

# BURROWES and Company

Barristers and Solicitors

Client Newsletter

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## LEAKY HOMES

There has been considerable publicity recently about the problem of houses which are not watertight – commonly known as "leaky building syndrome". There can be a number of causes for this, including:

- \* Incorrect installation of monolithic cladding systems;
- \* Inadequate construction of design features which do not allow for proper deflection or drainage of water;
- \* Inadequate administration by councils and the Building Industry Authority (the latter having been set up under the Building Act 1981 to monitor the implementation of building standards);
- \* A failure by the building industry to deliver the additional level of care and skill required for modern building systems;
- \* The use of untreated framing timber which is susceptible to rotting if moisture penetrates the outer building frame.

### What Do You Do If You Own An Affected Property?

If you observe signs of cracking, staining or discolouration either on the exterior or interior of your property, then a weather tightness specialist consultant should be engaged to assess the damage before undertaking any repairs. The consultant will be able to advise you as to the likely cause of the damage which, in turn, will enable you to assess what remedies are available to you.

### Weather Tight Homes Resolution Service

The Weather Tight Homes Resolution Service was established pursuant to the Weather Tight Homes Resolution Services Act 2002 to assist home owners whose properties are affected by leaky building syndrome. The purpose of the Act is to provide access to "speedy, flexible and cost effective procedures" for

assessment and resolution of claims.

Despite this, it appears that in practice building owners are dissatisfied with the service and the high costs associated with pursuing claims. This dissatisfaction has resulted in the formation of several action groups, to lobby for reform of the Weather Tight Homes Resolution.

### How To Avoid Buying A Leaking Home

If you are purchasing an existing property, then arrange for a professional inspection of the house to be carried out by a qualified and experienced inspector. The relevant professional or trade organisations include:

- \* Building Officials Institute of New Zealand;
- \* Building Research Association of New Zealand Accredited Advisors;
- \* Institution of Professional Engineers New Zealand;
- \* New Zealand Institute of Architects;
- \* New Zealand Institute of Building Surveyors;

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## WHAT IS A CHARITY? A DEFINITION FROM 1601

With the Charities Commission up and running and registration for charitable organisations just around the corner, it is timely to consider what exactly constitutes a charity, and why it is beneficial for an organisation to be classified as one.

### What is a Charity?

Until recently, the statutory authority for what a charity is has been found in income tax legislation. The Income Tax Act sets out four criteria for an

organisation to be classified as a charity. These are:

- \* it cannot be established or operated for personal pecuniary gain;
- \* its purpose must be altruistic and carried out for the benefit of the public;

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## BRIEFLY...

### A SNEAKY APPROACH TO AVOIDING LITIGATION

The High Court was recently asked to make a ruling on how the Disputes Tribunal should conduct its business.

The case has its origins in a series of outstanding invoices, debts incurred under a contract between Cornerstone Group Ltd (CGL) and a Mr Page. The total debt owing was a considerable amount; far above the Disputes Tribunal jurisdiction of claims under \$7,500. To get around this and avoid costly court proceedings, Mr Page took CGL to the Disputes Tribunal to obtain payment for one particular invoice for \$6885.

The Disputes Tribunal held that CGL was required to pay the invoice. CGL sought a judicial review of this decision, claiming that the Disputes Tribunal did not have the jurisdiction to make such an order as the invoice was only a small part of a larger debt.

The High Court held that the structure of the contract was such that in this case the Disputes Tribunal was able to make such an order.

This case has the potential to open the Disputes Tribunal to similar claims in the future.

# WCC EARTHQUAKE-PRONE BUILDINGS POLICY

With the coming into force of the Building Act 2004, the Wellington City Council (WCC) has put out a draft Earthquake-Prone Buildings Policy which outlines its proposed approach to ensure it meets the requirements of the Act. This policy has a number of implications for owners of commercial property in Wellington.

### The Building Act 2004

The Building Act 2004 (the Act) requires territorial authorities to adopt a policy on earthquake-prone buildings to either bring them up to the minimum standard under the Act or arrange for their demolition.

An **Earthquake-prone building** is defined under the Act as being a building which, "having regard to its condition and to the ground on which it is built, and because of its construction, the building—

- a) will have its ultimate capacity exceeded in a moderate earthquake; and
- b) would be likely to collapse causing injury or death".

The Act states that the earthquake-prone buildings provisions do not apply to buildings that are used wholly or mainly for residential purposes unless the building comprises two or more storeys and contains three or more household units.

### The WCC Policy

The draft policy states that buildings will have to be assessed in order to determine whether they are earthquake prone and sets out the process by which the WCC will identify earthquake-prone buildings.

