ENVOY

LEGAL EXECUTIVES NEW ZEALAND

SPRING 2020



BRADIE CLAYDON'S WAY AHEAD

Smart saving and living without debt

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FROM THE PRESIDENT

Tēnā koutou katoa

This year has certainly been like no other and, as the battle with COVID continues, it is important that we all continue to keep safe and support each other. Please remember, we are all in this together and Legal Executives New Zealand is here to support you in any way it can.

Constitution

Over the course of this year we have undertaken a comprehensive review of the institute's constitution to ensure we comply with the anticipated requirements of the proposed new Incorporated Societies Act, support the rebranding of the institute, make provision for a board to support the management of the institute, incorporate a name for the institute in te reo, and update and streamline disciplinary and dispute resolution processes.

The amended draft constitution was emailed to all members for your consideration and comments. Thank you to those members who provided feedback; the final version will be voted on at the national AGM.

Occupation right agreements

We are continuing work to obtain amendments to the Retirement Villages Act 2003 and to the Retirement Villages (General) Regulations 2006. If we are successful, these amendments will allow Fellows of the institute to provide independent legal advice, and to witness and certify occupation right agreements.

In August, we asked members to speak with their employers to obtain letters of support for these proposed changes. Thank you to all of you who did this as we received close to 100 letters. We are now seeking the same support from the retirement village sector. We will keep you updated.

Kaiārahi

Our Kaiārahi service offers peer mentoring and support to all



members, whether you have questions or concerns regarding technical work matters, or personal wellbeing concerns. Experienced senior members are available to you as confidential mentors. I encourage you to use this service if you have matters you are concerned about; together we can support each other. Please refer to our website for further details.

Westpac – estates management

The New Zealand Law Society (NZLS) recently updated its website and changed some of the registry information available to the public. As a consequence of that update, Westpac has issues verifying law firms. They are now asking Registered Legal Executives for letters signed by lawyers before the bank will release estate funds to firms. We have spoken with the NZLS; it is now aware of the issue and will look at ways of reinstating the information that was previously available.

Branches

Please continue to support our branches by attending the seminars and social events that they organise. Each event takes time to arrange and is planned with you in mind. If you have a suggestion for a seminar topic or social event, please don't be shy about contacting someone on your branch committee; they would love to hear from you.



Necia Parker
PRESIDENT



Nicky Dreadon
Northland Branch President

Northland

I must say that 2020 has been an 'interesting' year so far.

Since returning to the office after the Level 4 lockdown, this year seems to be speeding by. It will be Christmas before we know it, and definitely time for taking a very well-deserved break.

The feedback I am getting from colleagues around Northland is that everyone is very busy in all areas of law. The property sector, in particular, is humming. With the Trusts Act 2019 coming into force on 30 January 2021, I imagine many of you will be keeping busy with reviewing trusts, providing advice on and assisting with compliance, and the follow-through work which may be generated by these reviews.

AGM
Our AGM was held on 20 October; details will be in the next issue.

End-of-year social event
As our mid-year function could not be held, our committee is looking forward to organising an awesome end of year event. Let's face it, we will all need a little down time and 'cheer' by the end of this year!

Last year's long lunch at the Plough & Feather in Kerikeri was a lot of fun, with great company, fabulous food and lots of Kerikeri sunshine — hopefully this year's event will be just as much fun.

I encourage all Northland Branch members to attend as it is always a very enjoyable and relaxing afternoon, and a great way to catch up with colleagues from around Northland; members' costs will be subsidised.

Education
We held a successful and informative seminar in Whangarei on 10 August presented by Jason Lovell of Kāinga Ora.

The committee is very proud that we managed to successfully livestream this seminar to members in Kerikeri. We will consider livestreaming our next seminar to more locations. If you are interested in organising a venue close to you for livestreaming, please let me know.

The presidents of the six LENZ branches had hoped to attend a training session at the national office in Auckland in early September. COVID restrictions on travel and numbers, however, made this too difficult and it was cancelled for this year. We hope to have a new date for this in early 2021.

We would love to have more Northland members involved on our committee. If you live outside Whangarei and are unable to attend meetings in person, we would be happy to arrange for you to attend remotely via Zoom if you would like to consider joining our team.





Pip Glasson
Auckland Waikato Branch President

Auckland Waikato

Hi from Auckland Waikato.

At time of writing, Auckland is back to COVID Level 1 after experiencing our second lockdown for the year. Hopefully, the arrival of spring will mean that COVID cases stay low and we won't have to go back into lockdown for a third time. Even in the second lockdown, however, I found that interactions with other legal executives were always positive, regardless of the additional pressures we were facing, and our resolve was steadfast.

On the second day of 'lockdown 2.0' our branch held its first webinar. The topic was the recent changes to the ADLS/REINZ Agreement for Sale and Purchase. This was well-attended as our first virtual event and positive feedback was received from our members. We're now reviewing the feedback and looking for opportunities for future webinars.

Our branch AGM was held on 5 October. I stepped down as branch president as I am looking at exciting new ventures in the New Year; however, I remain a friend of the committee. Michelle Way, one of our Waikato members, was elected as the new branch president. Michelle has been on the committee for many years and I congratulate her on her new role.

From all of us in Auckland Waikato we wish you well around the country.





Ally McEldowney
Bay of Plenty Gisborne Branch President

Bay of Plenty Gisborne

Many of you are probably wondering where the year has gone. Certainly, for me, with the lockdown, the months seem to have merged into one and winter has come and gone relatively quickly. Time to look forward to some warmer weather and longer days.

I hope you and your families are coping as best you can with the continued challenges faced with COVID. If you are struggling, please do reach out to those around you, and continue to be kind to one another.

Education
Our branch committee has decided to postpone hosting seminars this year.

Social events
Since the Winter edition of *Envoy* was published, our branch committee organised midwinter events across the region in Tauranga, Taupō, Whakatane, Gisborne and Rotorua which were well-patronised. I attended both the Tauranga and Whakatane luncheons; it was lovely to see so many members at the Tauranga event and to have the chance to meet and chat with our Whakatane members.

If COVID restrictions allow, we hope to hold end-of-year events throughout the region in November or December.

Branch AGM
Our branch AGM was held at the offices of O'Sullivan Clemens, Rotorua on Thursday, 22 October.

Branch committee
A big thank you to our branch committee members: Cathy Punter (Vice President/Taupō Social Convenor); Raewyn Miller (Secretary/Membership); Lorraine Kyle (Treasurer); Anne Hodge (Newsletter Editor); Grace Fox (Education Convenor); Debbie Boyd-Collins (Tauranga

Social Convenor); Sherrie Slappendel (Rotorua Social Convenor). Thank you also to our liaison members: Andrea Haycock (Whakatane Social Convenor) and Sue Cameron (Gisborne Social Convenor). The work, time, commitment and support of all these members is very much appreciated.



Sheryl Thornton
Wellington Central Districts Branch President

Wellington Central Districts

The redesign and rebranding for what is now Legal Executives New Zealand looks amazing; I'm sure you will all agree. Congratulations to all those involved in the process.

What was an 'interesting' year has now changed to 'crazy' for me. I have spoken with a number of colleagues around the country over the past few months who all say the same thing – the property market has gone nuts! There are large numbers of New Zealanders coming back from overseas with cash in their pockets, with most wanting to invest in the property market. Demand is high and supply is low, particularly in some regions of the country. Prices are holding or rising for existing stock with a trend toward new builds. Some developers can't keep up with the demand.

Whatever your new 'normal' is, I do hope you have been able to take some time out for yourself.

Social events and COVID
It has been difficult to organise social events while gathering numbers have been limited. In these COVID times, we are all continuing to be careful, with many sticking to their own bubbles. The COVID contact tracing app helps to keep track of where we have been at any given time. I suspect this will be our new normal for quite some time yet.

Committee meetings
Our branch continues to hold its monthly branch meetings via Microsoft Teams; this is working very well as the committee members are spread around the different regions. It is so nice to see them on-screen and to interact in this way, as pre-COVID our meetings were held by teleconference. The new audio-visual method is more cost-effective too!

CPD
Online webinars have become the way of the future. There has been an increase in the number of annual CPD hours required for Affiliates and Associates to complete their CPD. If you missed those changes, you can read about them on page 27. I continue to encourage you to keep your eye out for webinars which are relevant to your practice.

