ENVOY

LEGAL EXECUTIVES NEW ZEALAND
RĀNGAI HĀPAI TURE O AOTEAROA

SUMMER 2024



Merry Christmas and a happy, safe 2025

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RĀNGAI HĀPAI TURE O AOTEAROA

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FROM THE PRESIDENT



Writing this report for the Summer edition *of Envoy* means we are in the mad crazy rush to the end of the year. Christmas parties, shopping and, of course, our work commitments are the precursor to our holidays when we can just 'down tools' and hopefully relax.

I hope that most, if not all, of you will enjoy a holiday break with family and friends. No doubt some of you will be working through the Christmas period (me for one!) but I know that as soon as my day is finished, I will escape to the beach and enjoy a swim.

This year has been a whirlwind of activity for Legal Executives New Zealand. It has been marked by the implementation of our digital transformation, the formal change of our legal name, hosting the AGM in Christchurch, attending a pre-planning meeting with NZLS CLE Ltd for the legal executives' conference in 2025, plus three webinars, submissions and initiating preparations for our upcoming 50th anniversary celebration to be held in Auckland.

National AGM
Our AGM was held on 9 November in Christchurch. Thank you to the members who attended.

I am honoured to continue as your president for the next two years and look forward to serving you all.

During the AGM, we acknowledged and thanked Carla Rule, who stood down as an independent councillor. Carla, your contributions were much appreciated, and we are grateful for your service.

As well, our Vice President Ally McEldowney stood down from the role. Thank you Ally for your hard work and dedication to LENZ over your years as Bay of Plenty Gisborne Branch president and your term on the Council. It has been great working with you.

NZLS CLE Legal Executives Conference: 1-2 September 2025, Christchurch
Planning is well underway for our biennial conference, again to be held at Te Pai in Christchurch. The feedback from the 2023 conference was incredibly positive and we look forward to seeing many of you at the 2025 conference, either in person or online. Thank you to those who provided feedback after our last conference. Your comments and contributions have been valuable, and were taken into consideration at our initial planning meeting.

Save the date – Saturday, 3 May - 50th Anniversary
As mentioned above, LENZ will turn 50 next year! Please mark the date in your calendar for a celebration in Auckland on Saturday, 3 May 2025. More details will follow in the New Year.

Thank you
My sincere thanks to my fellow Board and Council members. The work that you do does not go unnoticed. The time you give as volunteers and your dedication to LENZ is truly appreciated; I look forward to working with you all again in 2025.

Finally, my sincere thanks to Jo Buckton, our executive officer, for her continued dedication and commitment to LENZ. Jo, your guidance and support has been invaluable. Thank you.

To you all, have a wonderful, restful and safe Christmas.



Carmen Franich



Pahia

Northland

Hello from us all in Northland Branch, and Merry Christmas!

I'm so pleased to say that up here in Northland things have dried out a bit and we've been able to enjoy some beautiful sunshine. Long may this last!

I know we typically get to this time of the year and all mention how quickly the year went by, but truly, this year has just whizzed along.

This is usually a very busy time of year for most of us, so I hope you all get to have a lovely break over the Christmas and New Year holiday period.

Education
We hope to bring you more useful and informative seminars/webinars in the coming months. The branch is particularly interested in holding a subdivisions webinar, focusing on tips of the trade from legal professionals, and maybe surveyors and council staff. If anyone is interested in presenting on the topic, please do let us know; we would love to hear from you.

Social events
The branch recently held a cocktail evening at a local bar which was well attended, and everyone had a lovely time. It was great to see you all there.

Our Christmas lunch was held in late November, followed by our AGM. Another great turnout – thank you to all who attended and thank you also to those of you who were unable to attend but provided proxies. In the next edition of *Envoy* we will list the 2024-25 branch committee.

The branch is keen to hold more social events for Kaipara and Far North members. Any social events arranged will be subsidised by Northland Branch, so let us know if you would like to arrange something.

Branch committee – thank you
Thank you very much to our committee members, who dedicate their time and effort in keeping the branch running smoothly. It's very much a collaborative effort and it's great knowing that we're all able to help where needed.

The branch is dedicated to helping and supporting our members, providing informative webinars and seminars, and holding social functions which everyone can enjoy. We're always here to help, so please feel free to contact us at any time.

If you'd like to become a committee member, or you'd like to know more about what we do, please get in touch.

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



Jennette Overton
Northland Branch President

Auckland Waikato

Greetings from Auckland Waikato Branch.

Summer is here, and I am very excited for all the summer concerts. In November I was lucky enough to see both Pearl Jam and Coldplay; both concerts were fantastic.

Meetings
We held the branch AGM in October; I am delighted that Hannah Kuus and Karen Erceg have joined the branch committee. Committee roles were assigned at the committee meeting on 19 November; more on that in my next column.

After many years on the branch committee, Michelle Way stepped down at the AGM. We would like to thank her for her contributions to the branch while on the committee for many years and as branch president in 2021-2023. As I said at the AGM, Michelle, I will definitely be calling you for help!

Events
A croquet night was held for Auckland members on 13 November at the Epsom Remuera Croquet Club. Even though it was a damp evening, we had an enjoyable time drinking Pimms and gin, eating snacks and learning how to play croquet. Some of the legal executives were pros!

With Christmas holidays fast approaching, I hope you all manage to enjoy a break with your family and friends.



Sarah Blaney
Auckland Waikato Branch President



Auckland Harbour Bridge

Bay of Plenty Gisborne

Hello all

I can't believe Christmas is just around the corner – yet again! I don't know if it reflects my age, but the years just seem to zip by, faster and faster. I expect everyone is eagerly anticipating the long awaited Christmas break.

For most of us, this year has been busy. Conveyancing does not seem to have slowed at all in some areas and now, with interest rates beginning to drop, it appears the property market is gaining traction again. At the time of writing, we are eagerly awaiting the next official cash rate (OCR) announcement and anticipating another decrease. The Reserve Bank is expecting the OCR to drop to its lowest level towards the end of 2026, so we could see an increase in property sales and potentially more people refinancing over the next year.

Estates is another area where there is more work than ever before – mainly due to the low probate threshold of $15,000. The High Court recently sought submissions on increasing the probate threshold and statutory legacy limit. It will be interesting to watch developments in the coming year.

AGM
The branch AGM was held at the Tauranga offices of Cooney Lees Morgan on 24 October. This year we farewelled committee member and Tauranga social convenor, Deb Boyd-Collins. Deb has been instrumental in arranging social events in Tauranga for the past few years. It was sad to see Deb leave us, but I am sure we will see her at social events in the future. Deb, thank you for your contributions to the branch committee.

We also welcomed a new committee member, Kilara Blakey from Nolans in Gisborne.

Social
Our annual end of year functions were recently held and, as always, were well-attended. These social events are a good way to wind down at the end of a busy year and catch up with colleagues. They are an important part of connecting with each other; there is a lot to be gained from networking with colleagues.

Committee 2024-25
Once again, I acknowledge and thank the members of the committee for their support of our branch over the past year. The committee is:

- Sue Cameron, vice president (Nolans, Gisborne)
- Andrea Haycock, secretary and Whakatāne social convenor (Holland Beckett, Whakatāne)
- Lorraine Kyle, treasurer (O'Sullivan Clemens, Rotorua)
- Raewyn Miller, education officer (Keam Standen, Tauranga)
- Anne Hodge, newsletter editor (BlackmanSpargo, Rotorua)
- Mel Cox, membership officer (Cooney Lees Morgan, Tauranga)
- Sherrie Slappendel, Rotorua social convenor (Lance Lawson, Rotorua), and
- Dianne Duckitt, Gisborne social convenor (Nolans, Gisborne)

A special thank you also to Helen Grigg of Jensen Waymouth Solicitors in Taupō, and Ally McEldowney of Fenton McFadden in Te Puke, the recently appointed social convenor for the Papamoa/Te Puke area. Neither Helen nor Ally are committee members, but they have agreed to be our liaisons in their respective areas.

Also to be acknowledged and thanked is Cooney Lees Morgan for hosting our AGM this year and for providing the refreshments.