The first step under the policy will be to undertake a desktop review of the status of all buildings. From here, the following buildings will be exempt from any further assessment:

- \* those which are designed or strengthened to the 1979 NZS 4203 and subsequent codes (unless they

have a critical structural weakness);

- \* isolated structures unlikely to cause injury or death;
- \* those buildings outside the Act—buildings used wholly or mainly for residential purposes;
- \* Council and Transit New Zealand infrastructure covered by an Asset Management Plan.

Buildings that are not covered by any of the above categories must then have a site assessment to determine if they are earthquake-prone.

If a building is deemed to be earthquake-prone, the building owner will be given the opportunity to provide further information on the matter. Should the building still be considered earthquake-prone after the consideration of any additional information, the building owner will be required to carry out strengthening works. If the building owner does not wish to or cannot afford to carry out the necessary strengthening works, the building will be demolished.

We recommend that all building owners obtain a copy of the draft policy in order to ascertain how it may affect them.

## LEAKY HOMES

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- \* New Zealand Institute of Quantity Surveyors.

If you are constructing a new home, then make sure the design takes into account the issue of weather management. This includes:-

- \* adequate drainage;
- \* using a design which ensures rain cannot enter the building through eaves or other features;
- \* adequate ventilation so that water which leaks inside cladding can dry if it cannot drain away;
- \* the use of materials which are suitable to the environment for the area in which you are building.

Make sure you obtain guarantees from the cladding installer, system manufacturer and your builder. In addition, check your builder is a member of Master

Builders or the Certified Builders Association of New Zealand.

### Conclusion

In an effort to prevent instances of leaky building syndrome in the future, the Building Act 2004 introduced stricter compliance procedures for the building industry. However, the problem is set to continue for some time in respect of buildings constructed prior to that Act coming into force and prospective purchasers should make sure they take all possible steps to avoid surprises later.

# A FURTHER CHALLENGE TO COMPANY INDEPENDENCE

A High Court decision holding the creator of biscotti spoons for serving with coffee personally liable for a promise she made to pay a contractor's invoice was overturned by the Court of Appeal late last year.

The action was brought under section 9 of the Fair Trading Act, which deals with misleading or deceptive conduct.

The Court of Appeal held that the failure on the part of the Company Director to follow through on her promise to pay does not prove she never intended to honour that undertaking.

This decision will come as a relief to Company Directors, reinforcing the immunity of directors and

shareholders from their company's actions.

The *Muollo v Creative Engineering Design Ltd* case comes after the case of *Mountfort v Tasman Pacific Airlines of NZ Ltd* featured in our December newsletter in which a different challenge to the doctrine of independence was mounted. In that case, two separate companies were pooled so as to be treated as one under the Companies Act.

## WHAT IS A CHARITY?

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- \* its purpose should not be illegal or contrary to public policy; and
- \* its activities must further or be in aid of its charitable purpose.

The Charities Act 2004 has adopted these criteria and also requires registration of each elected office holder with the Charities Commission.

### Charitable Purpose

Of the four criteria, the one most open to interpretation is the definition of "charitable purpose". A definition for this has been a long time in the making; the first attempt to provide guidelines for the identification of charitable purposes being the Statute of Elizabeth of 1601.

The Statute of Elizabeth set out a number of charitable purposes, including the marriage of poor maids, the maintenance of scholars and the repair of churches, but was in no way exhaustive. It represents the realisation that some sort of classification is needed to avoid abuse of charitable trusts.

The next attempt at a definition came in a landmark House of Lords decision in 1891. The *Pemsel* case classified charitable purposes under four heads:

- \* the relief of poverty;
- \* the advancement of education;
- \* the advancement of religion;
- \* other purposes beneficial to the community.

These four classifications form the basis of what we still consider to be a charitable purpose today. Section 5 of the Charities Act states:

In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.

By leaving this definition as wide as they have, the

Courts retain their jurisdiction to continue to establish what constitutes a charitable purpose. As it stands at the moment, the case law definition of charitable purpose includes the four *Pemsel* heads and gives some guidance on what the fourth head means:

- \* the advancement of health;
- \* the advancement of social and community welfare;
- \* the advancement of culture and heritage; and
- \* the advancement of the natural environment.

### Benefits of Registration

Registration under the Charities Act is not compulsory. However, it is advisable to do so.

Registration will provide an assurance to the public and funders that registered charities have been and continue to be subject to a review that ensures that they operate charitable purposes and that the organisation has rules and an administration structure which supports these.

It will also give charities eligibility for an exemption from income tax.

Registration under the Charities Act will begin shortly. Organisations will have until 30 September 2007 to register to retain or gain tax exempt status.