Branch AGM
We held our branch AGM on Wednesday, 14 October at Buddle Findlay's Wellington office. Thank you to the members who attended. It was my last meeting as president of the branch — I have resigned from the committee as I will be leaving legal executive employment at the end of the year to pursue other interests. I have greatly enjoyed my years on the committee and the opportunity to support members in their careers.

Nicole Mangin is the new branch president and I wish her and the committee all the very best; they're a great group of people. Please support them by attending the events that they organise.



Robyn Dewson
Nelson Marlborough Branch President

Nelson Marlborough

Spring is here and we are enjoying the drier weather. Hopefully we will have another stunning summer!

Continued on page 6...

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Lunches were held in August for members in Nelson and Richmond, and were enjoyed by all who attended. Thank you for your company.

Our committee would like to hold another seminar soon and we are open to topic suggestions. Even though we are moving quickly toward Christmas, if you have a suggestion, we would love to hear how we can enhance your CPD.

The branch AGM is scheduled to take place on Thursday, 29 October; we invite all our members to attend. Then we move into the 'silly season' of Christmas and New Year — where has the year gone? We will hold gatherings to mark the end of 2020 in both Nelson and Blenheim, and we look forward to seeing everyone at one or other of these events.

As always, if you would like to assist our branch committee, please contact me or one of our committee members.

Enjoy the warmth of spring!!



Jo Langton
Canterbury Southern Districts Branch President

Canterbury Southern Districts

Welcome to the Spring edition of *Envoy*.

The branch committee members and I are thrilled to see that spring is here; hopefully, as a nation, we are through the worst of the COVID lockdowns. My thoughts have been with Auckland members and the wider community; it is good news that the cases in Auckland were contained so effectively.



It has been nice to be in Level 1 here in Christchurch and to have some normality. We held our midwinter dinner on 20 August at The Dish restaurant. Whilst it was seated table service, it was lovely to meet members and to have a catch-up over a drink and a meal.

Other regions in our branch also held their midwinter functions and, from the reports received from the area representatives, they all had a good turnout, which is great.

Speaking with the Christchurch crew and all our area representatives at the last branch committee meeting, everyone seems to be extremely busy with conveyancing, whether residential or commercial. The consensus was that it may only slow down if there is a short supply of properties on the market.

Seminars

Our last seminar, on subdivisions, was held in October. Paul Coughlan, a lawyer from Christchurch firm, Saunders & Co, was the presenter. It was very well attended, with more than 160 members present, either in person or via livestreaming. The next seminar is planned for February 2021.

Social events

The latest social event for Christchurch members was a 'Paint 'n Sip' on 15 October. I encourage branch members to keep an eye out for invitations to social events in your region, and to support your local area representatives when they arrange these events. Our area representatives do a great job and your support shows their efforts are valued.

As always, branch events are a great way to meet people and to put faces to names; and remember, they are always subsidised for our members.

Don't forget our email address has been changed to reflect our new branch name; it is now canterburysouthern@nzile.org.nz

I take this opportunity to wish everyone well for the rest of spring, and to please stay safe. Before we know it, it will be Christmas, and hopefully all of New Zealand will be able to enjoy a safe and enjoyable Christmas summer break! ■



New residential tenancy laws being phased in

Changes to tenancy laws are being phased in by way of three steps, after the Residential Tenancies Amendment Act 2020 was passed and took effect on 12 August 2020.

Associate Minister of Housing (Public Housing), the Hon Kris Faafoi, said that the Residential Tenancies Act 1986 was outdated. The new law modernised rental legislation and aligned it with the present-day realities of the 600,000 households that rent in New Zealand.

"More Kiwis than ever are renting now, including families with young children, as well as older people, and it's important that there are appropriate protections in place for them. The Government considers that every New Zealander should have a safe, warm, dry home to call their own — including if they are renting.

"Renters should be able to put down roots in their community and not face the stress of continually having to find a new home."

Mr Faafoi said that the reforms also came at a time when many New Zealanders, including tenants, faced financial challenges due to the impacts of COVID.

Phase One: Rent increases are limited

The first part of the new law came into force on 12 August, limiting rent increases to once every 12 months. The law previously provided that rents could be raised every 180 days. COVID resulted in a freeze on rent increases until 25 September 2020.

Phase Two: Changes taking effect in February 2021

The second — and largest — tranche of law changes takes effect on 11 February 2021. From that date, landlords will not be able to end periodic tenancies without providing 90 days' notice. Landlords will also be required to adhere to a list of specific reasons for ending tenancies — they will not be permitted to terminate tenants' leases without good cause.

All fixed-term tenancy agreements will convert to periodic tenancies at the end of the fixed term unless the parties agree otherwise, the tenant gives 28 days' notice, or the landlord gives notice in accordance with the termination grounds for periodic tenancies.

Tenants will, in future, be able to ask to make changes to properties. As long as the alterations are minor, landlords must agree to them. Property owners will be required to respond to tenants' requests within 21 days.

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Rental properties will no longer be able to be advertised without a rental price being listed. Landlords will not be permitted to invite or encourage tenants to bid on rentals and offer to pay more than the advertised rent.

From next year, renters will be able to ask for fibre broadband to be installed. Unless specific exemptions apply, property owners will be required to grant such requests if fibre can be installed at no cost to them. The exemptions cover situations in which:

- Fibre installation would materially compromise the weathertightness, character or structural integrity of the building
- Installation would breach an obligation such as a body corporate rule, or
- The landlord intends to begin extensive renovations within 90 days and fibre installation would hamper that work.

Another aspect of the new law will be the ability to make suppression orders removing names and identifying details from published Tenancy Tribunal decisions if a party who has applied for a suppression order is wholly or substantially successful, it is in the interests of the parties or in the public interest.

Landlords will, in future, be banned from unreasonably declining requests to assign tenancies. All requests will have to be considered. Any clause in a residential tenancy agreement prohibiting assignment will be unenforceable.

Failure to provide a written tenancy agreement will be an unlawful act under the new law. Property owners will need to retain and provide new types of information.

Enforcement of tenancy laws will be stepped up under the new regime, with the Ministry of Business, Innovation and Employment (MBIE) able to take tougher action against those who fail to comply with their obligations. The Tenancy Tribunal will be able to hear cases and make awards of up to $100,000 — a doubling of the current $50,000 limit.

More Kiwis than ever are renting now, including families with young children, as well as older people, and it's important that there are appropriate protections in place for them.



Phase Three: Changes from 11 August 2021

The final part of the new legislation will apply from 11 August 2021. It provides that tenants who experience family violence will be able to withdraw from a fixed term or periodic tenancy without financial penalty by giving two days' notice and providing evidence of the family violence. If the victim is the only tenant, the tenancy will end.

Landlords will be able to issue a 14-day notice to terminate tenancies if the tenant has assaulted the landlord, the owner, a member of their family, or the landlord's agent, and the police have laid a charge against the tenant in respect of the assault.

Healthy homes standards coming into force 2021-24

New healthy homes standards that became law in July 2019 will also gradually come into force between 1 July 2021 and 1 July 2024. Private rentals will be required to comply with the new standards when new or renewed tenancies are entered into after 1 July 2021, with all private rentals being compliant by 1 July 2024.

All boarding houses must comply by 1 July 2021 and all houses rented by Kāinga Ora and registered Community Housing Providers must adhere to the standards from 1 July 2023.

The standards cover heating, insulation, ventilation, moisture ingress, drainage and draught stopping. They are designed to address the health problems suffered by tenants living in damp and mouldy homes. Research shows that New Zealand's rental stock is of poorer quality than owner-occupied dwellings, with tenants in substandard homes suffering from negative health outcomes, including asthma and cardiovascular conditions.

The heating standard requires landlords to provide one or more fixed heaters that can directly heat the main living room, meeting the minimum heating capacity for the room. The insulation standard builds on the requirement since 1 July 2019 for ceiling and underfloor insulation in all rental homes, with different levels applying to different parts of New Zealand. ■

CASES UPDATE



Estates

Judge criticises failure to assist siblings in reaching estate settlement

A High Court judge has expressed regret that a woman's heirs were not assisted to reach a mutually acceptable middle ground in dealing with her estate, rather than resorting to court proceedings over a $40,000 inheritance.

Stevens v Stevens [2020] NZHC 1136 involved an application brought by Vickie Stevens to have her brother, Wayne Stevens, removed as executor of the estate of their mother, Patricia Hantler. Mrs Hantler died in 2017 and probate was granted to Wayne on 20 September 2017. Wayne wrote to each of his siblings requesting that they sign a consent to a speedy winding up of their mother's estate.