I wish you and your family a Merry Christmas and a happy New Year. I hope the weather is kind to us and we can enjoy the break over the Christmas period, as I expect we are in for another busy year.



Cathy Punter
Bay of Plenty Gisborne Branch President

Wellington Central Districts

At the time of writing, it's a gorgeous day in Whanganui and we're having a record run of sunshine. On top of the Christmas rush that happens every year, there's now the added pressure of ensuring my teenage sons remember to slip, slop, slap and wrap, as they head to the beach to enjoy fishing, surfing and all the other activities this beautiful place has to offer. The bright red cheeks and burnt noses that appeared yesterday make me smile and cringe at the same time. They're out there doing it, but I do wish they'd use lots more sunscreen!

Annual General Meetings
The national AGM has been held and Carmen has written about this on page 2. It was a busy day in Christchurch; the AGM was followed by a national council meeting where we set some plans in place for the coming year. It was not all work; it's also fun to catch up with everyone and check in on what is happening around the country.



Feilding clock tower

By the time you read this, Wellington Central Districts Branch will have also held its AGM. I'm hopeful that many of you attended and had your say on where you see the branch going for the next 12 months.

We are always looking for new committee members; it's not an overly time-consuming or onerous task and the more of us there are, the easier the tasks become missed the branch AGM, you can still be co-opted onto the committee to help out. Please contact me in the first instance if you would like to assist the members in your region.

Social
The branch is here to support its members and provide opportunities to connect with colleagues from other workplaces. The committee is trying to organise more social events, but attendance is not great in some areas. Members' feedback is much appreciated so the committee can provide events that members would like to attend. Branch events are for you, to get to know your colleagues, share knowledge and offer support.

The branch representative in your area will have arranged either a Christmas or New Year event. It would be great to see as many of you as possible at these events.

Please feel free to contact me or your local representative with any suggestions for events.

I wish you all a safe and happy Christmas and New Year. Enjoy a well-deserved break wherever you may be, at home or on holiday. And remember the sunscreen!



Stephanie Bishop
Wellington Central Districts Branch President


Boulder Bank, Nelson

Nelson Marlborough

Hello everyone

As ever during this season, the year is unravelling fast, with clients sure it is essential that all their needs must be attended to before 25 December!

I'm sure you are all looking forward to some time off to enjoy all that our lovely country has to offer (including some warmer weather) after working hard all year.

Meetings
The branch AGM was held on 7 November at the offices of C & F Legal in Nelson. A reminder re AGMs – please, if you cannot attend in person, at least return your proxy form (it only takes few minutes of your time) as, in some years, making a quorum has been tight. For our branch, remote attendance (via Teams/Zoom) is another option.

We held a quick inaugural branch committee meeting after the AGM to appoint the committee roles for the upcoming year. These are:

- President: Rachael Cooke
- Secretary: Sophie Ennor
- Treasurer: Jo Bruning
- Education convenor: Diane Bennett
- Membership convenor: Jackie Faulkner
- Newsletter convenor: Jenna French
- Social convenor: Jane Quinton (assisted by Natalie Bell)

The committee is due to meet next in February.

Social gatherings
I hope everyone who attended the branch Christmas/end of year festivities on Thursday 28 November (dinner at the Appleby Garden Bar and Kitchen, followed by ten-pin bowling) had a good catch up and a great night.

If you have any ideas for social events, please do not hesitate to contact either of our social convenors: Jane or Natalie.

I wish you all a wonderful, relaxing festive season and all good things for 2025.

Looking forward to seeing you at our next social event in the New Year!



Rachael Cooke
Nelson Marlborough Branch President

Canterbury Southern Districts

Branch AGM
Our branch AGM was held on 11 November. I have now completed my first term as branch president and want to thank the committee members for their support over the last year. I couldn't run things from the Deep South without them.

Penny Green was re-elected as both vice president and secretary. Nikki Riach was re-elected as treasurer. Penny joins the Christchurch-based committee members every second month for a face-to-face meeting and joins by Zoom when she is in Ashburton. This year we changed our meeting process slightly by having everyone 'zoom in' for every second meeting.

I would like to say a big thank you to Jill Forde and Pam Harliwich for their invaluable knowledge and the support they have provided over their years on the branch committee. They have always been there willing to lend a hand, come up with ideas or answer questions. These lovely ladies stepped back from the committee during the year.

The branch has also been lucky to have had Nicola Thyne on the committee for many years. Nicola has decided it is time for her to step away. We thank her for the many seminars she has organised, and for all the other help and support she has provided.

The rest of the committee comprises Cheryl Clausen, Shelley O'Connor, Maria Piercy, Gaylene Campbell and Nicole Spicer in Christchurch, along with our regional representatives – me (Southland), Penny Green (Ashburton), Diana de Koning (Queenstown - outgoing), Atlanta Stewart (Queenstown – incoming next year), Alison Smith (West Coast) and Nicki Howie (Ōtago).

We are also assisted by Leanne Sadler, our social representative for the Timaru/Oamaru area.

A big thank you to the regional representatives, plus Ellen Langley at PR Law in Invercargill, Jacqui Walker at Gresson Dorman & Co in Timaru, Debbie Wendelborn at Berry & Co in Oamaru, Louise Thomas at Sumpter Moore in Balclutha, Becky Slade at Checketts McKay Law in Alexandra and Jo Panirau at Aspiring Law in Wānaka for arranging the livestreaming of our seminars in their respective regions.

Social events
Christmas functions have been held throughout the region, with the branch heavily subsidising these as a way of giving back to members.

It has been nice to hear that members in the regions have been catching up for social events.

I cannot believe we are already at the end of 2024!! On behalf of Canterbury Southern Districts Branch we wish everyone a Merry Christmas and safe, happy and healthy New Year.



Andrea Murchland
Canterbury Southern Districts Branch President



Dunedin Railway Station

CASES UPDATE



Property

How much bad behaviour is needed for 'intransigence'?

In *Turner v Goldsbury* [2024] NZCA 292 the Turners, the Goldsburys and the Wardlaws were the owners of property subject to a cross-lease. The Turners' dwelling was in a poor state and the couple wished to demolish it and replace it with a new build. Under the terms of the cross-lease, consent was required from the other owners. Consent could not be unreasonably withheld. The Wardlaws consented but the Goldsburys did not.

The Turners twice took the matter to arbitration but were unsuccessful. The Goldsburys' view was that the Turners were obliged to maintain their house, rather than demolish and rebuild it. If the dwelling was to be rebuilt, the Goldsburys considered it would need to have the same, or almost the same, footprint as the existing house and the same roof height and profile, even though the house floor would need to be raised to deal with the risk of flooding.

Relations between the couples became so bad that the Turners no longer wanted to deal with the Goldsburys. Examples given by the Turners of the bad relationship included the Goldsburys refusing to give consent for the installation of an internet fibre cable, delaying the installation of that cable by five months and abusing the eventual installers. Ms Turner also said that Mr Goldsbury's partner Ms Nightingale had thrown rubbish onto the Turners' property, screamed at Ms Turner, positioned the Turners' rubbish bin so it could not be emptied and repeatedly abused her with foul language. Neighbours provided evidence of other poor behaviour.

The Turners accordingly applied to the High Court for a partition order in respect of the cross-lease under section 339 of the Property Law Act 2007.

The application was dismissed by the High Court and the Turners appealed to the Court of Appeal.

The Court of Appeal judgment was delivered by Justice Mallon. Her Honour said that the High Court had placed insufficient weight on the breakdown of neighbourly relations.

"Ms Turner's evidence was that she was no longer able to deal with the Goldsburys. That Ms Turner is not being unreasonable about this is supported by the evidence of Ms Batten, Mr Duke (former owners before Mr Wardlaw) and Mr Wardlaw himslef. All four reached the point where they had given up on having a reasonable relationship with the Goldsburys.



"It follows that we do not accept the submission for the Goldsburys that they were not intransigent."

Continued on page 10...

...Continued from page 9

The Court of Appeal said that the mechanism in the cross-lease for resolving disputes had failed. It was accordingly appropriate that there be an order for division of the property subject to conditions. The matter would be remitted to the High Court for determination of the appropriate order for division.