## BRIEFLY...

### Enforceability of an Oral Employment Agreement

Continuing the trend of litigation involving employers and employees, the Court of Appeal recently had to rule on the enforceability of an oral individual employment agreement.

The decision in *Warwick Henderson Gallery Ltd v Weston* emphasised the basic rules of contract law and the requirement for good faith negotiations under the Employment Relations Act (ERA).

While the ERA does require individual employment agreements to be in writing and the employee to have had time to seek independent advice on the agreement before signing it, the onus is on the employer to ensure this process is followed. If it is not, it will only result in the employer being penalised. Furthermore, in recognition of the inequality of bargaining power between an employer and an employee, the employer is required to negotiate in good faith. The Court held that not reducing an agreement to writing and then arguing that an action could not be brought against it for that reason did not constitute good faith.

This case is a good reminder to employers to ensure all employment agreements are in writing.

## BRIEFLY...

### Extension Of Paid Parental Leave To The Self Employed

A Bill that has now been referred to the select committee proposes to extend paid parental leave to the self-employed.

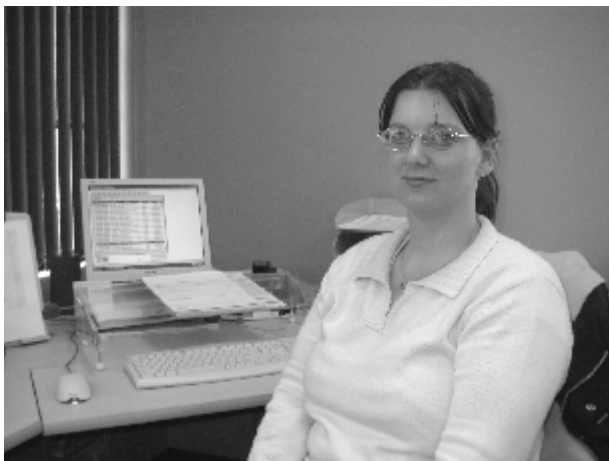
Self-employed mothers who have been working an average of 10 hours per week, during either the previous 6 or 12 months before the expected date of delivery of their child, will be entitled to 14 weeks paid parental leave. Parental leave payments may be transferred by a self-employed mother to an eligible partner.

To be eligible for parental leave payments a self-employed person is required to take a break from his or her work. However, unlike an employed person, a self-employed person is permitted to maintain a level of oversight of his or her business during the period of parental leave.

If the Bill is passed it will take effect from 1 July 2006. It is estimated that over 2000 self-employed people will take paid parental leave each year.

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# NEW ACCOUNTANT JOINS BURROWES AND COMPANY



**Tania O'Donnell has joined Burrowes and Company as our new Accountant**

The team at Burrowes and Company was recently joined by Tania O'Donnell who has taken over the accounts from Mary Fifield.

Mary had been with the company since its inception in 1997 and retired in January.

Tania has ten years experience in payroll, specialising in small business accounts. She graduated two years ago with a Bachelor of Business Studies in Accountancy.

Tania is married with two children aged seven and five. She enjoys reading in her spare time.

## THE END OF SPAM AS WE KNOW IT

A 2004 report estimated that businesses worldwide lose \$50 billion a year as a result of unwanted emails, making spam a major problem in the commercial environment. Between 40 and 70% of emails received in New Zealand are classified as spam.

To combat this, the Unsolicited Electronic Messages Bill was introduced to the House last year, following the enactment of similar pieces of legislation in the US, UK, Australia, Japan and Korea.

Modelled on Australia's 2003 Spam Act, the Bill targets unsolicited emails sent for marketing or promotional purposes. If the Bill is enacted, companies will have to have to have the express or implied consent of the recipient. Where there is an existing commercial relationship, this will be taken to be implied consent.

This opt-in approach to spam contrasts the American opt-out legislation, under which the recipient is required to contact the sender to request they desist from sending messages.

The New Zealand Bill will still require an unsubscribe facility on all marketing or promotional messages.

As it currently stands, there is no requirement under the Bill as to the number of messages sent to constitute spam. This means that any marketing or promotional message sent will come under the scope of the legislation.

The two exceptions to this cover situations where a message is sent to the wrong person or is sent by an ISP or network operator without their knowledge.

At present, spam is controlled by a number of pieces of legislation including the Privacy Act, Harassment Act, Crimes Act and Fair Trading Act. By amalgamating the relevant provisions of these Statutes, this area of law will become clearer.

Those opposing the Bill question its effectiveness, given that around 90% of spam does not originate in New Zealand.

However, with the move by the international community towards anti-spam legislation, the Unsolicited Electronic Messages Bill can only help the situation here in New Zealand.

Submissions are currently being heard on this Bill.