Vickie declined to sign the document and disagreements subsequently arose between her and Wayne over the appropriateness of expenditure Vickie incurred, at her mother's expense, while attending to her mother's needs while the latter was in a care facility suffering from dementia.

Lawyers produced a statement of assets and liabilities for the estate and advised that they had no further instructions and that Wayne intended to carry out the estate administration on his own. Vickie said she understood that Mrs Hantler's two bank accounts had been closed and the full proceeds had been transferred to an account in Wayne's name.

Wayne paid himself and one sister their shares of the residue, but neither Vickie nor two other siblings received any funds. Vickie's lawyers wrote to Wayne in March, June and August 2018 seeking a statement as to the administration of the estate. They received no response until August, when Wayne emailed them asking for receipts for items purchased by Vickie at her mother's expense.

Vickie's lawyers responded advising that the receipts had previously been provided, and forwarded them again. Wayne still did not provide accounts of the estate's assets. In October 2018, Vickie applied to the court for an order requiring Wayne, as executor, to file an inventory and an account of the estate. Orders to that effect were made in February 2019 and served on Wayne in March.

Wayne did not comply with the orders and, in June 2019, Vickie applied to have him removed as executor. Wayne took no formal steps in response but filed an informal, handwritten affidavit stating that until he was satisfied as to Vickie's spending in relation to their mother, he could not carry out his duties as executor.

Justice Dobson said that any concerns Wayne might have about inappropriate expenditure by Vickie during their mother's lifetime could have no material impact on the net assets available for distribution. Nor could such issues justify non-compliance by Wayne with his obligation to account to his siblings for the estate assets.

Justice Dobson said that the amount at issue did not warrant formal court proceedings but emotional concerns about the appropriateness of the administration of a parent's estate were understandable. An

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order removing Wayne as executor was made.

Daughter fails in attempt to bring dispute over father's estate to Supreme Court

In *Rosalie May Yozin v New Zealand Guardian Trust Company Ltd* [2020] NZSC 63, Rosalie Yozin was one of four siblings each entitled to a 25% share of the residue of their father's estate. Their parents, Milan and Zorka Yozin, had bought a four-hectare block of land in Swanson, Auckland in 1937.

Milan's will bequeathed £1,000 and household furniture and effects to his wife, with the residue of his estate to be vested in his trustees to divide equally among his children on Zorka's death or remarriage. Clause 7 of the will gave the trustees the discretion to postpone the sale of trust property, to lease or farm the land, or to apply any income or raise capital for the maintenance or education of a minor.

Milan died in 1975 and Zorka continued living in the family home on the land with three of her children. Siblings Rosalie and Maurice bought Lot 3 after Milan's death.

By the time Zorka died in 2014, only Rosalie remained at home. She had ceased full-time employment and had taken over management of the land from her brother. She also cared for her mother for several years before her death.

Rosalie continued living in the family home after her mother's death. She did not pay rent but paid the rates and other expenses. Differences arose between the siblings as to whether Rosalie and her sister, Helen, could acquire Lots 1 and 2 and Part Lot 4, or whether all the land should be sold and the proceeds be divided equally.

Rosalie and Helen sought High Court orders that Lots 1 and 2 be transferred to Rosalie and Part Lot 4 be transferred to Rosalie and Helen, with their shares in the estate being modified to account for the value of the land they received. Justice Peters held that the sisters were not 'interested' in the land in terms of section 14(6B) of the Trustee Act 1956, as they were not entitled to require its conveyance to them under their father's will. Her Honour also held that partition would not be advantageous to the beneficiaries in terms of section 14(6B).

Section 14 gives trustees general powers to sell, exchange, partition or lease property, while section 14(6B) provides that a court may order partition of the real estate of a deceased person if it would be advantageous to interested parties.

On appeal, the Court of Appeal held that section 14(6B) applied only to applicants with legal or equitable interests in land. It did not apply to residuary beneficiaries as they generally had no right to call for the conveyance of land to them under the terms of a will. Rosalie and Helen were residuary beneficiaries and the trustees were, ultimately, required to sell the land.

The appeal was dismissed and Rosalie then sought leave to appeal to the Supreme Court. The leave application was out of time and the court refused to grant an extension of time, holding that there had been considerable delay and the proposed appeal did not raise a matter of general or public importance.

Property

High Court grants order for sale of property after settlement not completed

Chandler Properties Ltd v Yu [2020] NZHC 753 involved a section owned by Chandler Properties Ltd on Potters Hill Drive in Queenstown.

Chandler Properties and Hongying Yu entered into an agreement for the latter to purchase the land and settlement was due in December 2018. The parties deferred settlement under February 2019 on the condition that the defendant make a part-payment of the purchase price. The defendant failed to pay the money and refused to settle, despite Chandler Properties issuing a settlement notice.

Chandler Properties brought proceedings seeking specific performance of the agreement for sale and purchase and obtained an order by way of summary judgment against the defendant for specific performance of the defendant's obligation to purchase the section.



The defendant failed to comply and Chandler Properties then obtained a charging order against the property and subsequently applied for a sale order. However, the plaintiff's lawyer had stated in an affidavit that Chandler Properties had cancelled the agreement. The registry accordingly sought clarification from Chandler Properties as to the legal basis on which a sale order could be sought when it appeared that notice of cancellation had been given.

The plaintiff's lawyer filed a further affidavit explaining that the notice of cancellation was ineffective as it had not been properly served. However, the Registrar advised that the enforcement process would not be undertaken without further court orders.

Chandler Properties sought additional orders from the court declaring that the agreement remained on foot and that summary judgment could be enforced by way of a sale order in respect of a separate unencumbered property owned by the defendant at Sunset Lane in Queenstown. The defendant took no steps in relation to the further orders sought.

The High Court held that, as the agreement remained on foot, it was open to Chandler Properties to enforce the summary judgment order. Orders were made that the agreement remained on foot and that the summary judgment could be enforced by way of a sale order. ■



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CHANGING THE CULTURE OF A PROFESSION



Bradie Claydon's way ahead

Smart saving and living without debt

Gallie Miles' Registered Legal Executive, Bradie Claydon, has several strings to her bow.

Bradie has been working at the Te Awamutu firm since 2014, and has recently been promoted to Associate.

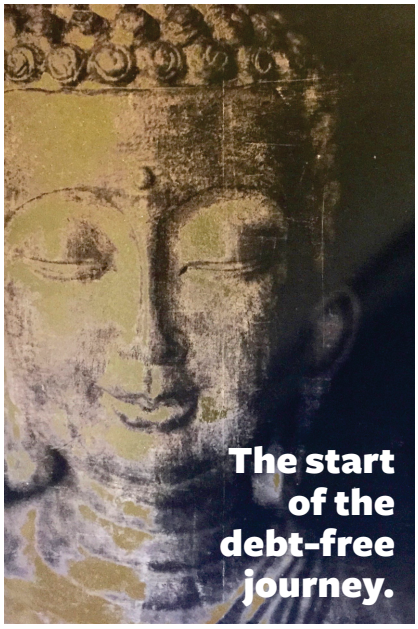
In the public arena, however, Bradie is also possibly better known for her *Kiwigirlonabudget* blog and media appearances promoting smart saving and living without debt.

She says it all started nearly five years ago when she was dealing with what she calls "a few extra events in my life", including the death of her sister from cancer.

Face your debts

"It was a bit of a year really. We were visiting New Plymouth and I was casually paying for a new artwork purchase [see the painting below] with my credit card and my husband, Paul, said, 'How are you going to pay for that?' The following weekend, we went to the movie, 'The Big Short', that is set after the 2007 Global Financial Crisis and people were losing their homes because they were unable to service their high levels of debt. The lightbulb moment came when I realised Paul and I weren't even repaying $1 of our debt - that included a mortgage on a rental property – we were only paying the interest! There and then we added up our debt, and it was a whopping $566,308! It was literally a shocking moment.

"I was 45 years old at the time, and immediately decided that we were going to be completely debt-free in five years — by the time I turned 50," says Bradie. The good news is



that Bradie and Paul cleared all their debts in 39 months — just over three years.

Make a plan

Bradie says it was a rugged few years, but their new lives became more manageable as they got used to, and actually enjoyed, a somewhat slimmer lifestyle. She and Paul (Bradie calls him 'Mr Frugal') put together a plan and kept to it rigorously.