Damages awarded against builders who walked off job

Mendis v Panui [2022] NZDC 13261 involved a contract for the development of a property in Auckland.

Nethni Mendis owned the property and wished to erect two multi-storey, three-bedroom units at the rear of the section, behind the existing dwelling. Ms Mendis entered into a $466,430 fixed price contract with the defendants, with a commencement date of September 2018 and a completion date of April 2019. A liquidated damages clause provided for the defendants to pay $1,100 per week in the event of late completion.

The contract stipulated that enough time would be allowed for completion of the first stage of the development, comprising the foundations and floors, with a sceduled completion date of 24 December 2018.

In Septemer 2018, Ms Mendis paid a deposit and building commenced in October. However, she said that Mr Panui began asking for additional payments which were not in accordance with the agreement. He said that he was seeking a variation to when the first progress payment would be made.

Ms Mendis and Mr Panui met on 10 November but reached no agreement on the issues and the defendants did not return to the property. On 3 December, Mr Panui emailed to say that the build was 'on hold.' Further communications between the parties took place before Ms Mendis engaged another contractor. The build was completed in June 2020.

Ms Mendis brought proceedings claiming damages as a result of the defendants' default. Judge Clark held that the defendants had breached the terms of the contract by failing to perform the work as required.

"Mr Panui seemed intent on breaching his obligations under the contract, reaching the point where he failed to return to the project at all. In the circumstances I find that Ms Mendis was entitled to cancel the contract and she did so in accordance with the terms of the contract."

Judge Clark said that, as a result, Ms Mendis was entitled to damages which would put her back in the same position as if the contract had been performed by the defendants. The correct calculation was the total amount Ms Mendis had paid to complete the project and the difference between that sum and what she had contracted to pay the defendants.

Ms Mendis had paid an initial deposit of $46,643, plus an amount of $468,800 to the second contractor. That was $49,013 more than the original contract price. Ms Mendis was awarded that sum plus $20,000 for loss of rent when the build was delayed, and miscellaneous losses.

High Court has no power to set aside or vary harsh or unconscionable agreements

Whai Rawa Railway Lands LP v Body Corporate 201036 [2024] NZCA 207 involved a dispute between a lessor and a body corporate over increases in lease payments.

Whai Rawa Railway Lands was the ground lessee of a block of land in Parnell, Auckland. Body Corporate 201036 was the lessee. The lease began in 1996 and was to be a 'peppercorn rental' of 10 cents per year – if demanded in writing – for the first 15 years.

After 2011, there were two rent reviews. The first, in 2011-13, fixed the ground rent at $740,670 per year, while the second, in 2018–19, resulted in a figure of $1,375,530 per year. A number of unit owners defaulted on their levy payments to the body corporate. The levy payments funded the payment of the ground rent as well as other costs incurred by the body corporate. Significant costs had been incurred due to weathertightness issues.

An extraordinary meeting of the body corporate resolved that each unit owner should pay the ground rent directly to Whai Rawa, leading to a significant fall in rental payments. Whai Rawa requested that the terms of the lease be complied with. The parties could not reach agreement and the body corporate filed proceedings requesting the High Court to set aside or vary the rental clause in the lease, on the grounds that it was harsh or unconscionable, or had been exercised in a harsh or unconscionable way. The body corporate relied on section 78(1)(f) of the Residential Tenancies Act 1986, which it said had been imported into the Unit Titles Act 2010 by section 176 of that Act.

Whai Rawa filed an application to strike out the statement of claim, and/or for summary judgment in its favour. The High Court declined the applications and Whai Rawa appealed to the Court of Appeal.

The Court of Appeal judgment was delivered by Justice Wylie. His Honour noted that there was no

previous case on the same point and the issues raised by the body corporate were novel. It was common ground that there was no inherent or common law power for the High Court to set aside or vary the terms of a lease. To obtain relief, the body corporate had to resort to section 78(1).

The court held that, while the dispute was one between the body corporate and the lessor, it was not a dispute in relation to a unit title development as those words were defined in section 5 of the Unit Titles Act and used in section 171(1) of that Act.

"It is not a dispute in relation to the unit title development, because it is not a dispute about the individual units and the common property comprising the stratum estate."

Justice Wylie said that section 176(1) did not apply to the High Court and neither the Senior Courts Act 2016 nor the High Court Rules conferred the power to set aside or vary agreements that might be harsh or unconscionable. Nor did the High Court's inherent common law powers.

The High Court had no jurisdiction to grant any of the declarations sought by the body corporate and the case was accordingly bound to fail.

The appeal was allowed and the High Court proceedings were struck out.

Building owner fails to prove bond loss

In *Moorhouse Commercial Park Ltd v Vero Insurance New Zealand Ltd* [2024] NZCA 415, Moorhouse Commercial Park Ltd owned two buildings in Christchurch that were insured with Vero Insurance. The policy was a material damage policy providing that, if physical loss or damage unintended and unforeseen by the insured happened to any insured property, or costs or losses for which the policy was expressly intended arose, then, subject to the policy's conditions and exclusions, the company would indemnify the insured.

For buildings covered by the policy's 'Reinstatement Memoranda,' reinstatement cover was prescribed. Cover was also expressly extended to damage arising from earthquakes. Vero had the ability to elect either to make payment, or to undertake the reinstatement or repair required.

The buildings were damaged by the Canterbury earthquakes in September 2010 and February 2011 and there was a dispute as to the extent of the damage, and what was required to reinstate the buildings to the policy standard. There was also disagreement about the calculation of the indemnity value.

Notwithstanding the fact that the earthquakes and resulting damage had occurred more than 13 years ago, Moorhouse maintained the stance that unless, and until, Vero accepted the extent of the damage caused and what was required to reinstate the buildings to the policy standard, it could not make the decision on whether it would actually rebuild and be eligible for reinstatement cover, or whether it was now limited to recovering only the indemnity value as prescribed.

Moorhouse alleged that the building had suffered greater damage than Vero had assessed, primarily arising out of 'bond loss' which it said Vero's proposed epoxy repair methodology would not fix to the policy standard. The High Court preferred the evidence of Vero's expert, who said that epoxy resin injections would repair the damage to the policy standard, over that of Moorhouse's expert, who disagreed.

Moorhouse appealed to the Court of Appeal. The Court of Appeal judgment was delivered by Justices Cooke and Osborne. Their Honours said that a plaintiff alleging that a contract had not been performed must prove that breach. In this case, it was accepted that there had been damage to the buildings which engaged Vero's contractual obligations. Vero considered that its obligations were met by the epoxy repair solution, while Moorehouse claimed that this was not the case as the damage to the buildings was more profound than Vero had assessed and its proposed repair solution was accordingly insufficient to remedy the damage.

The Court of Appeal said that, to establish this and thereby prove a breach of contract, Moorhouse must prove that the further damage had occurred. The burden of proof did not shift to the insurer because this was an insurance contract.

Their Honours said that they had some sympathy for Moorhouse's position, but the company had not proved, on the balance of probabilities, that bond loss had occurred. Bond loss during earthquakes was a recognised phenomenon that could arise with smooth reinforcing bars within concrete.

The court accepted that Moorhouse had demonstrated it was possible that bond loss had occurred in the buildings. However, there was no real way of knowing whether bond loss had actually occurred.

"No evidence was led to suggest a way of conducting a test to establish whether it has happened. Neither is there any recognised way of establishing it from external damage such as the cracking that has been identified. The fact that it is possible does not mean that it has probably occurred. In those circumstances we do not accept that bond loss has been proved."

The appeal was dimissed. ■

Keeping safe in the water

Cathy Punter's role with Coastguard Tautiaki Moana

When thinking of Coastguard, most Kiwis think of beaches and the sea. Cathy Punter, Bay of Plenty Gisborne Branch President, however, is a volunteer in Coastguard's Rotorua Lakes unit that looks after boaties and 'fishos' on 14 local lakes and a portion of the Waikato River.

With summer holidays coming up, *Envoy* wanted to not only talk about Cathy's role within Coastguard, but also remind readers of what to do to help keep safe on the water this summer.

