



CORCORAN FRENCH
LAWYERS (EST.1892)

NEWSLETTER

Summer 2010/2011

Merry Christmas

The partners and staff of Corcoran French wish everyone a safe and enjoyable Xmas break.

Partners	- Michael French - Lane McPhail - Philip Redmond - Martin Bell - Rachael Robertson - Mark Henderson
Associates	- Jan Avery - Christine Kay-Eastgate - Sarah Holder
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Our web site is now live and can be viewed at
www.corcoranfrench.co.nz

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NEW KAIAPOI OFFICE



Our Kaiapoi office was hit hard by the 7.1 magnitude earthquake on 4 September 2010. Built for the firm in 1978 the site sustained severe liquification and the southern end of the building subsided. Recent aftershocks made the three storey office block no longer viable to repair and demolition is expected to start prior to Christmas. After relocating to temporary premises in Sewell Street immediately after the quake the firm opened its exciting new offices on 23 November at the Crossing, adjacent to McDonalds, at the corner of Williams & Hilton Streets, Kaiapoi. This site retains a strong link with the Main Street which has been home to the Kaiapoi office since 1892, although for the first time now situated in the CBD south of the bridge. The partners invite clients to visit the new premises and new clients are always welcome. There is plentiful parking and disabled access available. Home consultations by arrangement.



We close for the Christmas holidays on Thursday 23rd December 2010 and re-open on Thursday 6th January 2011 in Christchurch and 10th January in Kaiapoi



Practical Advice | Effective Solutions

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www.corcoranfrench.co.nz
Corcoran French is a member of NZ LAW Limited, an association of independent legal practices.

Earthquake Services

After the 2010 Earthquake many legal issues have arisen. We can help you with those issues including:

- Disputes with your insurer.
- Advice in respect of purchasing a property that may have been damaged by the earthquake or aftershocks.
- Advice for employers including payment to staff when they were not working and enforced leave.

- Selling your home if it has been damaged.
- Employee's rights following the earthquake.
- Landlord and Tenant disputes as to occupation of damaged buildings and the effect on rental and other payments.
- Review of building and construction contracts.
- Advocacy with Government Agencies.

Directors Right to Rely on Specialist Advice

The recent 'Feltex Five' decision, *Ministry of Economic Development v Feeney and Ors*, demonstrated that directors may avoid being held personally liable in certain circumstances if they have relied on expert advice.

The decision involved the prosecution of five Feltex directors ('Directors') for failing to disclose breaches of an ANZ loan agreement and for classifying this ANZ liability as a current liability in their financial reports. While the Directors did not deny that their reports breached the Financial Reporting Act 1993 ('FRA'), they argued that they had a defence under s40 FRA, in that they took all reasonable steps to ensure that the requirements under the FRA had been met. The Directors argued that they relied on expert advice which led them to believe that their reports were compliant.



At the time the financial reports were prepared, the company was transitioning to new financial reporting standards and commissioned a team of accountants to review these standards and the company's financial reports. However, it was reported that the accountants incorrectly advised the company of the requirements under the new standards and their advice led to the breach and subsequently the prosecution of the Directors. The issue was whether the Directors could rely on this expert advice or whether they should have taken further steps to meet the requirements under s40 FRA.

The Court held it was necessary to determine whether the Directors had taken all reasonable steps in light of the protections under the Companies Act 1993 (the 'Act'). Under s138 of the Act, directors are able to rely on information and advice from a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence.

This defence applies where it is evident that directors:

- acted in good faith,
- made proper inquiries where the need for inquiry is indicated by the circumstances, and
- had no knowledge that such reliance is unwarranted.

In this case it was found that a reasonable director, having read the accountants' report and having attended their meeting, would have been left with no doubt that the financial statements complied with the new standards. Therefore the Directors had no knowledge that reliance was unwarranted and were entitled to believe that the work undertaken by such a highly reputable firm was within their expertise. Furthermore, they were aware that the transition to the new standards was very complex and had put in place a comprehensive strategy to manage it.