They:

1. Sold their rental property
2. Downsized their car for a less expensive, and cheaper-to-run, model
3. Paul worked an increased number of shifts
4. Sold possessions they didn't actually need
5. Cut back their personal spending from the *wants* to the *needs*
6. Bought from op shops when they *needed* something
7. Used vouchers to make their dollars stretch further
8. Wrote a weekly menu plan so there was no wastage, bought cheaper cuts of meat and ate only seasonable fruit and vegetables
9. Used cash as much as possible, and
10. Decided to live a simple life of enjoying their friends and family and the environment they lived in rather than cluttering it up with 'stuff.'

Bradie says there were no quick wins and it was challenging mentally to make such significant changes to their lives, but after a year they were starting to make real progress.

"It became quite heady as we realised we were doing so well. Then I decided I could share what we had learned and other people could learn from what we had achieved — so the blog, *Kiwigirlonabudget,* was born.

"The media side really grew. TV1's Tim Wilson interviewed me for 'Seven Sharp' and Frances Cook from NZME featured us in her podcast called 'Cooking the Books.' A real highlight was being featured on a radio show in Tennessee hosted by debt-free icon, Dave Ramsey, on his programme 'The Dave Ramsey Show'. We were the first Kiwis to be his guests, so we felt that was something special," says Bradie.

Now that Bradie and Paul have eliminated their debt, they are now saving hard and starting to invest — in shares in particular. "It was addictive watching our debt reducing, and now we're fixated on watching our savings and investments grow! I now share my insights and learning on Instagram and have more than 15,000 followers."

The day job

In all the time Bradie and Paul were reducing their family's debt, Bradie was busy in her day job. "I love being a Registered Legal Executive and have worked in the legal profession for 20 years," she says.

"I started my career working for a chartered accountant in Te Awamutu, and there was a small law practice behind the CA's office. Occasionally I was asked to witness wills and other documents, and thought it looked very interesting and then realised it was 'my thing.' My children were small at the time so I studied part-time for my legal executive qualification, and the lawyer-behind-the-CA then employed me. I became a Registered Legal Executive in 2002."

Bradie very much enjoys her career at Gallie Miles. "I get particular satisfaction from settlements and working with clients to help achieve their goal of owning property. Settlement day is very special for them, and it's great to share their excitement.



Bradie and Paul celebrating being debt-free.

"In recent years, I've been doing more work on subdivisions and rural conveyancing. There are a lot more components to these than straight residential settlements and I enjoy the challenge of it all coming together on the day. It's very rewarding, particularly as it's usually a long process."

Earlier this year Gallie Miles merged with Hamilton lawyers Bluett Law. Bradie now works with director Bryce Bluett in the Hamilton office three days a week, one day in Te Awamutu and on Mondays she works from home.

The value of LENZ

Bradie says she very much values her membership of Legal Executives New Zealand. "It's very positive and affirming being part of a like-minded professional community. It's good to see the recognition of the role that Registered Legal Executives play in a law firm, and in the wider profession."

What is next?

Bradie is the type of person who is always looking for the next challenge. "I want to see our savings and investments continue to grow so that Paul and I have a secure nest egg for our future, without incurring any debt. On a very personal level I want to complete the Tongariro Crossing, and also travel overseas again – COVID permitting." ■



Right-of-way case underlines importance of thorough title searches

The importance of legal executives carrying out thorough title searches is highlighted by a Court of Appeal decision relating to access to land near Auckland's Southern Motorway. The judgment underlines the need for searches to include not only the relevant title, but also those of adjacent properties to check easements and covenants.

The case of *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd* [2020] NZCA 309 involved the legal status of a driveway which provided access from Redoubt Road in Manukau, Auckland, to three adjoining properties. The properties were owned by the appellant, Infinity Enterprises Ltd; the respondent, Kinara Trustee Ltd; and Lakewood Plaza Ltd, with the latter not being a party to the proceedings.

Origins were 35 years ago

The origins of the case dated back 35 years when Hawkins Properties Ltd owned a larger parcel of land between the Southern Motorway to the east and Great South Road to the west. Manukau City Council approved the subdivision of the land by Hawkins into 15 parcels, with the intention that there be no access from Redoubt Road. The council's approval was accordingly conditional on no entry to or egress from Lots 1 and 4 to the Redoubt Road frontage, and no vehicle entry to Lots 1, 2 and 15 from the northbound side of Great South Road.

Hawkins later reconsidered the lack of access and offered to gift a strip

of land to the council in exchange for permission to create a single point of access off Redoubt Road onto the subdivision.

The council accepted that offer and the deposited plan showed a proposed right-of-way. Through an oversight by Hawkins' surveyor, the deposited plan recorded the right-of-way in a Schedule of Proposed Easements, indicating that it was not mandatory, notwithstanding the fact that the council had required provision to be made for the right-of-way to be reserved.

The plan was lodged and new titles were issued in 1987. The titles to 726 Great South Road (Lot 1) and 12 Lakewood Court (Lot 4) carried no memorials as to any appurtenant right-of-way, but both documents attached the deposited plan showing the proposed right-of-way.

The properties were subsequently transferred to Fletcher Merchants and 726 Great South Road was then sold to Robert Niven. At that point, the properties were in separate ownership for the first time and a legal easement could have been registered over 12 Lakewood Court in favour of 726 Great South Road. However, that was not done.

Properties changed hands a number of times

The properties were then bought and sold on further occasions with 726 Great South Road being subdivided to create 8 Lakewood Court. The property at 12 Lakewood Court was eventually owned by Infinity Enterprises Ltd and 726 Great South Road by Kinara Trustee Ltd. The driveway providing access from Redoubt Road to the two properties and to 8 Lakewood Court had existed for a considerable time, with 726 Great South Road having the benefit, pursuant to a registered easement, of a legal right-of-way entitling it to use the part of the driveway across 8 Lakewood Court. However, neither 726 Great South Road nor 8 Lakewood Court had the benefit of a legal right-of-way permitting them to use the part of the driveway passing over 12 Lakewood Court. A dispute arose in 2017 when Infinity declined Kinara's request to allow the registration of such a right-of-way.

Court proceedings begin

Kinara commenced proceedings in the High Court, which held that the doctrine of equitable estoppel meant that it would be unconscionable for Infinity to deny Kinara the use of the driveway where it crossed 12 Lakewood Court. Justice Duffy ordered Infinity to register a legal right-of-way in favour of 726 Great South Road.

Infinity appealed to the Court of Appeal. In the High Court, Kinara had also argued that it was entitled to a legal right-of-way based both on the existence of an equitable right-of-way in favour of 726 Great South Road over 12 Lakewood Court at the time Infinity acquired that property, and on Land Transfer Act 1952 fraud by Infinity at that time or subsequently. The High Court dismissed that claim and Kinara cross-appealed that finding.

Court of Appeal

The Court of Appeal judgment was delivered by Justice Clifford. His Honour observed that the protection that Land Transfer Acts provided to registered proprietors — in this case, Infinity — against claims based on unregistered interests — Kinara's claimed right-of-way — was central to New Zealand's system of land ownership. The protection of indefeasibility was established by sections 62 and 182 of the Land Transfer Act 1952, which was the relevant statute as the issues related to the period prior to the taking effect of the Land Transfer Act 2017.

However, Justice Clifford said that there were key exceptions to indefeasibility — including fraud and claims in personam. Kinara argued that Infinity's fraud was evidenced by what Infinity knew of the legal basis of the driveway and its use when it acquired 12 Lakewood in 2007 and by what it did afterwards, in particular, allowing Kinara to continue using the driveway and to redevelop 726 Great South Road on the basis of its claimed entitlement to that ongoing use.

Kinara also asserted that the in personam exception applied as Infinity had effectively represented to it, after it acquired title to 12 Lakewood Court, that Kinara was entitled to use the driveway. In personam claims are based on the conduct of a registered proprietor and must comprise a recognised cause of action, involve unconscionable conduct by the current registered proprietor, and not be inconsistent with the objects of the Torrens system.

Kinara said that it had acted on Infinity's representation, including in the way it redeveloped 726 Great South Road, and it would be unconscionable for Infinity to refuse to recognise that entitlement.

The Court of Appeal held that there was no knowledge evidencing fraud. Accordingly, even if an equitable easement had been created in 1989 and survived until Infinity took title, the protection of indefeasibility meant that it could not be enforced by Kinara.