Cathy's connection with water goes back many years. Growing up in Howick, she sailed with her father from when she was nine years old. Both her husband and father-in-law fish in the Rotorua area or out at sea. "We've always had boats and I like any water, whether it's freshwater or on the sea," she says.



Cathy Punter

"Serendipitously some years ago, I became friendly with someone who was involved in Coastguard. I investigated and then I was hooked. I started as crew and I'm now qualified as a skipper with my Master's Certificate. This means standing in the stern of our vessel coordinating operations, rather than actually steering. I can do that of course, but my role is to oversee all positions on the boat and to carry out the task at hand. I'm now qualified to skipper our 7.5 metre boat – which can reach speeds up to 45 knots per hour which is very fast. There's a huge responsibility not only to the crew and Coastguard itself, but also to the person or the boat we're out searching for," explains Cathy.

A 'normal' Coastguard day

Cathy emphasises there is no 'normal' Coastguard day, although it is more often a weekend, or any day over the summer period.

Crew members are not 'rostered for a shift' but will attend when their pagers go off if they are available. They get down to the boat shed as fast as possible – without breaking the speed limit! A crew can be assembled in as little as 10 minutes if needed (the boat cannot leave the shed until the skipper is present). The Rotorua Lakes rescue vessel is surveyed to take up to 10 people, however the minimum crew number is two. An ideal crew is six, which leaves some room for Police or those to be rescued.

The vessel is always 'rescue ready' with everything charged, fuel topped up and everything in place for a rapid departure to one of the Rotorua lakes or the Waikato River.

Cathy says it can take some hours to find the boat or person in trouble – the boat could have run out of fuel, have a mechanical problem, be overdue, crashed or may be unprepared for rough conditions. The Police will be the incident controller if they are searching for a missing person or there is danger to life.

When the rescue is completed, the boat is returned to the trailer, tidied up, everything is re-connected to chargers, refuelled and made ready for the next call out.

Challenging rescues

When *Envoy* asked if Cathy had ever been in danger on a callout, she said she hadn't, although there had been some difficult rescues. "We don't go out if the weather is really bad and there is danger to the crew or the boats.

Lake Rotorua, for example, chops up very quickly, so we always have an eye on the weather and will not put the crew or boat in danger. There's no point in everything going pear-shaped and we have to be rescued too!"

Cathy says it can be very difficult at night if Coastguard is searching for a boat and/or people. "One time we were out searching and searching, and couldn't find the young man who was missing. It turned out he'd got himself out of the water alone and visited his grandmother on his way home!"

There are of course many sad stories when carrying out a search and rescue. Cathy recalls a man out on Lake Rotoiti who was wearing a very old-fashioned kapok-stuffed lifejacket. The kapok is enclosed in a plastic bag within the jacket and when it gets very old, the plastic perishes. When the man jumped into the water to recover his hat which had blown off his head, the kapok soaked up water and pulled the man underwater. The crew on his boat was very inexperienced on the water and was unable to manoeuvre the boat to pick up the man. Making matters worse, in fresh water there is little buoyancy, unlike salt water. "People sink to the bottom very quickly in that situation, and it took a number of days before this man's body was recovered."

Tourists also often give Coastguard some challenges. "They're ill-equipped to go out in a boat, are inexperienced and/or unfit, don't understand New Zealand weather or, for example, decide to visit an island which appears closer than it really is. It can be very frustrating for our crew, but we are pleased to be able to help and keep people safe," says Cathy.

Proud to play my part

"Coastguard is a wonderful organisation and I'm very proud to play my part. I enjoy my time on the boat, whether it is for training or a rescue, as well as the continual education and training that Coastguard requires. It's a way I can give back to the community, and do something completely different from the day job. I love it and I have learned many valuable skills."

About Coastguard

Coastguard Tautiaki Moana is the country's primary maritime search and rescue operation that is powered by volunteers, and enabled by staff. Its vision is to help everyone get the best out of their time on the water, safely and with confidence.

Established more than 150 years ago, in 2023 Coastguard attended 2,867 incidents and safely brought home 7,196 people. There were 218,169 radio calls received by Coastguard; 55,914 app trip reports; and a massive 303,048 volunteer hours logged. There are 48 people alive because of a Coastguard rescue in 2023. Coastguard receives 30% of its funding from central government. The balance is raised through the support of members, donors, funders and corporate partners.

COASTGUARD
ROTORUA LAKES

Keeping yourself safe this summer

Log a trip report
Before you head out, log a trip report on the Coastguard app. It's free and easy to use, and it lets Coastguard know where you're going and when you plan to be back. This simple step can make a big difference in an emergency. You can also report via VHF or by calling *500.

Wear lifejackets
Lifejackets save lives, plain and simple. Make sure everyone on board has a properly fitting lifejacket, and keep them on at all times.

Two forms of communication
Take two waterproof ways to communicate—whether that's a VHF radio, a charged mobile phone or an emergency beacon. Having options in case of an emergency is key to staying safe.

Check the weather
New Zealand's weather can turn quickly, with sun one minute, and wind and rain another. Check the forecast and save it on the Coastguard app to stay updated.

Get a membership
Coastguard membership is a smart investment, offering 24/7 coverage for non-urgent help like towing, flat batteries and fuel issues — assistance that could otherwise cost up to $350/hour. With a Coastguard membership, you'll have peace of mind knowing you're covered on the water.

Support Coastguard this summer
Coastguard is excited to have launched its Old4New Lifejacket Upgrade campaign on 30 November, featuring 74 events scheduled at summer hotspots across the country.

At these events, people can exchange their old, worn-out lifejackets for discounted brand-new Hutchwilco lifejackets. The Old4New team will also provide lifejacket advice, including fitting and servicing, along with local boating safety tips and information about education courses - making it a one-stop shop for preparing for a fun summer on the water.

For more information, please visit: www.old4new.nz

Coastguard's famous Summer Lottery is also back. Each ticket purchased supports Coastguard's vital lifesaving mahi, meaning buyers not only have a shot at winning one of two Extreme fishing boats and a $17,000 travel prize, but also contribute to supporting Coastguard's units. Local volunteers have been out in their communities selling since mid-November, or tickets can be purchased online here: https://www.coastguard.nz/support-the-crew/lottery

If you would like a bequest in your will, you can find out more - go here: https://www.coastguard.nz/support-the-crew/support-us/bequests

Source: Coastguard Tautiaki Moana

Homes no longer FORTRESSSES



In his 1604 judgment, English Judge Sir Edward Coke said, "The house of every one is to him as his Castle and Fortress as well for defence against injury and violence, as for his repose."

That oft-quoted sentence came to mean that people's homes were their sanctuaries and should be free from interference. But ensuring the safety and wellbeing of others means the law, on many occasions, requires homeowners to act to protect the comfort and enjoyment of neighbours, visitors and others, irrespective of whether the property owner wants to do so.

Such obligations are contained in a myriad of Acts, regulations, local and regional plans, covenants, codes and other instruments. Being unaware of, or failing to comply with, the law can be expensive in terms of fines, convictions which might interfere with overseas travel, and the time and stress involved in court proceedings. Three recent cases illustrate this.

Unlawful removal of indigenous forest

In *Tasman District Council v Reith & Anor* [2024] NZDC 20507, Hamish Reith and Ealing Farm were fined a total of $98,000 for breaching the Resource Management Act 1991 by removing indigenous forest from two properties on Shenandoah Highway near Maruia. Ealing Farm owned the properties; Mr Reith and his wife were the directors of, and shareholders in, Ealing Farm.

In addition to farming operations on the properties, the defendants operated a firewood business. The two properties were in the Rural 2 Zone of the Tasman Resource Management Plan; removal of indigenous forest from the properties was controlled by rule 17.6.5.3, that restricts the amount of indigenous forest cleared as a permitted activity on each property to 0.2 of a hectare over a three-year period.

Removal activities undertaken by the defendants exceeded the limits in the plan and the defendants did not hold resource consents permitting removal of additional firewood. They pleaded guilty to four charges covering a period of almost seven years. When spoken to by council officers, Mr Reith initially said he was entitled to clear two hectares of indigenous forest every year, and later stated his understanding was that the permitted amount was 2.5 hectares every two years.

