis.

"The Court's findings on liability mean that approach is inutile. The remedial costs claims requires adjustment to reflect the partial success only and consequent impact on the scope of interrelated repair work for which liability is found."

Justice Walker said that the remaining issues, including whether there should be an apportionment between the defendants, would be determined following further submissions from the parties, or a hearing to be convened as early as possible.

This means that, after more than a decade and a five-month hearing, the quantum of damages has yet to be ascertained.

Lessons in dealing with unit titles

Several aspects of the judgment, however, provide interesting lessons for legal executives and others dealing with unit titles.

Firstly, the court held that the body corporate had standing to sue the council for the cost of remediating defects covered by section 138(1) of the Unit Titles Act 2010.

Section 138(1) provides that a body corporate must repair and maintain the common property, any assets designed for use in connection with the common property, any other assets owned by the body corporate, and any building elements and infrastructure that relate to or serve more than one unit.

Justice Walker determined that the body corporate could sue for remediation not only of the common property, but also of any building elements or infrastructure related to more than one unit. A majority of the defects were systemic and it would only be practicable to fix them throughout the entire building.

However, the court said that the body corporate could not claim for bathroom defects within a unit. Both those costs and claims for consequential losses – for example, alternative accommodation costs – and general damages for mental suffering, anxiety and distress could only be brought by apartment owners.

Secondly, the court discussed a council's duty of care in tort and stated that it was no more stringent than its statutory duty under the Building Act, with the extent of the duty being the same under both the Building Act 1991 and the Building Act 2004.

This meant that a council did not warrant that compliance with the Building Code had been achieved: rather, it must be satisfied on reasonable grounds that compliance with the Code should be certified.

Thirdly, the court discussed the 10-year limitation period for bringing civil claims relating to building work. Section 393(1) of the Building Act 2004 provides that the Limitation Act 2010 applies to civil proceedings arising from building work or construction. Section 393(2) states that no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person 10 years or more after the date of the act or omission on which the proceedings are based.

The High Court said that the term 'proceedings' in section 393 meant more than filing a statement of claim and notice of proceeding. The issue was whether a particular cause of action had been brought within the specified period. Claims referring to 'widespread building defects' were too abstract to stop time running. In order to do that, a cause of action must specify particulars and the relief claimed. Justice Walker accordingly held that some claims were out of time. ■

LAND AND CONVEYANCING UPDATE

Multi-factor authentication for Landonline rolls out

Toitū te Whenua Land Information New Zealand introduced multi-factor authentication to New Landonline in April. The agency said that this was a widely-accepted industry standard that increased security.

A small pilot was followed by a firm-by-firm rollout. Users get a multi-factor authentication prompt at login, meaning that they need to enter a verification code as well as their Landonline ID and password. The verification code needs to be entered from either an approved authentication application (Microsoft or Google), a text sent to a registered mobile device, or a call made to a registered mobile device.

The agency said that all New Landonline users need to have access to a mobile device to access the authentication application, or be able to receive the text or call for the verification code. Multi-factor authentication is not required for Legacy Landonline access, with digital certification continuing to be the authentication method in that case.

Landonline privacy statement updated

Changes have been made to the Landonline privacy statement that relate to updating the use of data accessed from the Toitū Whenua website and Landonline application. Toitū Te Whenua said that the cookie section includes using cookies to provide personalised services and to collect non-identifiable information for remarketing on online advertising platforms in order to present users with relevant advertising about Landonline.

Consultation on A+I requirements for e-dealing standard and guideline

In May, the Registrar-General of Land consulted on proposed new Authority and Identity Requirements for E-Dealing Standard and the Authority and Identity Requirements for E-Dealing Guideline.

Toitū Te Whenua Land Information New Zealand said that the proposed new standard would bring together the existing guideline and the interim guidance that had been published in the Authority and Identity Requirements and Electronic Signing of Documents Interim Guideline 2020. Key stakeholders were invited to comment on an earlier draft of the standard and guideline; their feedback was incorporated into the proposals.

Bill to amend Building Act to be passed before end of 2024

The government intends making three changes to the Building Act 2004 to increase the availability of high-quality, affordable building products and to help lower the cost of building in New Zealand.

Firstly, Building and Construction Minister Chris Penk said that the changes would recognise building product standards from trusted overseas jurisdictions, thereby removing the need for designers or builders to verify standards, which was a costly and time-consuming process.

Secondly, Mr Penk said that building consent authorities would be required to accept the use of products that complied with specific overseas standards that were equivalent to, or higher than, those in New Zealand.

Thirdly, the use of building products certified through reputable certification schemes overseas would be approved. The minister said that the approval of the Australian WaterMark certification scheme alone could immediately provide New Zealanders with access to 200,000 products.

Mr Penk said that the Building (Product Certification) Amendment Bill would be introduced to Parliament this year, with the intention that it be passed before the end of 2024.

Appeal over compensation for expressway land acquisition

In *Flath & Ors v The Minister for Land Information* [2024] NZHC 36, part of the appellant landowners' property was acquired for the 'Mackays to Peka Peka Expressway' in 2013. The parties were unable to agree on compensation and the Land Valuation Tribunal (tribunal) accordingly determined the figure.

The appellants appealed to the High Court, arguing that the value of the land taken should have been assessed at $195,000, there should be reimbursement of $3,500 plus GST for replacing the boundary fence, and the injurious affection compensation should be reassessed based on the corrected value of the appellants' land.

The High Court said that the market value of the land taken was difficult to determine due to its nature and the limited number of comparator sites. Although the tribunal had taken an unusual approach to valuation, the court agreed in general terms with its conclusion.



Earthquake-prone buildings, Ghuznee Street, Wellington.

However, the tribunal had given inadequate reasons for its conclusions and did not provide an understanding of why the matter had been decided in the way in which it had been. Despite that, the tribunal had reached the correct figure.

In relation to injurious affection, the High Court said that it represented the loss to the owners not only for the depreciation in the value of the remaining land as a result of the severance of the portion taken for the public work, but also for loss caused by the operation of the public work on the land taken. Examples could include visual, noise and light pollution.

The court said that the evidence supported a graduated discount to assess compensation over the property, decreasing from the rear boundary closest to the expressway. The tribunal had been well placed to make that assessment and the court agreed with its conclusion, although an arithmetical error meant that the correct compensation for injurious affection should be $32,920.

The appellants also submitted that they had lost the protection of mature trees on their boundary and the Crown had refused to re-fence, despite an 'Advanced Agreement' stating that it would permanently fence the land taken with a new post and seven-wire fence. The Crown argued that any breaches of covenants in the Advanced Agreement were separate matters, and the court agreed.

The appeal was allowed but the result remained similar to the Land Valuation Tribunal's decision.

Earthquake-prone buildings review brought forward

Work was to start this year on the earthquake-prone building review, said Building and Construction Minister, Chris Penk. A review had been scheduled for 2027 but the minister said that it was being brought forward to provide greater certainty. The deadline for remediations would be extended by four years.