Justice Clifford said that the next issue was whether Kinara had constructive knowledge that it had no legal right-of-way over 12 Lakewood Court. The Court of

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Appeal said that the combined effect of sections 62 and 182 of the Land Transfer Act 1952 was to protect a registered proprietor who, under the general law, would have been vulnerable to interests by which he or she could have been bound. The land register was 'notice to the world' of the facts it contained. When searching the title to land to which an easement or other right was appurtenant, it was necessary to search the record of title to the servient land to make sure that the easement or other right had been registered against that title.

On that basis, Kinara had constructive knowledge as to the absence of a legal right from the title to 726 Great South Road, as no right-of-way over 12 Lakewood Court was registered as an appurtenance. Further, if Kinara had searched the title to 12 Lakewood Court it would have found that no easement was registered in favour of 726 Great South Road.

That constructive knowledge precluded Kinara's claim for an estoppel by silence that would have required Infinity to speak up about Kinara's mistaken assumption. Infinity's appeal would accordingly be allowed.

The Court of Appeal went on to state that, in case it was wrong on that point, it did not in any event consider that a reasonable person would expect Infinity, acting honestly and reasonably, to bring to Kinara's attention that fact that the proposed right-of-way had never been registered. Infinity had not been under a duty to speak up and its failure to do so would not provide the basis for an estoppel as sought by Kinara.

The appeal was allowed and the cross-appeal was dismissed. ■

Legal executives should complete preparations for new trust law taking effect in late January

The Trusts Act 2019 will come into force on 30 January 2021. Legal executives and lawyers should have advised clients months ago of the new provisions and the need to review documents and ensure that trustees are familiar with their more specific obligations.

The 2019 legislation replaces the outdated Trustee Act 1956 and the Perpetuities Act 1964. It will apply to almost all existing trusts, as well as to new trusts, and aims to strengthen the position of beneficiaries and to make it easier to hold trustees to account.

New key principles

Section 4 of the new law requires every person or court acting under the legislation to have regard to two key principles. These are that:

1. Trusts should be administered in ways that are consistent with their terms and objectives, and
2. Administration should avoid unnecessary cost and complexity.

Mandatory and default trustee duties

The new legislation formalises the duties of trustees, enhancing their obligations and requiring them to be familiar with their duties.

Mandatory trustee duties will include:

- Knowing the terms of the trust
- Exercising powers for a proper purpose
- Acting honestly and in good faith and in accordance with the trust's terms, and
- Acting for the benefit of beneficiaries or to further the permitted purposes of the trust.

Default trustee obligations will include:

- Duties to invest prudently
- Not making a profit from being a trustee, and
- Avoiding conflicts of interest.

Beneficiaries must be provided with trust information

The new law requires trustees, at a minimum, to provide beneficiaries with basic trust information as early as possible. This should preferably be done without the need for beneficiaries to request information. Trustees will also need to keep beneficiaries informed on an ongoing basis about administration of the trust.

The 2019 legislation reduces the age of majority from 20 to 18. The age of majority is the default age at which someone can inherit if no specific age is stated. The new Act also

extends the maximum period of a trust from 80 to 125 years. That will be the default maximum span of a trust, unless the deed specifies another length of time.

Prepare

Legal executives should check that clients are aware of the new law and are taking steps to ensure compliance.

Settlors should have used this year to review their affairs and reconsider their rationales for establishing trusts, and to ascertain whether the trust is still required and what changes might be needed.

Trustees should have familiarised themselves with their enhanced duties, while beneficiaries should expect to begin receiving information about trusts by or before 30 January 2021. ■

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Public Works Act: Much wider consideration of land offers back has been mandated by Court of Appeal

A Court of Appeal decision has expanded the scope of those to whom Land Information New Zealand (LINZ) must consider offering back compulsorily-acquired land that is no longer needed for public works. The judgment means that, in future, it will no longer be enough for LINZ to offer land back only to the legal owner at the time of acquisition.

Section 40 of the Public Works Act 1981 requires land acquired for public works but no longer needed for that purpose to be offered back to the original owner or successor. Section 40 had no equivalent in the 1928 legislation which was the forerunner to the current statute. It was included in the 1981 law to strengthen the rights of property owners. However, many years might elapse between the time land is acquired and the decision that it is no longer needed for public works, and the original owner might no longer exist.

The Court of Appeal decision examined how broadly LINZ must enquire as to others with potential interests in repurchasing the land.

Background

In *Aztek Ltd v The Attorney-General* [2020] NZCA 249, land located in Waterview, Auckland, between Great North Road and Oakley Creek had been acquired by Tresta Prujean and her partner, Mr Cull, in the 1990s. The pair obtained resource consents for the land to be subdivided and developed for residential purposes. A staged development was envisaged but, after the first stage had been completed, there were financial difficulties and the remaining land was the subject of a mortgagee sale in 2001.

Ms Prujean and Mr Cull were then able to buy back much of the land and proceed with the development. Aztek Ltd was formed as the corporate entity by which the land would be owned and developed.

The New Zealand Transport Agency (NZTA) was, at the time, planning a motorway extension, but was uncertain as to what the exact route would be. The landowners contacted the NZTA and, in November 2003, asked it to consider acquisition of their land.

The Crown subsequently acquired the land from Aztek Ltd for roadworks under an agreement dated 29 August 2005. Aztek Ltd ceased to exist on 31 March 2009 when it was removed from the Register of Companies as a result of its failure to file annual returns.

On 3 November 2010, the NZTA determined that it no longer needed the land for the roadworks.

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On 21 February 2011, a delegate of the Chief Executive of LINZ accepted a recommendation that the land be exempted from offer back to the former owners or their successors under section 40(2)(a).

No successor was defined

The reason for the recommendation was that Aztec Ltd had been struck off and no change of name or amalgamation of the company had been recorded, and there was no successor as defined by section 40(5) of the Act. A report about the land said that this was sufficient justification to recommend an exemption from offer back on the grounds that it was impractical under section 40(2)(a).

Ms Prujean had been the company's sole director and shareholder and it was not considered that she was a person interested in the possibility of the land being offered back. She was not regarded as being prejudicially affected and was not contacted.

Aztec was restored to the Companies Register on 21 August 2015 and it and Ms Prujean issued High Court proceedings challenging the LINZ Chief Executive's decision that it was impractical to offer the land back. They sought declarations that the Attorney-General should offer to sell the land to them and that the price should be the market value of the land at the date it was decided that it was not required for the roading work.

Court refuses to grant declaration

The High Court refused to grant the orders. Justice Muir said that, if the land had been owned by Ms Prujean in her personal capacity, it was highly likely that the Crown would have been obliged to offer it back to her in 2011. The High Court said, however, that the obligation to offer back arose at a single fixed point in time and it was only then that the assessment of whether it would be impracticable, unreasonable or unfair to make an offer back must be made.

Justice Muir said that section 40(2) was a prerequisite to the 'endeavour to sell' obligation in section 40(1). Ms Prujean's interest in the land as a third party — Aztec's former sole director and shareholder — was too indirect and giving weight to it would be contrary to the principles of incorporation and limited liability.

His Honour concluded that recognising a claim by Ms Prujean would create too onerous an obligation to identify and notify many different classes of potential claimants who might qualify for a section 40 offer by taking a legal step — for example, those with Family Protection Act 1955 claims or paternity claims — as well as creditors of liquidated companies.

Further, since the decision not to offer back, tangata whenua rights and corresponding Crown obligations had accrued, and that would weigh against the exercise of the discretion in favour of Aztec.

Appeal

Aztec and Ms Prujean appealed to the Court of Appeal, arguing that endeavours to sell the land under section 40(1) must be reasonable. Where land had been acquired from a company that had subsequently been struck off the register, there was an obligation to consider whether there were persons who might wish to have it reinstated.

The Court of Appeal granted the appeal, referring to the right of the previous owner to repurchase land under the Act as the expression of a strong legislative policy to preserve the rights of an owner subject only to the continuing needs of the state.

Delivering the Court of Appeal's judgment, Justice Cooper said that the Chief Executive of LINZ should have made enquiries to find out who Aztec's shareholders were and to advise them of the possibility of an offer back if the company was restored to the register. That would have led to Ms Prujean procuring the restoration of Aztec, and it would then have been both reasonable and practicable to offer the land back to the company.

The Court of Appeal rejected the view that the lack of any personal or familial connection with the land should prevent an offer back from being made to a party or successor from whom land had been taken.