Approximately 4.39 hectares of indigenous forest was cleared from one property between January and November 2020 – an amount that would have taken 65 years under the plan. Later, 5.36 hectares was cleared from the other property, which would have taken 80 years according to the rules.

At sentencing, Judge Dwyer said that the offending had been deliberate in the sense that the defendants had intended to remove indigenous forest and had done so, but the council appeared to accept that the defendants genuinely believed they had been entitled to remove the trees. That misunderstanding, however, indicated a falure to check the law.

His Honour said that people undertaking business activities

could properly be expected to be familiar with the rules under which they were required to operate.

"It is apparent from the ecological report that the trees removed included mature indigenous trees, many exceeding six metres in height. The obvious quality, variety and stature of the forest area ought reasonably have led the Defendants to make some enquiry with the Council to check as to any restrictions which might apply over the tree removal operation. This was a serious failure on the Defendants' part and their culpability for the offending is high accordingly."

Judge Dywer adopted a starting point of a $140,000 fine on all charges and reduced the figures for the defendants' past good character and prompt guilty pleas. Each defendant was fined $24,500 on each of the two charges against them, and an enforcement order was made requiring the defendants to instruct an expert in ecology and native forest management to prepare a report setting out how to restore and preserve the forest.

Tyre burning ash could contaminate domestic water

In a second case, Bernard Stewart was fined $33,000 after breaching the Resource Management Act 1991 (RMA) by burning tyres on a Northland property.

In *Northland Regional Council v Stewart* [2023] NZDC 18844, Mr Stewart used a property for grazing livestock. Fire and Emergency New Zealand was called to the property in 2022, after neighbours said there had been heavy black smoke all night and an odour similar to burning rubber. They were concerned that ash would contaminate the roofs and guttering they used for gathering water for domestic purposes.

Officers at the property found an area of burnt material measuring 20m x 15m, the remains of 100-130 tyres, steel belts from tyres and a smouldering pile with visible flames and smoke.

Mr Stewart told council officers that he had burnt fence posts, wires and general farm material and a few tyres might have been scorched. He subsequently told enforcement officers that he had burnt farm rubbish, but did not intend to burn tyres and did not know the rules about burning and was not aware that he was not allowed to burn tyres.

Mr Stewart was charged with three offences of contravening section 15 of the RMA by discharging contaminants into the air and onto land when the discharge was not expressly allowed by any regulations, standard or resource consent.

Judge Kirkpatrick held that the scale of the burning meant that Mr Stewart must have known that tyres would be burnt. While he was obliged to dispose of the tyres under his lease agreement, he could have taken them to a transfer station which would have charged between $2,500-$3,400 for disposing of all of the tyres.

The defendant pleaded guilty and, in sentencing, Judge Kirkpatrick said that deterrence was an important factor in sentencing for environmental offending. The penalty imposed must be large enought to ensure that people adhered to the law. A fine of $33,000 was appropriate.

Hole digging modified archeological site

A third case involved a property owner digging holes along two boundaries to prepare for planting trees.

In *Heritage New Zealand Pouhere Taonga v Sheng Chu* [2023] NZDC 2687, Sheng Chu was charged with modifying an archaeological site, an offence under section 87(1) of the Heritage New Zealand Pouhere Taonga Act 2014, as an archaeological authority was required. Mr Sheng knew, or ought reasonably to have suspected, that there was an archaeological site.

Mr Sheng and his wife owned an Auckland property on the northern slopes of Te Kōpuke/Mount St John. The whole mountain is an archaeological site, with a history dating back to at least 1720 when the maunga was occupied by Te Waiohua. Mr Sheng dug 102 holes by hand, intending to plant camellia trees on the property.

When the land was inspected by Heritage New Zealand Pouhere Taonga (HNZPT) officers, 24 of the holes were found to contain archaeological material. The defendant had previously cleared vegetation and been advised that an archaeological authority would be required before any further digging work was done.

The defendant pleaded guilty. This was the first case of sentencing for offending under the Act, although there were sentencing decisions under the earlier Historic Places Act 1993. Judge Kirkpatrick said it was clear Mr Shen knew, or ought to have known, that his property was a protected archaeological site and that, notwithstanding that circumstance, he had modified the land. However, he had genuinely believed that digging a series of small holes did not require an archaeological authority.

The defendant was granted a discharge without conviction and ordered to pay $2,000 compensation to Tūpuna Taonga o Tāmaki Makaurau Trust Limited and $1,000 in costs to HNZPT.

The lesson from these three cases is that it is prudent to consider the interests of others when embarking on actions on a property that may impact on those nearby. Ignorance of the law is not a defence, so it is best to take care at the outset. ■

Ensuring escape of people in a fire

Locks on a building's shared toilet facilites

In *Palmerston North City Council v Brian Green Properties (1971) Limited* [2020] NZDC 1828, Brian Green Properties owned a commercial building in Palmerston North's main street. The building contained food and retail businesses in six separate shops, with shared toilet facilities located near the rear of the building.

Access to the toilet facilities was through a door from each shop, with the doors being the only exits from the shared toilet facilities. The Palmerston North City Council inspected the building and found that the doors to the toilet were fitted with three types of locks which the council considered did not comply with the Building Act 2004 or the relevant Building Code. The council was of the opinion that the locks did not provide toilet occupants with unimpeded means of escape in the event of a fire.

The council issued a notice to fix under sections 164 and 165 of the Building Act, requiring Brian Green Properties to remove the potential for the doors to lock in the direction of escape from the fire. Brian Green Properties applied to MBIE for a determination that the locks complied and to set aside the notice to fix. MBIE determined that two of the three locks did not comply and modified the notice to apply only to those locks.

The council appealed to the District Court. Judge Rowe observed that section 116B(1)(b) of the Act made it an offence to 'use a building, or knowingly permit another to use a building that has inadequate means of escape from fire.'

Clause C4.2 of the Building Code meant that MBIE had been required to consider whether the toilet facilities provided a means of escape that ensured there was a low probability of occupants being unreasonably delayed or impeded as they moved to a place of safety in a fire. His Honour said that MBIE considered that, in the case of two of the locks, there was a relatively high probability that someone using the toilet would not realise that they needed a key to re-enter the shop they had come from, forget to take the key or leave the key on the shop side of the lock.

"If a fire occurred, such an occupant of the toilet area would find themselves locked into that area and unable to easily escape."

However, MBIE was of the view that the situation was otherwise with the third type of lock. Judge Dwyer disagreed, holding that the Building Act and Building Code were concerned with how a building was designed and constructed to achieve its functional requirements.

"It is therefore incorrect to measure the functional and performance requirements of a building against the likelihood of human error. The code is not concerned with whether persons using a building will act or respond in a particular way, but whether the building facilitates the functional requirement; in this case, the safe escape of people in a fire."

His Honour said that, in the context of fire safety, there were strong policy reasons for such an interpretation.

The appeal was allowed, as none of the locks complied with the performance requirements of Clause C4.2. The court also held that the notice to fix was correct and enforceable without amendment. ■

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LAND AND CONVEYANCING UPDATE



New authority and identity requirements for e-dealing standard and guideline in force

A new standard and guideline for authority and identity requirements for e-dealing took effect on 23 October 2024. Toitū te Whenua Land Information New Zealand said that the new protocols extend the scope for practitioners to use audio-visual technology to obtain authority remotely and confirm client identities, as well as enabling the use of verifiable electronic signatures.

Feedback sought on replacing static plans with digital alternatives

Land Information New Zealand said that it was continuing to seek feedback on its proposal to replace static survey/title plans with a digitally visualised alternative. LINZ said it was looking for submissons about how a working tool with features such as zoom, customisable layers and the ability to have existing or new parcels highlighted for ease of locating and analysing them would help or hinder work. For instance, the agency asked, would it make a difference for due diligence when establishing easement paths or when scoping an upcoming subdivision?

Public Works Act law reform coming in 2025

In late October, Land Information Minister, Chris Penk, provided an update on the review of the Public Works Act 1981, advising that he had received a report from an independent expert advisory panel identifying aspects of the legislation requiring reform.