Therefore it was held that the Directors took all reasonable and proper steps to ensure the requirements of the FRA were complied with and there was no evidence of an intention to mislead. Each of the Directors was found not guilty.

Wills and Property Ownership – Things you need to know

The recent High Court case of *Rauch & Ors v Maguire & Anor* [2010] 2 NZLR 845 highlights two interesting distinctions. Firstly, the distinction between ownership of property as 'joint tenants' and ownership as 'tenants in common'. Secondly, the distinction between the duties of disclosure owed to beneficiaries by 'Executors' and by 'Trustees' of a deceased person's estate.

The Facts

The deceased and his son owned two properties that were originally purchased in 1997; mistakenly as tenants in common. The mistake was corrected one year later when the properties were transferred to them both as joint tenants. The effect of owning the properties as joint tenants was that on the death

of the father in 2009, the properties were transmitted by survivorship to the son and did not form part of the estate.

The son gained from this correction because the two properties, which together were worth \$5 million, were accordingly his and did not form part of his father's estate. This in turn meant that the father's estate reduced in value from \$2.5 million (a half share of the two properties) to \$39,000 - hence the claim by the disgruntled beneficiaries (who did not include the son).

The High Court held that the residuary beneficiaries were not entitled to information from the executors and trustees of the estate. The properties were personal assets that were transmitted by survivorship prior to death and as such the circumstances were confidential.

Joint Tenancy or Tenancy in Common?

If property is owned as joint tenants then it does not become part of the estate and transfers by survivorship to the surviving joint tenant regardless of the contents of the will. If property is owned as tenants in common, then it forms part of the estate and is dealt with according to the terms of the will.

Beneficiaries' Rights to Disclosure of Information

It is common for the executor and trustee named in a will to be the same person, however beneficiaries'

rights of disclosure of information differ depending on whether they seek disclosure from the Executor or the Trustee.

In the above case, the residuary beneficiaries could not compel the Executors to disclose any information because they had no legal or equitable property interest in the unadministered estate. They had no greater right to disclosure after death than during the deceased's lifetime.

The residuary beneficiaries also could not force the Trustees to disclose information regarding the transfers because the information sought was information relating to non-trust assets. The assets were not part of the residuary estate. The Court held that disclosure is at the Trustees' discretion and if asked the Court would intervene in a supervisory role, if appropriate, given the particular circumstances. In this case, the residuary beneficiaries could not show good reason for the court to intervene and order disclosure.

A beneficiary has a right to disclosure of information by the Trustee, provided the information sought relates to the assets of the estate.

Conclusion

Understanding the manner in which property can be owned, including an appreciation of the distinction between joint tenants and tenants in common is crucial to estate planning.

Alcohol Law Reform Package

There has been a reported increase in the consumption of alcohol since the liberalisation of the liquor laws in 1989, which made alcohol more affordable and more widely available. On 23 August 2010 the Minister of Justice, Hon. Simon Power, announced a new Alcohol Law Reform package. This new package is based on the Law Commission's report "Alcohol in our Lives: Curbing the Harm" (NZLC R114, Wellington 2010) a follow up on the initial report "Alcohol in our lives" (NZLC IP15, Wellington, 2009), and incorporates 126 of their recommendations.

The Law Commission's reports revealed that 54% of people under 25 and 25% of adults consume large quantities (6 plus standard drinks for males and 4 plus standard drinks for females) of alcohol when they drink, and that the number of liquor licences has doubled in the past two decades. However, it identified the main concerns for society are those aged 14-19 who are drinking at an earlier age and consuming larger quantities of alcohol than previous surveys have shown for this age group.