The legislation did not intend to distinguish between natural persons and bodies corporate.

The court ordered that the Chief Executive's decision to exempt the land from the requirement to offer back under section 40 was to be set aside and was to be reconsidered in accordance with the judgment.

Broader enquiries now needed when offering back land

The decision means that, in future, the Chief Executive of LINZ will have to make broader enquiries to ascertain to whom land no longer needed for public works must be offered back. It will be insufficient only to offer back to the legal owner at the time of acquisition. ■



Homeowners win court battles over Canterbury earthquakes' insurance cover

Canterbury property owners still battling a decade on to recover from damage and financial loss caused by the 2010 and 2011 earthquakes have won two victories from the Court of Appeal in proceedings relating to insurance cover.

First case: seeking damages for misleading and deceptive conduct

Southern Response Earthquake Services Ltd v Dodds [2020] NZCA 395 involved the Court of Appeal almost completely confirming a High Court decision in favour of Alison and Karl Dodds. The couple's home, which was insured by Southern Response Earthquake Services Ltd, was damaged beyond repair in the earthquakes.

The Dodds selected the 'Buy Another House' option under their policy, meaning that they would receive the cost of purchasing a new dwelling, capped at the amount it would require to rebuild their damaged home on its original site. The couple signed up to a settlement agreement after receiving a report showing that the cost of rebuilding their home would be just under $900,000.

Subsequently, the Dodds discovered that a second report had been provided to Southern Response, showing that the total cost of rebuilding their home would be almost $1.2 million. The pair brought High Court proceedings seeking damages for misleading and deceptive conduct under section 43 of the Fair Trading Act 1986, and misrepresentation under section 35 of the Contract and Commercial Law Act 2017.

The High Court awarded the couple damages of $205,000, accepting the pair's claims under the Fair Trading Act and the Contract and Commercial Law Act but rejecting their claim for general damages for inconvenience and stress. Southern Response appealed to the Court of Appeal in relation to the findings of misleading conduct and misrepresentation, and the Dodds cross-appealed over the general damages.

The Court of Appeal upheld the High Court finding that Southern Response had made false claims as to the cost of rebuilding the Dodds' home and had induced them to enter into the settlement agreement by an incorrect statement about their policy entitlement. The court

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also ruled that Southern Response had engaged in misleading and deceptive conduct by making the misrepresentations, and had thereby caused the loss incurred by the Dodds as a result of signing the settlement agreement.

Although the usual approach to calculate damages under the Fair Trading Act was the tort measure of damages and the accepted calculation under the Contract and Commercial Law Act related to the contractual measure of damages, the appropriate sum in this case was the difference between the Dodds' proper entitlement figure and the sum they had actually received.

The Court of Appeal confirmed the High Court's rejection of the couple's claim for general damages, holding that the evidence did not show a causal link between the breach and any stress or inconvenience endured by the Dodds. Justice Goddard said that Mr Dodds had not referred to stress at all in his evidence-in-chief and had given somewhat general evidence about the stress the dispute had caused in his brief in reply.

Court rejects material incremental stress claim

Mrs Dodds had given evidence about the stress that the earthquakes, damage to their home and insurance claim process in general had caused her. However, Her Honour said that, while the Court of Appeal accepted unreservedly that these must have been extremely stressful events for the couple, the evidence simply did not establish any material incremental stress as a result of the insurance claim being settled for less than it would have been if the misrepresentations had not been made.

That is a surprising finding by the Court of Appeal. The mis-representations both extended the period during which the Dodds were required to continue dealing with the issue of repairs to their home, and led to them filing and giving evidence in court proceedings. Both of those are extremely stressful matters and it accordingly appears that the Court of Appeal's rejection of the general damages claim was based on the failure to provide specific evidence on which to found the general damages claim.

The outcome might have been different had detailed evidence been led as to the specific impact of the misrepresentations.

On 22 September, the Crown announced that it would not appeal the court's findings, and would pay the damages awarded. The Crown was already meeting the Dodd's legal costs for this appeal.

Meanwhile, hopes that most Southern Response claims would be settled by mid-2020 were dashed in June when it was revealed that 236 claims were still to be dealt with. EQC took responsibility for the outstanding cases in late 2019 and, at the time, said it anticipated that only a few would still be on the books by the middle of this year.

By June, Southern Response had settled 48,864 claims, or 99.52% of its cases. Those remaining included 110 over-cap claims, 10 under construction and 17 involving court proceedings. Over-cap claims are those exceeding EQC's $115,000 cap. Earthquake repairs above that sum are the responsibility of property owners' own insurers.

Second case: aggregation clauses in insurance policies

In *Moore v IAG New Zealand Ltd* [2020] NZCA 319 Graeme Moore owned a property in the Christchurch suburb of Scarborough. His house was not damaged in the September 2010 earthquake, but sustained serious damage in the February 2011 and June 2011 earthquakes. The estimated reinstatement costs were $2.08 million for the damage caused by the February earthquake and $2.77 million for the damage resulting from the June earthquake. It was common ground that the losses were separate, with none of the damage caused by the February earthquake being subsumed in the losses assessed as having been caused by the June event.

Mr Moore had insured his home with IAG New Zealand Ltd for the 12 months from 13 November 2010 to 13 November 2011, with the sum insured being $2.5 million. The question for the Court of Appeal was whether Mr Moore had cover up to $2.5 million for each loss, or whether that was the limit of cover for both losses, even though they occurred four months apart.

Interpreting the aggregation clause

The answer turned on the interpretation and operation of the aggregation clause in IAG's policy. The Court of Appeal said that aggregation clauses were common in insurance policies, with their purpose being to enable separate losses to be treated as a single loss in certain circumstances for the purposes of setting the limit of cover.

Such clauses also determine whether one or more deductibles are to be borne by the insured for losses arising in a given set of circumstances. The High Court held that the losses caused by the February and June earthquakes were a series of losses caused by a series of events that had the same cause, being the September 2010 earthquake.

That meant that, even though the September 2010 earthquake had caused no damage to the house and had occurred outside the policy period, IAG's liability under the policy was capped at $2.5 million for

all losses caused by both the February and June earthquakes.

Mr Moore appealed to the Court of Appeal, which reversed the High Court decision. Delivering the Court of Appeal's judgment, Justice Gilbert said that aggregation clauses were to be interpreted in accordance with normal principles of contractual interpretation.

The Court of Appeal held that all three earthquakes could be regarded as being part of a series of events caused by the accumulation over thousands of years of stresses resulting from the movement of the Pacific and Australian tectonic plates. However, being causally linked in this sense did not meet the proximate causation test posited by the aggregation clause.

The sudden accidental physical damaged caused by the February and June 2011 earthquakes was not a series of losses caused by a series of events that had the same cause. Accordingly, the damage could not be aggregated for the purposes of determining the limit of cover for each loss.

The appeal was allowed. ■

NATIONAL AGM – CHANGE OF DATE -

Due to the uncertainty around COVID lockdown levels at the time the AGM date needed to be confirmed, the **national AGM has been deferred until 13 February 2021.** Details will be sent to all members closer to the time.

In the meantime, if you are interested in being involved in the governance of your professional association and would like to know more about standing for election at the AGM, please contact the President, Necia Parker (necia@telaw.co.nz), or the Executive Officer, Jo Buckton (jo.buckton@nzile.org.nz).



Taxation update

Clearer rules on the way for GST liability of agents and principals

Inland Revenue is working on clarifying the rules relating to GST liability in the context of agents and principals. An exposure draft — *PUB00327 Goods and Services Tax – GST and agency* — was issued by the department and submissions closed in October.

The document said that the key issue related to the application of sections 60(1) and (2) of the Goods and Services Tax Act 1985, with the exposure draft identifying features indicating when an agency relationship would exist in relation to a supply.

Section 60(1) states that, where an agent makes a supply of goods and services for and on behalf of any other person who is the principal of that agent, the supply shall be deemed to be made by the principal and not by the agent.

Section 60(2) provides that an agent may nevertheless request that the agent be issued with a tax invoice and a registered person may issue a tax invoice or credit or debit note as if the supply were made to the agent.

The exposure draft said that 'agency' was not defined in the Act, and must therefore take its meaning from the common law. In general terms, an agency relationship was where an agent was authorised by a principal to act on his or her behalf to create or affect the legal relations between the principal and a third party.