"The current earthquake-prone building system was put in place in 2017, requiring buildings considered to be earthquake-prone to be remediated before set dates with nearly 500 deadlines set to expire over the next four years.

"Councils and building owners have told me that many buildings will not meet their deadlines due to the high costs involved, further complicated by cumbersome heritage rules and ownership structures. Without change, a significant number of buildings could sit empty which would have a devastating impact on the economy in cities such as Wellington and provincial towns across New Zealand."

Mr Penk said that the review would be extensive and would consider the appropriate risk settings to protect safety while ensuring that the rules were workable to support businesses, increase economic activity and create jobs. ■

Professional standards
Two lawyers censured and fined

'Nightmare web of client conflict' leads to stern warning from disciplinary tribunal

A competent lawyer who became involved in client conflicts has been censured and ordered to pay the New Zealand Law Society a fine of $15,000, as well as costs of almost $20,000 to a Standards Committee and more than $3,000 to the New Zealand Law Society.

The New Zealand Lawyers and Conveyancers Disciplinary Tribunal described the case as 'a cautionary tale about a competent lawyer who got enmeshed in the nightmare web of client conflict. It is a grim tale, leading inexorably to regrets and self-doubt. A common tale, it starts so easily. Both parties want the same outcome so what could go wrong? In this case it went wrong and got worse. And worse.'

The tribunal said in its penalty decision that it wanted to warn practitioners against 'sleep-walking into this nightmare.' It said that Rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 was too easily overlooked or misunderstood.

'The rules can be misunderstood because they are not a blanket prohibition against acting for more than one client in a matter. This can be interpreted as permission to act. But permission should not be taken as encouragement, and that permission is restricted to limited circumstances. The rules permit acting for more than one client in a matter only where the risk (that the lawyer may be able unable to discharge the obligations owed to one or more of the clients) is negligible and where the informed consent of all parties is obtained. The threshold above which the prohibition in rule 6.1 applies is "a more than negligible risk." That threshold is very low. In most cases where there is a risk of conflict, the lawyer must not act for more than one client on a matter.'

The tribunal said that Rule 6.1.2 anticipated the situation in which the risk was assessed as negligible, but issues nevertheless arose. If the risk was negligible and informed consent was obtained, but it later became apparent that the lawyer would no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acted, the lawyer must immediately inform each of the clients and terminate all their retainers.

Although ending the engagements might be disappointing and even frustrating for the lawyer and perhaps one or more of the clients, the tribunal said that the exit must nevertheless be effective and complete.

In relation to Rule 6.1.3, the tribunal said that it created a limited exception that allowed a lawyer to continue to act for one client, provided that the other clients after receiving independent legal advice gave their informed consent and no duties to the consenting clients had or would be breached.

In the case of LB, although she was experienced, competent and otherwise conscientious, she had misunderstood the rules and compounded her errors by failing to withdraw completely when conflict arose. As a result, she had come close to being suspended from practice.

LB dealt with franchising agreements. Her major client entered into agreements with franchisees and reviewed those arrangements from time to time. Generally, the transactions appeared to be routine and the major client sometimes suggested that LB act for the other party.

LB acted for both the major client and a franchisee in relation to a lease renewal. She failed to obtain informed consent from both parties and then compounded that error by later failing to obtain informed consent in relation to a specific matter. An actual conflict arose, but LB continued to act for both parties and took several inappropriate actions when High Court proceedings were filed between the parties.

The tribunal held that LB's breaches were grave, with their long duration reflecting poorly on the legal profession. The tribunal said that suspension had been a live issue for it, but it had determined instead to impose the maximum fine as well as to censure LB.

Lawyer's incompetent will drafting leads to censure and penalties

A lawyer was found guilty of unsatisfactory conduct after drafting a will incompetently and displaying a lack of courtesy towards a beneficiary of the estate he was administering.

JP began acting for an elderly client in 2020. The client requested JP to arrange a reverse mortgage and to prepare a will for her. Both parties were Korean and communicated in that language, but the formal documents were drafted in English. JP was not experienced in drafting wills and the document he drew up had the effect of giving all of the client's property to JP.

The client died shortly afterwards and JP began acting as the executor, liaising with the two adult daughters of the deceased who were the intended residuary beneficiaries. One of the two beneficiaries was suspicious of JP and concerned that he took improper advantage of her mother. Their relationship quickly became strained and the complainant engaged lawyers to act on her behalf. Following negotiations, JP gave up his role as executor and renounced his interest under the will.

The New Zealand Lawyers and Conveyancers Disciplinary Tribunal considered that JP's error in relation to the will was more form than substance. He had not breached the restriction of a lawyer personally benefiting from a will he had drafted. JP did not consider that the will gave him a beneficial interest.

The tribunal held, however, that JP had breached his obligation to act in a competent manner as the will he had prepared was flawed and ambiguous. The tribunal noted that JP, who was an employed lawyer at the time, was poorly supervised by his employer. JP was found to have engaged in unsatisfactory conduct but the tribunal observed that it considered him to be an honest, diligent practitioner who was out of his depth.

In relation to the second charge, the tribunal found that JP's decision to continue to communicate with the complainant in Korean after she had expressly asked him to communicate in English was unsatisfactory conduct. He had failed to accord the complainant respect and courtesy.

JP was censured and ordered to pay a fine of $5,000. The tribunal ordered that his professional practice be supervised and directed that he pay costs of $12,000 to the Standards Committee and $4,500 to the New Zealand Law Society. ■

Lack of capacity in one area does not mean incapacity in all areas

Testamentary capacity always needs to be taken into account when legal executives are preparing wills. Lack of capacity can arise from dementia, advanced age, psychiatric disorders, brain injuries, intellectual disabilities or other causes.

If legal executives are in doubt as to whether a client has capacity, inquiries should be undertaken and, if necessary, advice or input should be sought from the client's GP or medical specialists.

Assessing capacity is complex

Capacity is a complex issue and the fact that a client lacks capacity in one area of life does not mean that the person does not have capacity to make a will. This is spelled out in the Protection of Personal and Property Rights Act 1988 (PPPRA). Section 31 provides for the appointment of a property manager to manage a person's property. Section 54, however, provides that a person subject to a property order shall not, only by reason of being subject to such an order, be incapable of making testamentary dispositions.

In cases where questions of part capacity arise, section 54 (2) states that a court may direct that a person subject to a property order may make a testamentary disposition only by leave of the court, while subsection (3) provides that a court may grant leave to make a testamentary disposition. Pursuant to subsection (5), a court has the power to enquire into whether a testamentary disposition made when a person was unable to manage his or her property affairs in fact expresses the present desires and intentions of the person.

These issues were discussed in detail by the High Court in a case involving a man who had been diagnosed with dementia and a will prepared by a legal executive who considered that he had testamentary capacity.