The problem with this heavy drinking culture is the risk that it poses and harm that it causes both to the individual and to society. Alcohol



contributes to 1,000 deaths per year and is a factor in 31% of all police-recorded offences, 34% of family violence incidents, and 49.5% of all homicides. The aim of the reform package is to change this drinking culture and reduce the harm it causes by restricting both access to alcohol and the advertisement of alcohol.

The reforms will provide the following:

- A split purchase age, 18 years for on-licenses and 20 years for off-licenses.
- Restricting RTDs to 5 per cent alcohol content and limiting RTDs to containers holding no more than 1.5 standard drinks.

- That it is an offence to supply alcohol to a person under the age of 18 years without their parent's or guardian's consent, and there is also a requirement that alcohol is supplied responsibly.
- That the Minister of Justice may ban alcohol products that are particularly appealing to minors or dangerous to health.
- It is an offence to advertise alcohol in a way that appeals to minors.
- Communities are to have a greater say on the concentration, location, and opening hours of alcohol outlets through the use of local alcohol policies.
- For a restriction of maximum opening hours for off-licenses to 7am – 11pm and for on-licenses, club licenses and special licenses to 8am – 4am.
- Clarity to the law that dairies and convenience stores are not "off-licenses" (and therefore

penalties for a range of licence breaches.

- An extension of liquor bans to include places that the public has legitimate access to, for example car parks and school grounds.
- Strengthening the offence of promoting excessive consumption of alcohol by having it apply to any business selling or promoting alcohol and providing examples of unacceptable promotions such as giving away free alcohol.
- Improved public education and treatment services.

It is anticipated that these reforms will provide a balance between restricting the use of alcohol and not inconveniencing those who drink responsibly. However, as has been reported in the media, by trying to satisfy everyone the changes may not go far enough to make a significant difference.

Snippets

DNA Collection

From 6 September 2010 the Criminal Investigation (Bodily Samples) Amendment Act 2009 extended police powers, giving them the authority to take DNA samples from individuals who are arrested. Previously samples could only be taken with the individual's consent, or where there was a court order, or police-issued compulsion notice, or the person had already been convicted of an offence.



These new powers are being implemented in two stages:

- 1) From 6 September 2010 the police can take DNA samples from individuals who have committed indictable offences, such as those punishable by more than 7 years imprisonment.
- 2) At a date yet to be set, these powers will then be extended to include individuals accused of any imprisonable offence.

Justice Minister Hon. Simon Power believes the key benefit will be the ability to solve "cold cases" and identify some of the 8,000 unidentified DNA samples. It is predicted that stage 1 will result in 4,000 more samples a year and 2,800 links to the crime scene database.

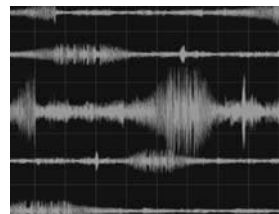
On the flipside, safeguards have been put in place. The police have developed guidelines, individuals will be penalised for misusing DNA, and if someone is not convicted their DNA will be destroyed rather than stored.

Government Response to Canterbury Earthquake

Parliament moved quickly to pass the Canterbury Earthquake Response and Recovery Act 2010 ('the Act'), which received Royal Assent on 14 September 2010 just 10 days after the earthquake struck. The Act will remain in force until 1 April 2012.

The Act grants the Government wide powers to make Orders in Council ('Orders') to relax or suspend provisions in any enactment that:

- may divert resources away from the effort to respond to the earthquake, or
- may not be reasonably capable of being complied with as a result of the earthquake.



The Orders may be used to temporarily override almost any law and are likely to be used to authorise such matters as

the destruction of buildings, regulate drainage and sanitation, and modify or extend town planning provisions. Unlike previous earthquake legislation, the Act does not specifically state what financial assistance the Government will provide and it does not create a right to compensation. Instead it establishes a Recovery Commission that will provide advice to the relevant Minister on Orders in Council and the prioritisation of resources and how funds should be allocated.

If you have any questions about the newsletter items, please contact us, we are here to help.