"In some cases, it can be difficult to determine whether a person is acting as an agent or as a principal in relation to a supply. For GST purposes, the nature of a supply is determined by considering the legal rights and obligations actually entered into between the supplier and the recipient, in light of the surrounding circumstances. Where

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the written documentation is ambiguous, or where there is no written documentation, the surrounding circumstances should be considered."

The paper said that authority and consent were essential features of agency. If they were not present, there could be no agency relationship. Features such as the payment of a commission by a principal to an agent, documentation and reimbursements were strong indications of an agency relationship, while fiduciary obligations owed by an agent to a principal and the principal setting the sale price of goods could indicate an agency relationship, depending on the circumstances.

Inland Revenue noted that the Act, in certain circumstances, operated to modify agency relationships. In some cases, the legislation might permit or require the parties to ignore the agency relationship and the GST consequences that followed. Part 4 of the document set out examples of how to determine whether a relationship was an agency relationship for GST purposes.

Law Society expresses concerns about taxation legislation drafting to Inland Revenue review

Inland Revenue is reviewing how tax legislation is drafted. In a September submission, the New Zealand Law Society expressed concern about the pace at which tax legislation is drafted and said it was leading to a reduction in the quality of laws.

A vast amount of legislation was produced each year by a very small Inland Revenue team, and there was insufficient scrutiny and lack of opportunity for considered review and comment. The Law Society said it had in the past received draft legislation to look at, as part of the consultation process. However, it now appeared that selected provisions were provided only to a limited group on a confidential basis for review by a few people. Wider consultation did not appear to be occurring.

A vast amount of legislation was produced each year by a very small Inland Revenue team, and there was insufficient scrutiny and lack of opportunity for considered review and comment.

This had resulted in tax legislation being passed and then being found wanting — one example was the KiwiSaver legislation. The submission acknowledged that there were some very experienced and informed people at Inland Revenue, but suggested that all tax legislation drafting should be done by Parliamentary Counsel Office, rather than by the department.

In addition, a more disciplined and principled approach was required, with internal peer review of drafting, independent review and use of the Rewrite Advisory Panel.

Court of Appeal allows Inland Revenue's appeal on tax avoidance transaction

The Court of Appeal has granted Inland Revenue's appeal in relation to the disallowance of deductions claimed by Frucor Suntory New Zealand Ltd in respect of a tax-driven structured finance transaction entered into by the company in March 2003.

The case of *Commissioner of Inland Revenue v Frucor Suntory New Zealand Ltd* [2020] NZCA 383 involved Deustche Bank advancing $204 million to Frucor in exchange for a fee of $1.8 million and a convertible note redeemable at maturity in five years' time at Deutsche Bank's election by the issue of 1,025 non-voting shares in Frucor.

The bulk of Deutsche Bank's advance was funded by a contemporaneous payment of $149 million by Frucor's then Singapore-based parent, Danone Asia Pty Ltd, for the purchase of the shares from Deutsche Bank in five years' time at a pre-agreed price matching the face value of the note.

Deutsche Bank contributed the balance of $55 million. Upon receipt of the $204 million from Deutsche Bank, Frucor immediately returned $60 million of capital to its parent in a share buyback and the balance of $144 million was paid in satisfaction of an existing loan from another Danone entity, Danone Finance SA in France.



Frucor paid Deutsche Bank $66 million over five years in coupon payments, calculated on an interest-only basis on $204 million. Frucor claimed interest deductions equating to the amount required to pay amortising principal and interest on the $55 million introduced by Deutsche Bank.

The Commissioner of Inland Revenue contended that the funding arrangement was a tax avoidance scheme and therefore void, and the claimed deductions of $10.8 million for the 2006 and $11.6 million for the 2007 income years could not stand.

The High Court held that the arrangement was not a tax avoidance scheme and Inland Revenue appealed to the Court of Appeal, which reversed that decision. The Court of Appeal said that the principal driver of the funding arrangement was the availability of tax relief to Frucor in New Zealand through deductions it would claim on the coupon payments.

The benefit the company obtained was the ability to claim payments totalling $66 million as a fully deductible expense when, as a matter of commercial and economic reality, only $11 million of the sum comprised interest and the balance of $55 million represented the repayment of principal.

The Court of Appeal set aside the High Court decision and reinstated the department's interest assessments.

Non-resident employers' obligations for PAYE, FBT and superannuation contributions

Inland Revenue has consulted on *ED0223: Non-resident employers' obligations to deduct PAYE, FBT and ESCT in cross-border employment situations.* The department said in an operational statement that it aimed to clarify the approach non-resident employers should take to deducting PAYE, fringe benefit tax and employer contribution superannuation tax in certain cross-border employment situations.

The document said that a non-resident employer was obliged to withhold PAYE from a PAYE income payment made to an employee if the employer had made itself subject to New Zealand tax law by having a sufficient presence in this country, and the services performed by the employee were properly attributable to the employer's presence in New Zealand.

A non-resident employer might also have an FBT or employer contribution superannuation tax liability for a benefit or contribution if the same two criteria applied. However, there was no PAYE withholding obligation if a PAYE income payment was 'non-residents' foreign sourced income' for the employee. There was also no PAYE withholding obligation for a PAYE income payment made to a non-resident employee working in New Zealand if the domestic exemption in section CW 19 applied, or a Double Taxation Agreement gave relief from source taxation, such as where the employee was in this country for 183 days or less in a 12-month period.

The New Zealand Law Society made a submission on the document. It said that the suggestion that an employer did not need to register for New Zealand employment taxes when an employee moved to New Zealand for personal reasons, his or her offshore employer had no presence in this country, and the employee's activities had no connection to New Zealand, was helpful but appeared to represent a change of Inland Revenue practice.

It suggested that an offshore employer could have a New Zealand tax resident employee for an extended period of time without needing to register for employment taxes. The Law Society said that the department should address the circumstances in which a non-resident employer's employees could trigger a permanent establishment, the risks arising from failing to register early for employment taxes, and the test for presence.

The operational statement was otherwise likely to encourage offshore employers to take the view that they could have employees in New Zealand with no tax obligations, which could ultimately have adverse consequences for the employer and/or employee if they were subsequently required to register. The Law Society said that the issues were particularly relevant at this time as there was an increasing incidence of employees locating themselves in this country for the short-to-medium term, not only because of COVID but also due to a growth in technology and mobility which meant that employees were increasingly able to work from wherever they chose. ■

What is a CPDPR?

All Registered Legal Executives are required to maintain a CPD Plan and Record (CPDPR).

To prepare your CPDPR you need to:

1. **Identify your areas of practice.** They may include, for example:
   - Residential conveyancing
   - Estate administration
   - Trusts
   - Retirement villages.
2. **Reflect on what you do well and what could be improved,** in terms of:
   - Your knowledge, eg: the areas of law that you work in
   - Your skills, eg: drafting documents, letter writing
   - Professionalism, eg: awareness of changes to legislation, and the rules and regulations relating to legal practice
   - 'Practice management', eg: time recording, file management
   - Professional conduct and personal wellness, eg: awareness of issues of conduct and professional responsibilities, self-care.
3. **Review your needs** against the needs of the firm, in consultation with your supervising lawyer, and identify your two or three most important learning needs for the coming year.
4. **Identify learning outcomes that will meet your learning needs.** These outcomes will be actions, for example:
   - "To understand and be able to apply new legislation relating to . . . "
   - "To implement a system and develop habits that will improve my time . . . recording".
5. **Choose three or four learning outcomes to focus on** for the coming year.
6. **Identify CPD activities that will help to achieve those learning outcomes,** for example:
   - "Attend webinar on changes to the XY Act"
   - "Attend in-house seminar on effective use of time-recording software".

CPDPR format

We recommend that you use the same format for your CPD plan as the lawyers and any other Registered Legal Executives in your firm.

Alternatively, there is a template in the members' only section of our website and both NZLS and ADLS have online CPDPRs for their registered users.

Your plan should include space to reflect on each CPD activity:

- Did the activity expand your knowledge and/or skills?
- What did you learn, and what will you do differently from here?
- How can you implement the new knowledge or skills in your work?
- Did the activity help you meet your learning outcomes? How did it do that?
- Has the activity identified further learning needs?

Eligible CPD activities

Your CPD activities need to:

- Be planned and structured, with a stated purpose and outcomes
- Be related to the learning needs that you have identified for the year
- Be verifiable, with supporting documentation
- Provide for interaction and feedback
- Not be part of your daily work.

Essentially, if an activity is something that a lawyer can count towards their CPD, then so can you.