Lawrence case

Re Estate of Lawrence [2022] NZHC 558 Mr and Mrs Lawrence had three children. Tony and Michael lived in

Continued on page 40 ...

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Christchurch and Helen lived in Sydney. Mrs Lawrence died in 2017 and Mr Lawrence in 2019. The couple had both made wills in 2013, with Mr Lawrence's 2013 will leaving his estate to his three children in equal shares. All three children were named as executors and trustees of the will.

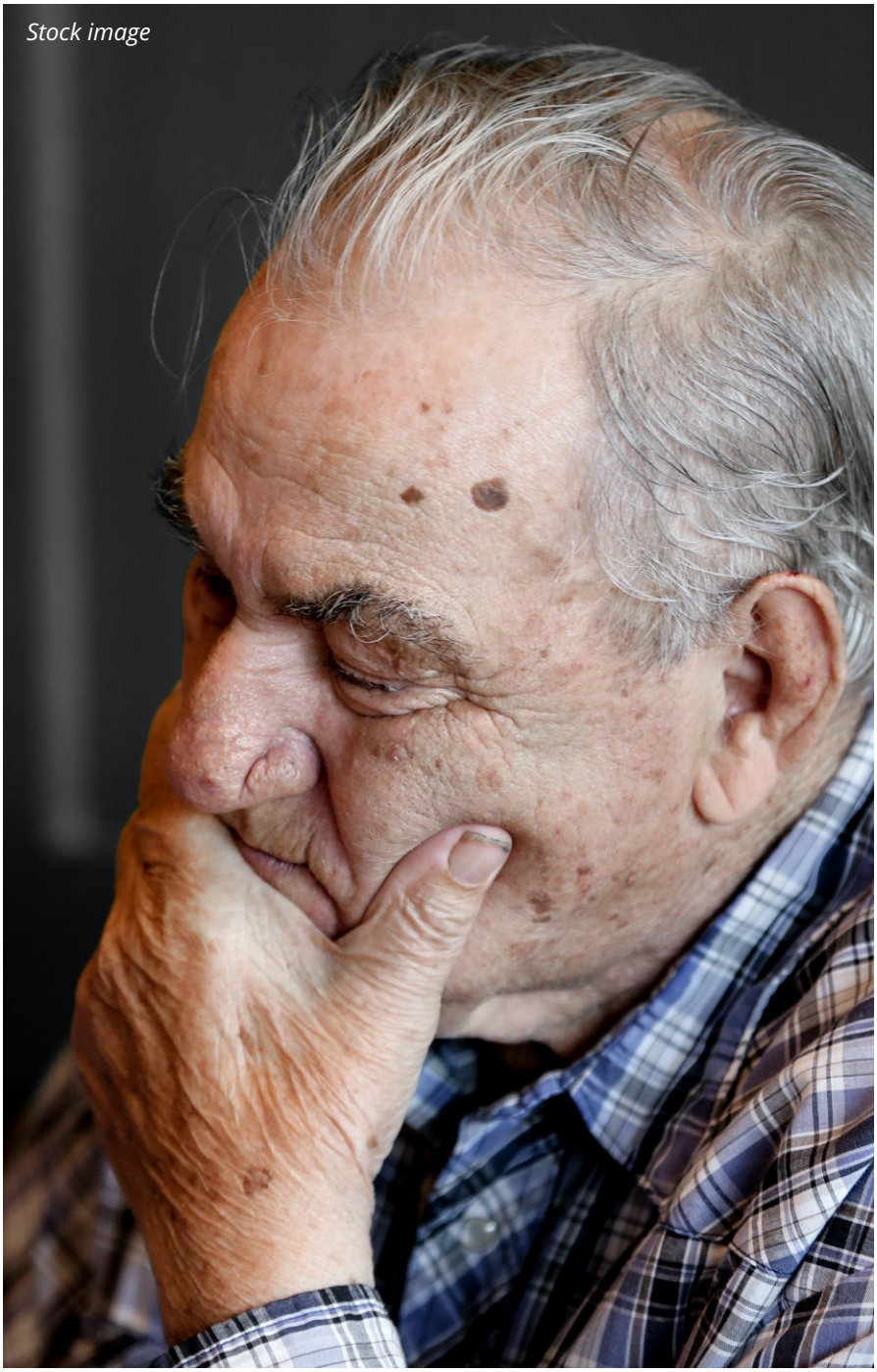
However, shortly before Mr Lawrence died family animosity arose between the two brothers and their sister over whether some of Mr Lawrence's funds should be distributed to his children while he was still alive.

Mr Lawrence had experienced a significant cognitive decline and his enduring power of attorney was activated in 2014. In early March 2018 a cognitive assessment stated that Mr Lawrence had a cognitive disorder 'within the group of senile dementia.'

Despite that, three weeks later Mr Lawrence executed a new will. The legal executive who acted for him recorded in a file note that she did not have concerns regarding Mr Lawrence's capacity. Instead of his three children, the new will appointed partners at another law firm as his executors.

Mr Lawrence died in August 2019. There were disagreements between the brothers and Helen over the funeral, and Helen learned of the 2018 will and that she was no longer an executor. Helen told the law firm that unless its partners stood down as executors she would seek an injunction to prevent her father's funeral from going ahead until the issue of who should be the executors was determined by a court.

The law firm partners resigned as executors and it was proposed that Public Trust should administer the estate. There was disagreement between the parties as to whether the 2013 or 2018 will should be admitted to probate, but all eventually agreed that the 2013 will should be put forward.


Stock image

However, Justice Dunningham noted that the parties could not consent between themselves not to put a will forward. Her Honour said that, if there was doubt as to testamentary capacity at the time a later will was made, the proper course was to seek to admit both wills to probate so the court could determine which was the last valid will.

Justice Dunningham observed that the key elements of testamentary capacity had not changed since the 1870 case of *Banks v Goodfellow* (1870) LR 5 QB 549. Accordingly, will-makers must understand that:

- They are making a will and the effect of doing so
- The extent of the estate and the property to be disposed of
- Moral claims to which they ought to give effect, and
- This understanding must not be impaired by any disorder of the mind or delusions.

Her Honour noted, however, that the mere fact a person had a mental impairment did not mean they lacked capacity. Even where an enduring power of attorney had been activated in relation to property, a person might be capable of making a testamentary disposition. Section 102 of the PPPRA anticipated that a person could be mentally incapable for EPOA purposes, but still have testamentary capacity.

"In [a] similar vein, s 54 of the PPPRA provides that a person who is subject to a property order is not, by reason only of being subject to that order, deemed incapable of making a testamentary disposition. The real issue is whether, despite having a mental impairment, the will maker had the requisite testamentary capacity."

Justice Dunningham said that, unless she was satisfied on the balance of probabilities that Mr Lawrence had testamentary capacity at the time of making the 2018 will, the earlier will which had been made when no issue as to capacity arose must be admitted to probate. The court said that there was clear evidence of a relentless decline in Mr Lawrence's mental faculties from 2014 onwards, observed by lawyers and his children, and supported by the cognitive assessment in early March 2018. That assessment scored Mr Lawrence as 9 out of 30, when normal functioning was indicated by a score of 26 or more.