Mr Penk said that the Act is a fundamental piece of legislation allowing the government to acquire land for critical public infrastructure. He said that New Zealand has a widely-acknowledged infrastructure deficit, which is holding the country back socially, economically and environmentally. The Public Works Act has not been substantially amended since 1988 and is no longer fit for purpose. It is accordingly time to make changes to improve its fairness and efficiency.

"For example, all infrastructure projects that use the Act must meet a high threshold of being of 'national and regional significance.' While a high threshold is important for protecting private property rights, there are many worthy and necessary projects that are vital for a particular region or community but may not be nationally significant."

The minister said that if it could be made simpler to acquire land for critical projects, the likelihood of budget blow-outs and delays could be reduced. He said that he would consider the review's findings and recommendations in detail and that he expected to announce policy decisions about changes to the Act before the end of 2024, with a view to a Public Works Act Amendment Bill being introduced to Parliament in mid-2025.

Feedback closes on managing 1.7 million hectares of Crown land

Toitū Te Whenua Land Information New Zealand sought public feedback on how to manage the 1.7 million hectares of Crown land in future. The land comprises 8% of New Zealand's land area and supports a range of public and private uses, including farming, forestry, tourism and housing.

The consultation closed at the end of October; LINZ Chief Executive, Murray Young, said that a summary of the feedback would be available on the LINZ website before the end of 2024. He said that looking after the land will become more challenging over the coming years, due to climate change and increasing competition for alternative land uses.

The public feedback will be used to help shape LINZ's 2025 long-term insights briefing. Government departments are required, under the Public Service Act 2020, to create long-term insights briefings at least once every three years.

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Overseas investment law changes due to be passed by end of 2025

Cabinet has agreed to principles for reforming overseas investment laws, said Associate Finance Minister, David Seymour.

"At the core of these principles is reversing the presumption that investing in New Zealand is a privilege and that investors must justify their transacion to the government. The new starting point is that investment can proceed unless there is an identified risk to New Zealand's interests. This process will be guided by a government policy statement."

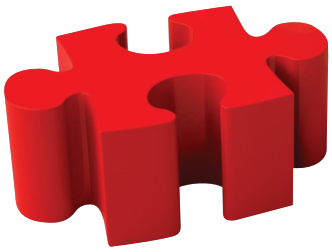
Mr Seymour said that the Overseas Investment Act 2005 will be amended according to the following principles:

- The scope of what is currently screened – including farmland – will be retained in order that the government retains the legal option of screening all investments currently subject to screening
- The assessment process will be fast-tracked, with the starting assumption that investment can proceed unless there are risk factors identified, by consolidating the Act's core tests (investor test, benefit test and national interest test), and
- Providing the government with the flexibility to call in such investments for detailed scrutiny on a case-by-case basis and impose conditions or block the investment if there are risks to New Zealand's national interest.

The minister said that attracting more overseas investment is a vital part of the government's economic strategy. The decisions that Cabinet has taken will ensure that New Zealand is a player again, instead of sitting on the bench.

LINZ Head of Regualtory Practice and Delivery, Rebecca McAtamney, said that LINZ's overseas investment team is working closely with Treasury on the law changes. Detailed policy options will be developed in the coming months, with the aim of passing legislation by the end of 2025.

There will be no immediate changes to assessment processes, which remain in line with the delegation and directive letters introduced earlier in 2024.



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CHANGING THE CULTURE OF A PROFESSION

Building law changes continue

The government will make further announcements about its plans to make building easier and more affordable, said Building and Construction Minister, Chris Penk.

The minister said the construction sector needs to be "firing on all cylinders" but productivity is being lost because of a building consent system which adds layers of regulations. The guiding principle for the government's reforms is that building should be easier and the regulations surrounding it should be streamlined, proportionate to the risk, consistent nationwide and place liability in the appropriate places.

Mr Penk said that the government had already announced a range of initiatives to make building easier, including commencing a major reform of the structure of the building consent system; removing barriers to the use of overseas building products; increasing the use of remote inspections; and removing compliance costs for councils by reducing the frequency of competence assessments for building control officers.



New resource management law blueprint due by Christmas

A seven-member Expert Advisory Group has been established and is chaired by Auckland barrister, Janette Campbell, a resource management lawyer.

The Expert Advisory Group is to develop and provide a blueprint for replacing the Resource Management Act 1991 before the end of 2024, said Minister for Resource Managment Act Reform, Chris Bishop.

Mr Bishop said that he will seek Cabinet agreement to key aspects of the replacement legislation at the beginning of 2025, after which detailed policy work and legislative drafting will begin. Legislation is expected to be introduced to Parliament in 2025 and be passed into law by mid-2026.

The minister said that Cabinet has agreed to 10 core design features for the new resource management system. These include:

- Narrowing the scope of the system to focus on managing actual effects on the environment
- Creating two pieces of legislation with clear and distinct purposes: one piece of legislation will manage environmental effects arising from activities, while the other will enable urban development and infrastructure
- Providing faster and cheaper processes with less reliance on litigation, and
- Providing for greater use of national standards to reduce the need for resource consents and simplify council plans.

Mr Bishop said that the government has designed the reform programme in a calibrated and sequenced way to ensure a smooth transition with minimal disruption. Changes made during Phase Two between the current time and mid-2025 are intended to transition into the new system. Phase Two of the changes aim to progress targeted amendments and national direction to deliver objectives for Electricty New Zealand, Infrastructure for the Future, Going for Housing Growth and the Primary Sector Growth Plan.

Parliamentary Under-Secretary for Resource Management Reform, Simon Court, said that the government is making it clear from the outset what the design of the new system will look like.

"Putting property rights at the centre of resource management means ditching rules that invite every Tom, Dick and Harry to vexatiously object to peaceful use and development of private property. Rules should only restrict activity with material spillover effects on other people's enjoyment of their own property, or on the property rights of the wider natural environment that sustains us." ■

Legal executive news from the United Kingdom

Conveyancing process in England requires substantial reform, says CILEX

Buying and selling a property in England is inefficient and ineffective, and the process needs substantial reform, said the Chartered Institute of Legal Executives (CILEX).

CILEX said that sellers should be required to provide material information about their properties at the earliest possible stage. In addition, the government should consider introducing an auction-style pack which potential buyers could view, as well as being able to search the title and accompanying documents when viewing a property.

Responding to the call for evidence by the Levelling Up, Housing and Communities Committee Inquiry into buying and selling homes, CILEX said that the government should introduce new legislation, rather than allowing for voluntary change across the industry. The risk of voluntary change is the piecemeal adoption of digitisation, resulting in inconsistencies and confusion.

One-third of CILEX's 17,500 members work in conveyancing, with at least 20% of all members working in residential property. A CILEX members' survey found that 53% of respondents consider that the current process is inefficient, while 81% said that the amount of work in buying or selling a house has increased in the past two years.

First CILEX Lawyer appointed as Recorder

Nick Hanning has become the first CILEX Lawyer appointed to the post of Recorder, meaning that he can preside in the County, Family or Crown Court with broadly the same jurisdiction as a Circuit Judge, says CILEX.

In 2023, the Westminster government updated the law so that suitably-qualified CILEX Lawyers could apply to become Recorders and Upper Tribunal Judges. CILEX said that the appointment was an historic milestone for the profession, showing that CILEX Lawyers had the training and skills needed to meet the competencies required for more senior judicial posts.

Six honorary CILEX Companions appointed as over 260 members celebrate graduation

Six legal professionals have been appointed as Honorary Companions of CILEX in recognition of their significant contributions to the profession and support of CILEX's mission. The awards were presented at CILEX's annual graduation ceremony, held at the QEII Centre in London in October.



QEII Centre, London

More than 1,100 members and guests attended to celebrate the achievements of the 264 new CILEX Fellows, CILEX Lawyers, Advocates, Practitioners and CILEX graduates.

Among the new Honorary Companions are Rita Leat, who was recognised for her long-standing commitment to raising standards and supporting the legal profession; and Claire Parrott, who was honoured for her continued services to CILEX and her work promoting social mobility and justice within the legal sector. ■

Source: www.cilex.org.uk



Lessons for legal executives from four Court of Appeal property sale cases

The Court of Appeal recently handed down four judgments involving disputes over property purchases, with important lessons for legal executives.