Seminars (both in-house and external), conferences, study groups, webinars and interactive 'on demand' CPD such as that offered online by NZLS CLE Ltd and ADLS may all be eligible activities.

Please note that not all online learning activities are eligible — you need to check when registering. For example, if you are unable to attend a webinar 'live' and watch it later by yourself, it may not meet the criteria. (However, if you watch with colleagues, discuss it, make notes, and have your attendance verified, it may be able to be included.)

At least 80% of the CPD activities that you include in your CPDPR should address your areas of legal practice. Up to 20% of your annual CPD must focus on wellness and professional conduct.

Verification of attendance

Verification of your attendance at an event or successful completion of an on demand CPD activity must be attached to your CPDPR if you wish to include it in your CPDPR.

CPD audit

If you are randomly selected for a CPD compliance audit, you need to provide your CPDPR for the selected period, by the date given. Your attendance verifications must be included.

Queries?

For any queries about your CPDPR, please contact Jo Buckton at: jo.buckton@nzile.org.nz



Deceased estates and Australian assets

Andrew Johnstone of APEARS, Sydney, Australia



Every couple of years I like to refresh Registered Legal Executives on dealing with deceased estate assets in Australia.

There is no set statutory limit for probate; rather it is up to the company, lender, titles offices or other institutions as to their individual requirements. This is further complicated by the fact that each institution may have different requirements based on the state in which the asset is held. Lenders may have different requirements for their own shareholders compared with deposit holders.

The following is a basic synopsis of the requirements. I must stress that these are the normal requirements and are subject to change at the whim of the entities involved. Unless specifically stated, reference to probate refers also to a reseal of a foreign grant.

Shares

Currently limits for transferring shares without probate are set by the share registry that maintains that particular company's share register. The Computershare limit is a value of A$50,000 for each shareholding; the limits for both Link Market Services and Boardroom are A$15,000 for each shareholding.

There are some further anomalies for particular companies within registries whose limits vary from the main registry. Also, shares that are registered under the CHESS system (through a sharebroker) are subject to the rules of the particular sharebroker. When overseas probate is not available, generally an Australian grant is required to effect a transfer.

If selling shares, the limits vary again and are subject to the sharebroker's own internal requirements, but generally these are set at similar rates to the share registries.

Bank accounts

ANZ has a probate limit of A$80,000 that reduces to A$50,000 for intestacies. Westpac has a limit of A$100,000. CBA and NAB each have limits of A$50,000.

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The banks can negotiate on this but it depends on the actual bank involved. Some requirements will be different at the same bank in different states. Some banks insist on probate being obtained in the state in which the account is held and others insist on probate but are not concerned with where it is obtained in Australia. Furthermore, some smaller banks and credit unions that may in fact be subsidiaries of the major banks, have different limits and requirements from their owners!

Real property (including timeshares)

Most dealings with real property, except where held as joint tenants, require probate to be obtained in the same state as the property is located.

Beware Queensland: In Queensland, it's possible to deal with property with the production of a foreign exemplification (or even the original death certificate and will, although you will not get the original will back). Please be careful getting property dealt with in Queensland — you can spend money unnecessarily!!!

In New South Wales, timeshare interests can be dealt with without a reseal, provided the value is not 'excessive', ie: more than A$10,000.

Managed funds

There are no steadfast rules with any of the fund managers in Australia. A good guide to use, however, is the same as for shareholdings. For transfers of unlisted units, stamp duty is still assessable in some states.

Superannuation

Superannuation in Australia is compulsory for most workers, and with these schemes most employees also have a death benefit insurance cover. Superannuation is mostly covered by federal legislation and is intended to provide retirement benefits for the contributor, or their dependents in cases where the contributor dies before retiring.

It is essential, therefore, to ascertain from the deceased's superannuation fund to whom they intend to pay the benefit. Superannuation funds will always avoid paying the funds to the estate if they can!! If there are no dependents, an Australian grant is required. It generally does not matter in which state the grant is obtained. If paid to the estate there are various taxation complications that arise, including the possible withholding of up to 30% from the payout to non-financial dependents.

Where to obtain a grant?

Real property is the only asset that requires probate to be obtained in the same state as the location of the property. Some banks will insist on probate being obtained in the state in which the account is held, in which case, if the real property and the bank account are in different states, we sometimes have to reseal in both states.

When dealing with shares or managed funds, a grant can be obtained in any state, provided that a separate declaration is lodged with the company signed by the executor confirming probate is not being obtained elsewhere. This declaration complies with a section of the Commonwealth Corporations Act 2001. Interestingly, however, it does not provide any indemnity or protection for the company or institution concerned!

To further confuse this issue, all Australian states have different probate procedures. Each state has a different fee structure, often scaled to the asset value. Further, some states require details of all worldwide assets and liabilities, and details of all beneficiaries' names, addresses and birth dates. These rules are often based upon outdated legislation that has been superseded but, typical of the departments involved, their internal rules have not kept up with the legislative amendments. A good example of this is the asset detail requirement which was useful when death duties existed, but would be generally irrelevant to the registrars now.

Please also note that assets held in South Australia should always be avoided. That state is very complex and costly when seeking to obtain a grant. If you know of clients with assets there, please ask them to review their assets before it is too late.

Unclaimed/lost money

Many people receive offers of assistance to claim funds that have been found and may belong to them. These funds are discovered by certain money-finding organisations that scour the government gazettes, and then hope to hit the big time by charging fees of up to 25% of the funds claimed.

Basically, unpaid company dividends (except for bank dividends) are paid over to the state governments. Company takeover proceeds, bank deposits and bank dividends are paid to the Commonwealth government. When unclaimed funds are paid to the government, the amounts are advertised and become public knowledge. If you or a client receive a letter like this you can search the government's online facilities (contact me for the websites or google them). Once found, you can lodge the claims directly.

If this process all sounds too hard, you can go through my office at only 5% (of unclaimed money received) with a minimum fee of $500. Do your research first as there may be more money at stake than you think!

Anti-money laundering and counter-terrorism financing legislation

In recent years, Australian governments have implemented complex AML rules that have mostly been adopted by all institutions here. In nearly all dealings with Australian institutions, verification of individuals' identification is required. In general terms, this is not too onerous. Many legal executives would have, however, come across requests to prove the identity for transferors on Australian shareholdings and to pay a fee for the privilege of being identified! According to the registries, this is more about fraud prevention than AML requirements.

It is interesting to note that when lodging a number of share transfers at the one time with the same person being identified, then only one fee is payable,

If you're lodging transfers over consecutive weeks or months for the same person, however, a separate fee is payable each time!!

What should you do when assets are discovered in Australia?

Naturally I suggest you contact me for assistance.

However, my first advice is to ensure you have all details of every asset that is held.

Second, don't take it as read that you have to do what the company or issuer has advised you to do. If you think the value of the asset is borderline around the limits we've mentioned above, make a special request to the company to waive their probate requirements in that instance.

Don't forget to be in touch if you need any help with Australian assets!

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 17.

CPD year for Registered Legal Executives

Our CPD year is aligned to our membership / registration year, starting on 1 July and finishing on 30 June of the following year.

Your CPD activities for the current year need to be completed between 1 July of this year and 30 June next.

Annual CPD declaration

When you renew your registration before 30 June each year for the new registration year commencing
1 July, you will be required to declare that you have met the CPD requirements for the preceding 12 months.

In any year you may be randomly chosen for a CPD audit. You only need to send your CPDPR and verifications to us if you are selected for audit.

CPD hours – increase for Affiliates and Associates from 1 July 2020

Affiliates are now required to complete at least six hours of relevant and verifiable CPD between 1 July and 30 June of the following year, an increase of one hour per year.

Associates are now required to complete at least eight hours of relevant and verifiable CPD between 1 July and 30 June of the following year, up from 7.5 hours per year.

Fellows will continue to complete at least 10 hours of relevant and verifiable CPD, the same number of hours as lawyers, between 1 July and 30 June of the following year.

What if I do more than the required number of hours?
If you complete more than the minimum annual requirement for your membership level you may carry hours forward into the following membership year commencing 1 July, as follows:

- Affiliates: up to three hours
- Associates: up to four hours
- Fellows: up to five hours

Any additional CPD hours completed in the current membership year cannot be carried forward into subsequent membership years.

The Policy on Mandatory Continuing Professional Development can be found in the members' only section of our website: www.nzile.org.nz

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