"In these circumstances, there would need to be positive evidence that Mr Lawrence had the requisite testamentary capacity as at the date he executed the 2018 will. On the information before the court, I do not consider that has been established. This is, in part, a consequence of no party actively promoting the 2018 will and therefore not calling [the legal executive] to give more detailed evidence about why she was satisfied that Mr Lawrence had testamentary capacity."



Her Honour said that she was left with the legal executive's file note about the meeting between Mr Lawrence and his son, and it did not answer the questions arising about testamentary capacity. In particular, Justice Dunningham said that the legal executive knew that Mr Lawrence's EPOA had been activated four years earlier, and her firm did not then consider that he had capacity to act as the executor of his wife's and sister-in-law's estates.

"In those circumstances, some level of enquiry was warranted into testamentary capacity and that is not evident from the file note. Although the recent dispute between his children may well have been the motivating factor for the change in the will, it is not clear that Mr Lawrence himself says this. Furthermore, while [the legal executive] read the will to Mr Lawrence and explained what each clause meant, that, without more, is insufficient to establish that he adequately understood the provisions of the will. It would have assisted if I had evidence that he had articulated to her what the will did and why."

However, the court went on to say that the legal executive might well have been right when she said she did not have any concerns about Mr Lawrence's mental capacity. The issue was that the court did not know the reasons for the legal executive's conclusion.

That left the 2013 will as the last valid will.

Contention on administering the estate

The other matter to be determined was who should administer the estate: should Public Trust continue to act or should another independent person or entity take over? All the siblings agreed that an independent executor/administrator was required due to the animosity and distrust between the siblings.

Justice Dunningham considered Helen's objections about Public Trust's fees and rejected suggestions the organisation would not be impartial. Public Trust was appointed to be the executor of the 2013 will. ■

Introducing two new branch presidents

In late 2023, two branches elected new branch presidents at their respective AGMs - Auckland Waikato Branch President, Sarah Blaney and Canterbury Southern Districts Branch President, Andrea Murchland. We introduce Sarah and Andrea to *Envoy* readers.

Auckland Waikato Branch

Sarah Blaney readily admits the reason why she joined the Auckland Waikato Branch Committee was to get to know people as she was new to Auckland. “I could go to meetings or seminars and meet branch members – it meant we immediately had things in common and, as a newbie, I needed personal connections. I enjoyed branch activities very much, joined the branch committee and seven years later I found myself branch president!”

Quick to acknowledge the work of the branch’s immediate past president, Michelle Way, Sarah's current focus is to hold more branch events and increase attendance at those events. “We've found that asking members from, say, all over Auckland to gather in the CBD does not work. The traffic is terrible and parking is difficult. Late last year the branch held events in West Auckland, the North Shore, Botany and in Newmarket and was rewarded with a higher attendance rate. Let's hope we've cracked this!”



Auckland Waikato Branch President Sarah Blaney

Legal executive career

Sarah came to her legal career in an unusual way. Inland Revenue may not immediately come to mind as an inspiration for a career as a legal executive, but for Sarah this fitted perfectly. “I had left school and started studying economics at Victoria University of Wellington, but I didn't finish my degree. I was offered a role with Inland Revenue's litigation team and I really enjoyed the work. When they offered to pay my course fees, I jumped at the opportunity to qualify as a legal executive.” From Inland Revenue, Sarah worked at Public Trust focussing on property matters, and then spent a decade at a mid-size law firm in Wellington.

> *... [my] immediate focus is to hold more branch events and increase attendance at those events.*

On her move to Auckland in 2016, Sarah worked at Prudentia Law, a boutique property, commercial law and trusts firm, until June this year. She has now moved to a larger firm, Steindle Williams, which deals with property, trusts, commercial law and litigation.

Working full-time, Sarah says she doesn't have huge amounts of spare time. She has, however, supported the Little Miracles Trust (formerly the Neonatal Trust) for 10 years. “My daughter, Holly, was born at 23 weeks gestation and spent six months in the neonatal intensive care unit at Wellington Hospital. It certainly was a roller coaster at times, with many ups and downs. Holly is now doing well, and I'm so proud of what she has achieved after such a shaky start. The trust was marvellous to my husband and me, and I'm more than happy to help fundraise for the work of the trust.”

Canterbury Southern Districts Branch

Andrea Murchland is well aware that Canterbury Southern Districts Branch covers more than two-thirds of the South Island. She says the challenge for the branch is to not only to have events and seminars in the main centres, but also to reach out to members in smaller towns and isolated areas. “This will be beneficial to our current membership and, we hope, encourage an increase in the membership of LENZ. The irony is not lost on me that I'm based in Invercargill and it's a long way to the northern most tip of the branch,” says Andrea.



Canterbury Southern Districts Branch President Andrea Murchland

Paying tribute to the branch’s immediate past president, Jo Langton, and her achievements over her term, Andrea is keen to continue visits to schools to promote the role of legal executives. “Senior students often have no idea of the role of a legal executive. They think they must have an LLB to have a satisfying career in a law office. The branch has already talked with schools in Christchurch and had a good response. We are continuing this speaking programme in 2024.”

Early career

Andrea readily admits that all she wanted to do when leaving Invercargill's James Hargest High School was 'to help people' but she wasn't sure what that could entail. Initially working for the local district health board (that Andrea calls 'an interesting experience'), in 2008 she answered an advertisement for staff by local law firm French Burt Partners. “I had no idea what was expected of me, but decided to give it a go,” she say.

> *“... the challenge for this branch is to not only have events and seminars in the main centres, but also to reach out to members in smaller towns and isolated areas.”*

After 18 months as a law clerk, in 2010 Andrea started studying for the legal executive qualification. “I love my work at French Burt Partners, it's always been a family firm and has a nice feel to it, and it fulfils the goal I had as a school leaver to help people. There's a great deal of variety in the work the firm does and, being a small firm, one is not boxed into a particular role.

“I work on residential and rural property transactions, company and commercial law files, and trusts, estates and personal law matters. Property, however, is my great love. There's a beginning, a middle and an end; it gives me immense satisfaction that a matter is completed on time and done well,” she says.

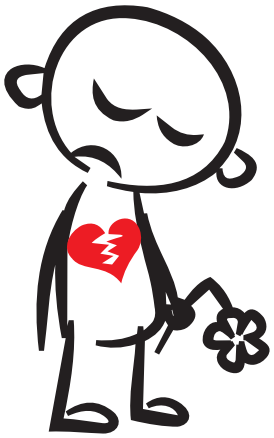
Outside of work Andrea is kept busy on aunt duties to her three young nephews. She is a member of the Invercargill South Rotary Club. “I find my work with Rotary to be very fulfilling. I meet people from all walks of life which is very broadening, and the various Rotary Club projects ensure I'm helping people.” ■

Relationship property division

Relevance of claimants' financial position

When relationships end, determining the division of property can lead to drawn-out disputes and large costs. Two recent cases illustrate the factors considered by the courts and the relevance of the claimants' financial position to the final outcome, irrespective of whether the partnership was ended by death or by separation.