The cases also illustrate that hundreds of thousands of dollars can be at stake when a sale goes wrong, leaving the vendors or the purchasers significantly out of pocket when attention to issues at the outset could have prevented many disputes.

Aspects of a sale misrepresented

The first case, *OHL Limited v Premier Property Developments Ltd* [2024] NZCA 422, involved the purchase by OHL Ltd from Premier Property Developments Ltd of one of two units (Unit A) in an Auckland 14-storey unit title development. By agreement, a retention of $692,000 was held in a stakeholder's account pending resolution of

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OHL's claim against Premier for breach of the warranties contained in the agreement for sale and purchase.

In July 2021, Premier commenced proceedings seeking the release of the retention, and OHL counterclaimed for damages under the Fair Trading Act 1986 for breach of warranty. The High Court rejected the Fair Trading Act claim, but held that Premier was liable to OHL for breach of warranty. However, OHL had unreasonably refused Premier's offer of a rent guarantee which was a reasonable mitigation measure. That refusal eliminated any loss arising from the breach and Premier was accordingly entitled to recover the retention.

OHL appealed to the Court of Appeal. The Court of Appeal held that the value of Unit A as at February 2019 was $3,100,000. OHL had paid $3,500,000, meaning that its loss was $400,000.

The court said that, at common law, a victim of a breach was under a duty to take all reasonable steps to mitigate loss and was debarred from claiming damages due to neglect in mitigating the initial loss. The test was what a reasonable person would have done in their position.

The Court of Appeal concluded that it was understandable that a rent guarantee had not been an attractive proposition to OHL.

“The idea that Premier, who had misled OHL in material respects, should have the ability to arrange a third-party tenant would seem a fraught proposition and certainly not what OHL had contracted for. It was a very different proposition from buying a property with an established tenant.”

The court accordingly said it disagreed with the High Court's view that it would have been reasonable for OHL to accept Premier's offer of a rent underwrite and this would have completely elimiated OHL's loss. The appeal was allowed and judgment was given for OHL in the sum of $400,000 plus accrued interest.

The judgment demonstrates that, where important aspects of a sale have been misrepresented, purchasers cannot be compelled to accept proposals from vendors seeking to remedy the situation if the buyer considers that the suggested remedy will place him or her in a less advantageous position. OHL had wanted to purchase a property which was attractive to tenants and provided a secure rental return. The fact that the vendor was offering a rent guarantee meant that this was not in fact the case, thereby undermining an important reason for the purchase.

Vendors reselling at a loss

A second case, *Bath v Whakaruru* [2024] NZCA 350, involved an agreement by Jay Bath to buy a residential property from Sonny and Anna Whakaruru as trustees of their family trust. Mr Bath defaulted and the vendors resold at a loss and brought proceedings seeking damages.

The High Court granted Mr and Mrs Whakaruru summary judgment of $320,500 in damages for the loss on resale, penalty interest of $72,822 on the unpaid portion of the purchase price, costs and expenses of $36,000 in relation to the resale, and rates of $1200.

Mr Bath appealed to the Court of Appeal, claiming that it was reasonably arguable that the vendors had failed to mitigate their losses and the High Court had accordingly erred in granting summary judgment. The Court of Appeal decision was delivered by Justice Downs.

His Honour noted that a vendor who resold following cancellation for repudiation or breach by the purchaser did not owe a duty of care to the purchaser based on proximity. The duty was the ordinary common law duty to mitigate loss. That only required the vendor to take such steps to obtain a proper price as were reasonable in the circumstances.

The vendors had engaged the same agent who had acted initially in relation to the sale. The market was in heavy decline by the time the property was resold; and the vendors were in a difficult situation as their interest rates had risen signficantly, they were servicing a second loan, they no longer received rent from boarders and they needed to leave Auckland for family reasons.

The Court of Appeal said that the vendors accordingly could not be criticised for accepting an offer – one of three – with the highest deposit and fewest conditions. They had had little choice but to resell the property, and speedily. The vendors were in that situation because Mr Bath had defaulted and it was not arguable that the process adopted by them was unreasonable in the circumstances.

The appeal was dismissed, leaving Mr Bath liable for damages of $429,000 in relation to the original purchase price of $1,160,000.

The case provides important lessons for purchasers. The most significant of these is the astronomical liability a buyer can incur if he or she fails to complete a purchase. A sale and purchase agreement is a binding contract and buyers should not sign on the dotted line unless they are absolutely certain that they have the money to meet the contract price.

Buyers cannot simply change their minds about completing a purchase, or think that not having all the money required is a good excuse. Purchasers who are uncertain about their finances should make the agreement 'subject to finance' and only make the contract unconditional once the finance is fully in place.

Buyers might think that deposits will be their backstop if their circumstances change and will provide enough money to cover them failing to meet their obligations. In a volatile market, however, the vendor's losses may be higher than the deposit and the buyer might accordingly be liable for additional damages.

Informal agreements

Thirdly, in *Xu v Meng* [2024] NZCA 436, couple Wei Xu and Junhui Zhang agreed to sell a property to Xing Meng and Huimin Guan. Mr Xu and Mr Meng were long-standing friends since attending high school together in China.

The purchase price was $1.78 million and it was agreed that a 20% deposit would be paid when the buyers sold another property; the purchase was conditional on finance; and the buyers would be liable for all costs associated with the property until settlement. No settlement date was fixed.

The buyers took possession of the property, but settlement never took place. The sellers obtained an order from the High Court on 29 July 2021 granting them vacant possession, but the prospective purchasers did not vacate until two months later, having made no payments since February 2020.

The owners later sold the property at a price substantially greater than that for which the prospective buyers had contracted. Mr Xu and Ms Zhang appealed to the Court of Appeal against a December 2023 High Court decision allowing the prospective purchasers' claim for return of a deposit paid to the sellers and otherwise dismissing all claims and counterclaims between the parties.

The Court of Appeal dismissed the appeal. Delivering the Court of Appeal judgment, Justice Jagose described the pleadings as "a mess." Their Honours said that the only real ground of appeal was if the High Court had erred in ordering the deposit's return in whole or in part.

"The contract here, being conditional on the respondents obtaining finance, was avoided when that condition went unmet by the time for its performance on 2 December 2020. As the agreement under which the deposit was paid came to an end without the respondents' unlawful repudiation, but with no provision for what was to occur to the deposit in such circumstances, there was no basis on which the appellants were entitled to retain it. The Judge was right to order its return."

The case illustrates the dangers of informal agreements and failing to provide specific details of essential aspects of sale and purchase agreements, such as a settlement date. It is also prudent to set out exactly what will happen if things go wrong and settlement does not take place, in order to avoid expensive court proceedings to sort out such issues.

The judgment further underlines the additional complications which can arise when people seek to contract with friends or family members. The very informality of such situations can actually increase their risks.

It is extremely prudent for legal advisers not to allow entry to a property until settlement has been completed. If buyers enter and then refuse to pay the purchase price, or withhold part of it because they discover circumstances they did not expect, the vendors will have the expense of seeking vacant possession and trying to obtain the purchase price. That situation should be avoided at all costs.

Covering specific conditions

The fourth case is that of *Watson v Zhou and Zhang* [2024] NZCA 417, in which Lei Zhou and Qiuying Zhang purchased a property from Ms Watson. After settlement, the buyers discovered that the property suffered from leaks. High Court proceedings were brought and the High Court held that there was a common mistake between the parties that the property was sound and did not leak, and that Ms Watson was also liable for breach of warranty in connection with certain work undertaken on the property which required a consent. No consent had been obtained.

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The High Court awarded the buyers $271,600 for mistake under the Contract and Commercial Law Act 2017 (CCCLA) and $15,000 for breach of a vendor warranty in relation to the sale of a residential property on standard terms and conditions.

Ms Watson appealed to the Court of Appeal and Mr Zhou and Ms Zhang cross-appealed against the High Court's conclusion that there was no oral misrepresentation, and in relation to findings associated with the claim for breach of contractual warranty.

The Court of Appeal allowed the appeal. Their Honours said that the case involved the sale of residential real estate under the standard ADLS/REINZ terms.