In the first case, a young, vulnerable woman was held to be entitled to provision, while in the second an older woman in a good financial position had her claim dismissed.



Serious injustice and entitled to provision

WL v AJ [2023] NZHC 703 involved a 17-year relationship, including periods of separation. The parties had three children.

Early in the relationship WL bought a property for $128,000 and, during an initial separation, the parties signed an agreement drawn up by WL's sister, who was doing a legal secretary's course. The document purported to exclude the property as relationship property. Neither party received independent legal advice at the time of signing the document.

Following the parties' final separation, AJ claimed half the equity in the property, occupation rent for the time WL lived in the property after separation, and a declaration either that the contracting out agreement was void, or that it should be set aside on the basis that it was seriously unjust. She also sought equal division of the other relationship property.

WL sought an order that the agreement should be given effect to so that the property was his separate property, and that the rest of the relationship property should be divided equally. If the court invalidated the agreement, he sought a division of not less than 80% of the relationship property in his favour, and an order that no adjustments be made for occupation rent.

In terms of contributions to the relationship, AJ said that she was the primary caregiver for the children, while WL said that the parties looked after the children jointly. AJ said that WL did the outside work while she did all of the housework.

AJ worked full-time until early 2003 when she was five months pregnant with the couple's first child. She then cared for the child after he was born. After that, her main sources of income were the Working for Families Tax Credit and a benefit. She received occasional wages for cleaning work she did at a play centre. Her total income was under $400 per week.

WL was in full-time employment throughout the relationship. At the start of the relationship he was paid $381 a week, while by 2016 he was earning $764 a week after tax. The property was valued at $525,000 in 2022, with a mortgage of $46,000 remaining.

The parties prepared their briefs of evidence for the court hearing on the basis that the agreement that had been signed could not be found or had been destroyed. WL said that the agreement was handwritten and stated that the property would always be his separate property and, if he sold it, all the proceeds would be his. WL's parents supported his account.

AJ did not recall WL's parents being present when the agreement was signed and said the document focused on her renting the home while the parties were separated. She thought it had ceased to be relevant when they reconciled. At the hearing, WL's mother produced a typed and unsigned version of what appeared to be the agreement. She said she had found it the weekend before the hearing.

The High Court said that the agreement signed by the parties was better viewed as a post-separation agreement under section 21A of the Property (Relationships) Act 1976 rather than a contracting out agreement under section 21. As the parties had signed a post-separation settlement agreement while in a de facto relationship, the document was required to comply with section 21F at the time it was signed.

Section 21F provides that agreements are void unless they comply with specific requirements, including being

in writing and signed by both parties, each party receiving independent legal advice, and the parties' signatures being witnessed by lawyers.

Justice Mallon held that, as neither party had received independent legal advice as required by section 21F(3), the agreement was void. The issue then was whether the court was satisfied under section 21H that the non-compliance had not materially prejudiced the interests of any party to the agreement. Her Honour said that she did not accept the evidence showed that AJ would have signed the agreement had she had the opportunity for independent legal advice.

Independent legal advice would have told her that it was not in her best interests to sign the document, as it was possible she already had a claim to an equal share of the property and, if the parties reconciled, she would be entitled to an equal share of the family home.

'AJ was vulnerable to doing what WL wanted. She was young (aged 20), had a young child, had left school at a young age, had no formal qualifications and no assets of her own. These circumstances would have made AJ [wary] of accumulating more debt and concerned with providing a safe home for her and her child. The lack of independent legal advice here is material and 'attacks the very rationale for allowing a party to contract out.' Upholding the agreement would materially prejudice AJ.'

Justice Mallon said that, even if the agreement had not been void, she would have set it aside for creating serious injustice. The relationship property was to be shared equally and AJ's claim for occupation rent was dismissed.

Claim dismissed as claimant was 'not badly off'

In contrast, in *KC v JRJ* [2024] NZFC 2717, a 61-year-old woman in good health, with no dependents, a net worth of $2 million and a good income, was held by the court to be 'not badly off' and her claim for provision from her deceased partner's estate under the Family Protection Act 1955 was dismissed.

CD died unexpectedly in 2019, leaving behind a de facto partner, KC, and his only child, a son from a previous marriage, MD. CD's will left all of his estate to his son. CD and KC had made a section 21 agreement in 2017, setting out what was to happen if their relationship ended in separation or death.

KC did not challenge the property agreement but instead made a claim under the Family Protection Act 1955 on the grounds that CD had breached his duty to make adequate provision for her in his will. Judge Manuel said that, although the terms of the property agreement prevented KC from making a claim against CD's estate, it was an established rule of law that parties could not contract out of the Family Protection Act.

'The net value of [CD's] estate is approximately $2 million. [KC's] net worth is approximately $2 million. The issue is whether approximately $2 million is adequate provision for [KC] and if not, how much [CD] should have left her.'

Her Honour said that the parties met when they were in their late forties. They were a mature couple who had led full lives, both worked full-time and they had built up assets over the years.

The court said that KC's application under the Family Protection Act was premised on her claim that the terms of the property agreement did not reflect the parties' intentions if their relationship ended on death, and neither did CD's will. KC said that CD had intended or promised to update his last will, but had not done so.

However, Judge Manuel said that other evidence did not support this allegation.

"[KC] may have conflated the parties' intentions for money, finance and wills after they retired and begun to implement their retirement plans and pool their resources with their intentions for money, finance and wills before that happened. When [CD] died the parties had not retired. They had not begun to implement their retirement plans. Nor pool their resources."

Her Honour held that that the parties' intentions if their relationship ended on death were, as at the date of CD's death, as recorded in the property agreement. Judge Manuel also concluded that there had been no breach under the Family Protection Act by CD towards KC in his last will as the parties' de facto relationship was the third or fourth qualifying relationship for CD and the second for KC, and CD had a child from a previous relationship. Further, the provisions of the last will had been reconsidered by CD and no changes had been made, and KC was 'not badly off.'

KC's application was dismissed. ■



Finding the balance between testamentary freedom and family protection

Legal executives advising clients on will drafting always need to balance the will-maker's freedom to dispose of their estate as he or she wishes against the familial obligations imposed by law. The Family Protection Act 1955 permits a court to make provision from an estate if a will-maker has failed to provide adequately for a claimant's proper maintenance and support.



Who can make a claim on an estate?

Section 3 of the Act states that those entitled to claim under the legislation are:

- The spouse or civil union partner of the deceased
- A de facto partner living in a de facto relationship with the deceased at the date of death
- Children
- Grandchildren
- Stepchildren, and
- The parents of the deceased.

Section 4 permits any of those people to seek further provision by bringing court proceedings if they consider a testator has failed in his or her duty to make provision for them. There is no clear-cut rule, however, as to exactly what provision is required.

It is accordingly essential for legal executives to discuss these matters with clients and ensure that they understand the law and keep it in mind when deciding how to divide up their estates. Failing to do this can result not only in expensive court proceedings, but also in hostility within families.

The courts' approach need not be formulaic

The Court of Appeal recently discussed the principles to be applied and how the courts approach a determination as to whether provision for a protected person under the Act is insufficient. The court observed that provision as between siblings does not have to be exactly equal, and the question as to whether proper provision has been made in a will is not one that can be answered mathematically or as a matter of percentages.

In *Barnard v Robertson & Ors* [2023] NZCA 230, Margaret Barnard died in 2019 leaving three adult sons – Graeme, Roger and Timothy. Mrs Barnard left an estate valued at approximately $4.4 million. The only beneficiaries under her will were her three sons, but Graeme was left less than Roger and Timothy. Graeme brought proceedings under the Family Protection Act 1955 claiming that his mother had failed in her moral duty to provide him with proper maintenance and support.



Graeme had married in 1985; he and his wife separated in 2006 and his mother provided Graeme with $150,000 to buy out his wife's interest in their family home so he could remain living there. In return, a quarter share in the property was vested in Mrs Barnard in 2008. Mrs Barnard's interest in the property increased to a third when she subsequently paid off Graeme's mortgage.

Mrs Barnard's last will provided that her interest in Graeme's property was to be gifted to him. Roger and Timothy were each to receive $250,000 of Mrs Barnard's investments, with the remainder of the portfolio being divided into three equal shares. Roger and Timothy were to receive their shares outright as capital sums, while Graeme was to receive a life interest in his share.

The residue of the estate was to be divided equally between the three brothers, giving them $290,000 each.

The High Court dismissed Graeme's claim and he appealed to the Court of Appeal. Graeme claimed that he had a special claim on his mother's estate as he had contributed to it, both by working on the family farm and by caring for his mother in her later years.

The Court of Appeal's judgment was delivered by Justice Ellis. Her Honour noted that the court's jurisdiction to order further provision from a deceased person's estate derived from section 4(1) of the Family Protection Act, which provides that if adequate provision is not made from an estate for those protected by the Act, the court may order further provision.

Justice Ellis observed that the broad principles applying to claims under the Act were well settled, with the starting position being that testamentary freedom remained except to the extent that there had been a failure to make proper provision for the maintenance and support of those entitled to it. Those principles had recently been summarised and confirmed by the Court of Appeal in *Brown v Brown* [2022] NZCA 476, which quoted an earlier decision to the effect that the enquiry as to whether there had been a breach of moral duty was to be judged by the standards of a wise and just testator or testatrix, followed by consideration of the appropriate remedy. Only to that extent was the will to be disturbed.

The Court of Appeal acknowledged that Graeme had received a lesser share from the estate than his brothers, but said that any notion of a 'presumption' of equality between siblings in testamentary matters, or that a departure from equal sharing must be expressly justified, could not survive recent Court of Appeal decisions which emphasised the importance of testamentary freedom.

The Family Protection Act does not authorise the courts to rewrite a testator's will merely because it might seem unfair to a family member, and a beneficiary is not required to justify the share of the estate they have been given.

Justice Ellis said that Graeme had been treated more favourably than his brothers during his mother's lifetime and a 2008 lawyer's letter suggested that the reason for the differential testamentary treatment was known to Graeme.

There had been no failure by Mrs Barnard to fulfil her moral duty. The appeal was accordingly dismissed.

The case is a useful summary of the principles and explains how the courts approach such cases. ■



Focus on relationship property

The interface between trusts and relationship property

Now easier to claw back property transferred into a trust

The Supreme Court judgment in *Sutton v Bell* [2023] NZSC 65 represents a significant shift in the law. It means that in future it will be easier to claw property transferred into a trust back out of the trust and into the relationship property pool.

Three decisions last year from the High Court, the Court of Appeal and the Supreme Court have clarified how issues relating to trusts are to be dealt with when relationship property is divided.

Todd Sutton and Joanna Bell were in a de facto relationship for seven-and-a-half years and had two children together. The relationship ended in September 2012. Just before the commencement of the relationship, Mr Sutton transferred his residential property to the trustees of the Todd Sutton Trust. Ms Bell argued that the transfer was a disposition of property by Mr Sutton to defeat her claim or rights under the Property (Relationships) Act 1976 (PRA) and that this came within section 44 of the Act.

Section 44 provides that, where a court is satisfied that a disposition has been made to defeat the claim or rights of a person under the PRA, the court may set aside the disposition. Ms Bell brought proceedings seeking a half share of the couple's relationship property and succeeded in her claims in the Family Court, the High Court and the Court of Appeal. Mr Sutton appealed to the Supreme Court.

The appeal raised questions:

- Whether section 44 could apply to a disposition of property made prior to the beginning of a de facto relationship
- If so, at what point section 44 applied to a disposition made before the commencement of the relationship, and
- If section 44 applied, was the disposition by Mr Sutton of the property to the trustees made to defeat Ms Bell's claim or rights?

The Supreme Court decision was delivered by Justice O'Regan. His Honour noted that there was no relationship property of any significance, so the section 44 claim was the only matter of substance.

Justice O'Regan said that there was nothing in the wording of section 44 limiting the ambit of the section to dispositions made only after the beginning of a relationship.

"In fact, the indications are to the contrary, given the terminology used (person, not spouse or partner, and property not relationship property). We agree with [counsel for Ms Bell] that the comparison between section 44 and sections 44C and 44F is significant."

Section 44C deals with compensation for property disposed of to a trust, while section 44F provides for compensation relating to property disposed of to a qualifying company. His Honour said that the Supreme Court agreed with the Court of Appeal that there would be considerable potential to hollow out section 21 (the contracting out section of the Act) if section 44 were interpreted to allow a soon-to-be partner to dispose of property unilaterally and thereby take it outside the scope of the legislation.

The Supreme Court said that people should not be able to dispose of property unilaterally the day before commencing a relationship but, on the other hand, dispositions made in the early days of a relationship should not be vulnerable to attack under section 44. Section 44 should apply to dispositions that occurred when the parties had a clear and present intention to enter into a de facto relationship.

The court was satisfied that Mr Sutton and Ms Bell had a clear and present intention to begin a de facto relationship when the Auckland property was disposed of to the trust. Further, Mr Sutton had transferred the property to the trustees in the knowledge that this would defeat Ms Bell's future claim under the PRA, and therefore with intent to defeat that claim.

The appeal was dismissed.

Changes to interpretation of s 44

Prior to the above Supreme Court decision, it was thought that section 44 applied only to dispositions made at the time of, or after, a relationship commenced. The judgment means that earlier transactions can be unrolled, thereby lessening the scope to defeat claims under the PRA.