"This is a standard form contract that is used in almost all residential property sales in New Zealand. One feature of this standard contract is that it generally proceeds on the basis of the common law principle of caveat emptor. The buyer is taking the risk associated with the acquisition of the property subject only to the contractual warranties set out in the standard terms, any other express conditions included in the contract (including any additional warranties), and the application of any other principles of law such as misrepresentation under the CCLA, or the potential application of the Fair Trading Act 1986,which limit caveat emptor. If there is some important issue that affects the value but this issue does not go to one of the exceptions, the risk of this matter is taken by the purchaser."

The Court of Appeal said that risks associated with the acquisition of residential property under these terms were commonly addressed by making contracts subject to a builder's report or similar condition. Allowing a broad interpretation of mistakes would undermine both the concept of caveat emptor that generally existed with residential property sales on standard ADLS/REINZ terms, and certainty of contract. It was especially important for everyday property sales that the law be as straightforward as possible.

The appeal was allowed and the cross-appeal was granted in part.

The case demonstrates the importance of including specific conditions to cover issues about which buyers have concerns, such as weathertightness. The contract should be made conditional on the buyers obtaining the information they require to be satisfied that their concerns about weathertightness, and any other issues, have been allayed. ■

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

Migration to New Landonline nears completion

The Modernising Landonline programme continues to progress on schedule, with more instruments and functionality recently released.

Toitū Te Whenua Consulting Solicitor, Andrea Watson, says LINZ expects to be in a position to switch off Legacy Landonline towards the end of February 2025. This will be done in a staged transition process so that the LINZ Contact Centre has the capacity to support customers with any concerns they may have in this window of time. "You'll hear more from us about this in the New Year," adds Andrea.

The only functionality yet to be migrated is the Memorandum of Priority instrument, together with some ancillary features such as dealing templates and some search and user account features.

Recent releases

New Landonline supports the preparation of all types of caveats, since the recent release of the final parts of functionality. This includes complex and instrument modes which are used when:

- Dealing with only part of the land
- Adding images, for example to include special conditions or provisions for a caveat
- The caveat type is Forbidding issue of title removing limitation under s207(1) Land Transfer Act 2017, and
- Dealing with a lease, mortgage or other registered interest.

The Notice of Claim instrument has been released, as well as the



Andrea Watson, Consulting Solicitor, Toitū Te Whenua Land Information New Zealand

remaining piece of the Change/Correction of Name instrument, being its instrument mode.

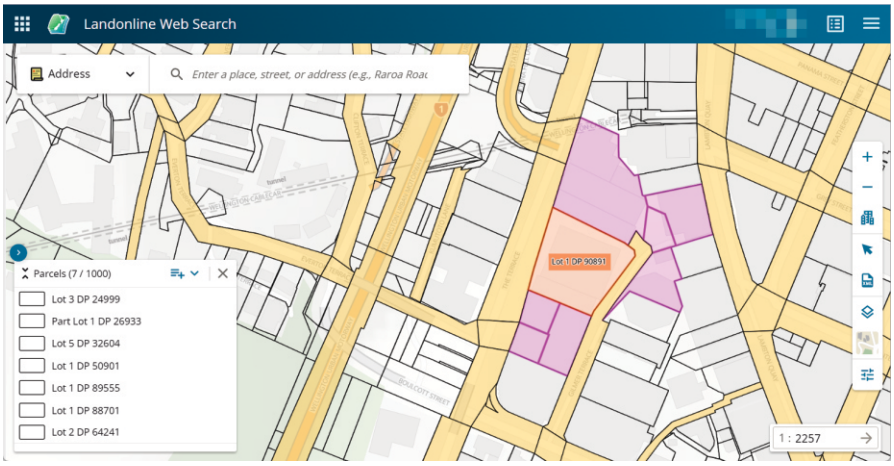
The Transaction log is also now live and can be accessed from the My/Firm Dealings screens via the Dealing Details summary. This displays a record of key changes that have been made to a dealing and its instruments during the preparation of the dealing.

Over in Search, the Multi-Select feature has also been released. By holding down the Ctrl key (or Command on Mac), you can now multi-select parcels and add them or their associated titles to your product list.

Do you still need the digital certificate?

Users who are non-signers and already using New Landonline for everything required may want to give up their digital certificate now and transition completely to New Landonline. Users should call LINZ on 0800 665 463 or email customersupport@linz.govt.nz to find out more.

As almost all functionality is supported in New Landonline, there's never been a better time for users to move their day-to-day work to the new platform. Andrea noted, "Making this move now will ensure users are up to speed with the new look and feel before the option to occasionally revert to Legacy is no longer available". ■



Select multiple parcels in Web Search using multi select tool

Australian superannuation death benefits in a mess

Andrew Johnstone of APEARS, Sydney, Australia



Since 1992, Australia has had compulsory superannuation for all workers. Most superannuation schemes have some form of insurance included to cover death, and also total and permanent disability. The claiming of such insurance has recently come under the spotlight.

Current action

In November, the Australian Securities and Investments Commission (ASIC) launched legal action against United Super Pty Ltd, the trustee of the Construction and Building Unions Superannuation Fund (Cbus), alleging systemic failures in its handling of insurance claims. The regulator claims that these failures have resulted in significant financial hardship for thousands of Cbus members.

ASIC alleges that more than 10,000 Cbus members were impacted by delays in processing death benefits and total and permanent disability (TPD) insurance claims exceeding 90 days. In some cases, delays extended beyond a year. This resulted in a financial loss estimated at $20 million for affected members and their families.

The regulator claims that Cbus failed to act efficiently, honestly and fairly in handling these claims, breaching its obligations under financial services regulations. ASIC alleges that despite receiving reports from its third-party administrator about processing delays, Cbus did not adequately assess or address the scope of the problem. The regulator further alleges that Cbus failed to notify ASIC within the required 30-day timeframe about the potential breach of financial services laws.





Cbus has acknowledged the delays and apologised to affected members and their families. The fund has implemented measures to reduce delays and established a compensation programme for impacted members. However, ASIC believes these measures are insufficient to address the systemic issues and protect members' interests.

Penalties being sought

ASIC is seeking penalties, declarations, adverse publicity orders and orders for compliance matters to be implemented. This highlights the importance of timely and efficient claims processing for superannuation members, and the potential consequences for trustees who fail to meet their obligations.

It also raises broader questions about the adequacy of oversight and regulation of the superannuation industry.

Consumer advocacy group, Super Consumers Australia, has called for stronger regulations and increased transparency in the superannuation industry. The group argues that the Cbus case highlights the need for mandatory standards for super funds' member services, including claims handling.

The Cbus case has also drawn attention to the potential impact of insurance delays on vulnerable members. Many superannuation members rely on insurance policies to provide financial security in the event of illness, injury or death. Delays in processing claims can lead to significant financial hardship, particularly for those who are unable to work or support their families.

The outcome of the ASIC allegations against Cbus will have significant implications for the superannuation industry. It could lead to increased scrutiny of claims-handling practices and potential regulatory changes to improve member protection. It is crucial for superannuation funds to prioritise timely and efficient claims processing to ensure the financial security of their members.

ATO and mishandling of super payouts

I have recently contacted local finance journalists regarding the Australian Taxation Office (ATO) and its mishandling of superannuation payouts. Some readers will have experienced this issue and dealt with my office in these frustrating claims. Superannuation in Australia, when untouched for a period of years (or if there is a very low balance) gets paid by the holding super fund to the ATO as unclaimed funds. The ATO will not advise how much it holds nor will it deal with anyone on any unclaimed funds without an Australian probate or reseal. Without the details of any assets, we cannot actually get a grant or reseal. So, a Catch-22 situation.

Further, in a recent scenario, we had sought a reseal (the particular super fund had found old records and confirmed the amount held). We lodged the relevant documentation with the ATO only for it (after a period of six months and many complaints) to advise it had to seek the ruling from the original super fund as it may not be obliged to pay to the estate (a spouse or child, for example, may be the preferred beneficiary). If that ends up being the case then we will have wasted time and money on the reseal. Did I mention frustration . . . ? ■

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 23.

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