The second case, that of *Cooper v Pinney* [2023] NZCA 62, examined the issue of whether rights and powers under a family trust should be categorised as property under the PRA and, accordingly, whether they were available for division as part of the relationship property pool.

Raewyn Cooper and Marcus Pinney were in a relationship for 10 years, during which time they worked together in farming and other businesses. Two years into the relationship, the farm where the couple lived and worked was transferred from a family trust set up by Mr Pinney's father to one established by Mr Pinney. Mr Pinney was both a discretionary beneficiary and a trustee of the new trust, and had the power to appoint or remove trustees.

The key issue was whether Mr Pinney's powers under the trust, and particularly the powers to appoint and remove trustees, comprised interests or rights falling within the definition of property in section 2 of the PRA. The Family Court held that the powers were relationship property, meaning that the farm became part of the couple's relationship property. The High Court reversed that decision and Ms Cooper appealed to the Court of Appeal.

A majority of the Court of Appeal said that the approach to be taken by the courts when assessing the implications of the use of trusts needed to be accessible and clear. Ordinary trust principles should be applied in all courts when assessing the validity of trusts, including in the context of relationship property disputes.

The primary purpose of the trust was to ensure that the benefit of the farm would be preserved for Mr Pinney and his children and grandchildren to the exclusion of any spouse or partner. A trust was a common and legitimate means of achieving this lawful objective. The trust was a valid trust and Mr Pinney's general power of appointment did not constitute a 'right or interest' and therefore property for the purposes of the PRA.

The appeal was dismissed. Ms Cooper was subsequently granted leave to appeal to the Supreme Court and a hearing was held in November 2023. A judgment is awaited.

Loans from a trust relationship debt?

Thirdly, the case of *Johnson v Johnson* [2023] NZCA 566 considered whether loans from a trust were relationship debt. Maria and Craig Johnson married in 1992 and, for most of the marriage, lived in a family home which underwent extensive renovations. In 2002, Mr Johnson incorporated a fund management company called Johnson Investment Management Ltd (JIML). JIML managed a hedge fund called Carpe Diem Absolute Return Fund (Carpe Diem), with Mr Johnson acting as the fund manager on behalf of JIML. In 2002 Mr Johnson invested $400,000 in Carpe Diem units, redeeming the funds for a substantial profit in 2011 and using the proceeds for family purposes including the purchase of a boat.

In 2004, the Johnsons agreed to buy a leasehold interest in an apartment in Fiji, with the deposit being funded by an advance from the Abel Trust, a trust established by Mr Johnson's father. Several other advances were made to Mr Johnson by that trust and, after the parties separated,

Continued on page 50 ...

...Continued from page 49

there was disagreement as to whether the loans constituted relationship debt.

The High Court held that, although the advances were loans and hence repayable, a number of them were not relationship debts as defined in section 20 of the PRA. Section 20 defines 'relationship debt' as debt incurred jointly by the parties, in the course of a common enterprise, for acquiring or improving relationship property, for the benefit of both parties, or to bring up children.

Mr Johnson appealed to the Court of Appeal, arguing that the trust had advanced $3.6 million for work on the family home, share purchases, the parties' taxes, the apartment in Fiji and other purposes. He contended that the money comprised loans repayable on demand and the $3.6 million was a relationship debt. Mrs Johnson submitted that, given the nature of the trust and the relationship of the trustees and the beneficiaries, the advances were not loans. Rather, they were a 'pre-payment' on Mr Johnson's eventual inheritance and not genuine debts.

The Court of Appeal examined in detail the purchase of the apartment in Fiji, observing that, as the trust had provided the funding to enable completion of the purchase commitment the couple had made in relation to the apartment, a question arose as to whether it did so as a lender to the Johnsons, or as the actual purchaser. Their Honours ruled that, on the available evidence, they could not conclude that the trust had become the legal owner of the property.

The court reduced the claimed relationship debt by 50% and did not accept that the funding provided to invest in Carpe Diem comprised relationship debt, but held that other advances did comprise relationship debt. The appeal was allowed in part. ■

Help us solve this puzzle



When writing Ivy Pack's obituary (see page 54), we were sent this delightful photo of seven legal executives taken in 1976 that appeared in *The Press* after Ivy's death.

Aren't those mid-70s fashions wonderful . . . takes some of us back!

We understand these seven women, including Ivy, were graduating as legal executives. Ivy is in the back row on the right.

Our puzzle is . . . who are the other six women? We would love to know their names and, if possible, the firms they worked for.

Please send your answers to Jo Buckton at jo.buckton@legalexecutives.org.nz by 10 September 2024.

We will report back in the Spring edition if we can solve the mystery as to the identity of these women. ■

The latest about New Landonline

New features recently introduced

Toitū Te Whenua Land Information New Zealand is on track to deliver the full suite of functionality into New Landonline by the end of March 2025.

Releases will continue to be delivered on an ongoing basis and users can expect to see more functionality added during the rest of this year and into early 2025.

Once all functionality has been migrated, the Legacy system will be switched off entirely, meaning it is important for Landonline users to become familiar with the new, web-based platform now.

Half of supported dealings are completed on new platform

It has been very positive to see an increasing uptake of New Landonline, with about 60% of supported dealings now being completed on the new platform (being sale and purchase, refinancing, simple estates, together with any discharges or withdrawals).

Some functions will switch off in late 2024

In September, LINZ plans to switch off the Certify & Sign, Release and Submit actions in Legacy. Users can already Certify & Sign, Release and Submit almost all dealings in New Landonline. Since 15 August, users can prepare image only instruments. With this release, Certify & Sign, Release and Submit will have full coverage in the new app. By switching these off in Legacy, it removes the need for us to maintain the features in two systems.



Andrea Watson is the Consulting Solicitor for Toitū Te Whenua Land Information New Zealand's Modernising Landonline programme.

New features

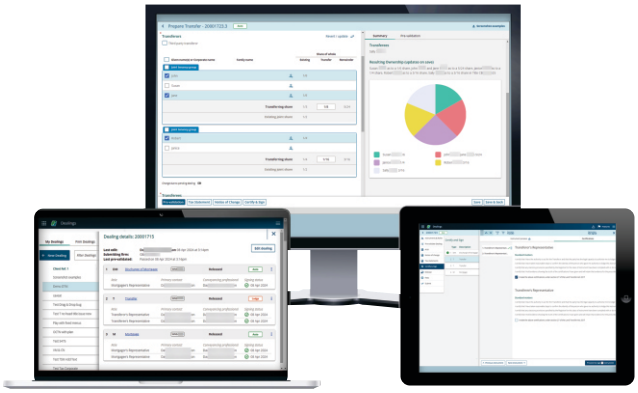
We have recently added the following features to New Landonline:

- Prepare any type of transmission, except for a lease, mortgage or other interest. However, Lease/Mortgage/Other mode is due to be released shortly.
- Prepare a transfer in Instrument mode (known as Lease/Mortgage/Other mode in Legacy Landonline).
- View and edit additional details for a transferor or mortgagor, such as an alias, suffix or the birth date of a minor.
- Use 'Change due to pending dealing' to edit registered owner details for transfers.
- Image only instruments
- We have updated the layout and navigation of the Certify & Sign page. Non-signers have read-only access.
- Multi-factor authentication (MFA) has been rolled out to all Landonline users. If you haven't already done so, the next time you log into a New Landonline service (Web Search or Dealings), you will be prompted to set this up.

The pace of the build is really ramping up now that the foundations have been laid, so keep your eye out for more releases soon, including image-only instruments, OTCNs, caveats and further spatial search features in New Landonline.

Users should look out for details of LINZ's proposal to shift to digitally visualised survey plans; these replace static survey plans. We are keen to get feedback over the next few months from customers and user representative groups.

The LINZ website (www.linz.govt.nz) has many helpful resources about New Landonline and it's a good place to go to find out more about our latest updates. We also encourage users to login and try New Landonline today to see what everyone is talking about. ■



New Landonline screens

Mutual wills and the challenges of enforcement

Andrew Johnstone of APEARS, Sydney, Australia



In a landmark decision delivered on 8 February 2024[2], Justice Gorton of the Trusts, Equity & Probate List of the Supreme Court of Victoria delivered a judgment heavily reliant on substantiating a decades-old oral agreement influencing the wills of a married couple.

[2] *Re Miglic* [2024] VSC 20

In *Re Miglic,* the plaintiffs successfully demonstrated the existence of a mutual wills agreement, leading to declarations that almost all (99%) of an estate, worth around A$13.5m, be held in trust for the plaintiffs. This case holds significance not only due to the rarity of mutual wills' cases, but also because the agreement in question was oral, made over 30 years ago and involved deceased parties. Consequently, *Re Miglic* serves as a valuable test of the principles guiding the court's assessment of evidence.

Background

In 1993, Kurt and Marilyn Miglic drafted wills with nearly identical provisions, leaving their estates to each other and eventually to Kurt's daughters (the plaintiffs) who were Marilyn's stepdaughters. Marilyn had no children of her own.

After Kurt died in 2007, Marilyn altered her will many times, favouring her nieces and nephew (the defendants). The plaintiffs claimed that Kurt and Marilyn had agreed in 1993 not to alter their wills without each other's consent, thus forming the crux of the legal dispute.

Principles of mutual wills

Proving the existence of a mutual wills agreement presents several challenges, as outlined in *Re Miglic*, including:

- Corresponding or 'mirror' wills do not necessarily imply a mutual wills agreement
- Making wills in a consistent pattern does not inherently demonstrate an intent to be bound regardless of future circumstances
- Establishing a mutual wills agreement requires clear and satisfactory evidence, imposing a heavy burden of proof, and
- Despite these challenges, the standard of proof remains that of the balance of probabilities.



Supreme Court of Victoria

Evaluation of oral agreements

This case also addressed the complexities of proving an oral agreement, especially when the parties involved have since died. Key considerations include:

- The reliance on hearsay evidence to establish prior representations
- Acknowledgment of the fallibility of memory over time
- The need to assess the substance rather than the verbatim recollection of conversations, and
- Evaluation of surrounding circumstances to corroborate oral agreements.

Court's findings

Ultimately, the court ruled in favour of the plaintiffs, finding sufficient evidence to establish the existence of the oral mutual wills' agreement. The plaintiffs' testimony, supported by additional witnesses, was deemed honest and reliable, despite minor inconsistencies.

Counterclaim and tracing

The defendants' counterclaim alleging separate trusts in the plaintiffs' stepmother's estate was rejected due to insufficient evidence of asset tracing beyond the initial capital sum.

Sets a precedent

Re Miglic sets a precedent for the meticulous assessment of evidence, particularly in cases involving oral agreements and mutual wills. The success of the plaintiffs underscores the court's commitment to thorough scrutiny and the importance of considering surrounding circumstances in evaluating agreements.

Additionally, the case highlights procedural aspects such as privilege waiver and solicitor's evidence, offering valuable insights for legal practitioners.

Re Miglic stands as a comprehensive study of evidentiary principles and their application in complex probate disputes, providing invaluable guidance for future legal proceedings.

Regards from Australia,
Andrew Johnstone
APEARS

APEARS

To contact Andrew, please email him at andrew@apears.com.au
His full contact details are on page 32.

In memoriam

Ivy Pack

Died 28 January 2024, aged 93 years.



Ivy and Alby Pack

Ivy Pack, one of the founding members of Canterbury Branch (as it then was) was famous (or perhaps infamous) for calling a spade a spade, or probably a shovel, and ran the office at Christchurch law firm Brassington & Co with an iron rod.

With her husband Alby, who she married in 1951, Ivy emigrated to New Zealand in 1959 to embrace wider opportunities, recounts her daughter Yve. Ivy immediately sought work in Christchurch and soon settled into a shorthand typist role at Brassington & Co – where she remained employed until she retired in 1993. Ivy's talents, and fierce loyalty and integrity, were quickly acknowledged; Alan Brassington promoted her to act as his assistant in what would now be viewed as a legal executive role, focusing on conveyancing and estates.

Relishing the greater responsibilities of working closely with Mr Brassington and with her love of learning, in 1975 Ivy completed the first course for legal executives and passed the Certificate of Attainment. She became an NZILE Fellow in 1976. While working full-time at Brassington & Co, Ivy studied at the University of Canterbury and completed a Certificate of Liberal Studies in 1981. She became an honorary life member of NZILE in 1993. The activities of what morphed into Canterbury Southern Districts Branch were close to her heart and, not long before her death, Ivy and Alby were frequent guests at branch events.

Ivy's character was no doubt formed from the hardships of the Depression and growing up during World War II in Whitstable, Kent. Ivy had always wanted to be a teacher, but with her family unable to afford higher education, Ivy went straight from school to work at the Whitstable Council as a shorthand typist. Marrying Alby in 1951, she continued to work, even after the birth of Yvonne, her only child.

Yve remembers her mother as an extremely strong and determined person with very fixed opinions - "her way or the highway!" Ivy's deep love for her husband Alby made them inseparable. Although they loved to travel, Ivy and Alby were happiest at the Lewis Pass bach that they built 60 years ago. Together, they relished forest walks and fishing (Ivy caught the biggest trout - 16lbs - in the nearby Boyle River) and they enjoyed bird watching. Ivy took a great deal of pleasure in her membership of SeniorNet Shirley and the NZ Labour Party, and was a longstanding volunteer at the Riccarton Police Station.

Ivy is survived by Alby to whom she was married for 72 years, daughter Yvonne, two grandchildren and six great-grandchildren. ■

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Continued on page 55 ...

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