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## NEWSLETTER

Issue 4  
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Come and see the beautiful product from Cambodia for sale at:

- The Cargo Shed, Dive Cres every weekend and cruise ship days 10 – 4; and
- Creative Tauranga, Willow Street, Tauranga from Tuesday 14<sup>th</sup> December.

Lovely silk handbags, Children's toys, wallets, spices, and much more.

Lovely Christmas gifts with all proceeds going towards helping the children in Cambodia.

If you have some time to spare and would like to help as a volunteer for the Trust, please let us know.

*All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.*

### 90 Day Trial Periods – Employers Beware!!

The Government's proposed changes to the Employment Relations Act 2000 ('ERA') include extending the 90 day trial period to all employers, rather than just those with fewer than 20 employees. The main benefit of a trial period is that it allows an employer to dismiss an employee within the 90 day trial period without fear of a claim from the employee of unjustified dismissal.

The Department of Labour has recently conducted an evaluation of trial periods and found that approximately 40% of employers stated that they would not have hired their last employee without the trial period and 74% of people hired on a trial period have retained their positions. It therefore appears to have been a win-win for both employees and employers.

The first decision on the interpretation of provisions, *Smith v Stokes Valley Pharmacy (2009) Limited*, demonstrates that an employer must comply strictly with the provisions of the legislation.



In this case Heather Smith was working in the Stokes Valley Pharmacy when it was sold. Heather was offered a job with the new employer and on 1 October 2009 commenced work for them. On 2 October 2009, she signed a new employment agreement that contained a 90 day trial period. The new employer quickly became dissatisfied with Heather's performance, and in reliance on the trial period provisions, terminated her employment in December 2009.

Heather commenced proceedings against her employer and, despite the existence of the trial period, the Employment Court found that Heather could make a claim for unjustified dismissal.

Under s67A of the ERA, trial periods can only apply to a person who has not previously been employed by the employer. When Heather signed her employment agreement on 2 October she had already commenced work, even if it was only for a day, and therefore she was no longer a 'new employee'. The employer argued that Heather had by her conduct accepted the terms and conditions of the draft employment agreement as it was provided to her on 29 September 2009. The Court rejected this argument and held that the Agreement required execution by signature and until it was signed the Agreement remained a draft that could potentially be amended. The result was that the trial period was void and Heather could claim unjustified dismissal, the very action the employer thought they were protecting themselves from.

This decision also discussed the requirement of good faith in relation to trial periods. It was found that an employer is not obliged to notify an

employee, who is employed under a trial period, of the employer's intention to dismiss them. Once dismissed, if an employee requests an explanation for the dismissal, good faith requires that they must be given one.

It was also found that if an employer seeks to rely on a trial period, the employment agreement must be terminated lawfully and in accordance with s67B (1) of the ERA, which requires notice to be given. While there is nothing in the ERA determining the length or form of this notice, in this case Heather's contract required 4 weeks notice. Therefore, the Court found that the two weeks notice period that was given was deficient and subsequently the agreement was not lawfully terminated.

This decision highlights that employers who wish to rely on a trial period must comply strictly with the provisions of the ERA.

## 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.

## Leaky Homes – Stop the Clock

Probably the most important issue facing owners of plaster, stucco and monolithically clad homes is the 10 year longstop limitation period for lodging a leaky home application with the Department of Building and Housing.

Put simply, thousands and thousands of home owners will be barred from being able to claim any compensation from anyone - even before they knew they had any problems at all – simply because they will

have failed to lodge a (free) application for an assessor's report within 10 years of their house being built. A few simple facts tell the story:

- 9 out of 10 plaster, stucco and monolithically clad houses built between 1992 and 2005 will leak (this expert assessment has been well publicised);

- The Government experts estimate that up to 89,000 dwellings are likely to be leaky homes;
- Based on the latest figures available there have only been 8,267 claims lodged (which represents less than 9% of the 89,000 total);
- The 10 year longstop limitation period begins once the house is built;
- Once the 10 year limitation period has expired the home owner's rights for compensation are statute barred;
- Home owners can stop the clock simply by lodging a free application for an assessor's report with the Department of Building and Housing ([www.dbh.govt.nz/we-pub-application](http://www.dbh.govt.nz/we-pub-application)).

Put another way, up to 81,000 homes (or up to 91% of the estimated total of leaky homes) have leaks that the owners are either entirely unaware of (the damage is usually largely undetectable to the average home owner) or that they have failed to fully appreciate and act upon. It quickly becomes clear that based on the current figures the vast majority of home owners will become time barred from claiming any compensation unless there is a huge increase in the number of home owners filing applications.

#### **What you need to know**

Probably the best thing you can do for any clients with potentially at risk houses (plaster, stucco or monolithic cladding) is to advise them to lodge a free application for an assessor's report. A single hairline crack in the exterior cladding (something probably every plaster, stucco or monolithically clad house will have) is sufficient to pass the technical requirement on the

application form for water to be penetrating the building envelope.

After lodging the application a note is made on the Council property file and the home owners receive a letter confirming receipt of their application (stopping the clock). The letter also provides them with the option of a free eligibility report or a complete registered building surveyor's report including a thorough investigation, Council file check, repair recommendations and cost estimate (a total report value of \$7,000 - \$10,000) at the significantly discounted cost of \$511. My general advice to home owners is that they request the full assessor's report. With the Government's no-fault compensation package coming into effect shortly it is likely to be the best \$511 they ever spent.

Based on the Government's experts' own figures, 9 times out of 10 the house will have building defects that will be causing long term damage. The simple step of lodging the free application will provide the owners with choices and, assuming the application is lodged within time, the ability to claim compensation of a minimum of 25 – 50% of the remedial costs. The one time out of ten that the experts find no faults in the house your (lucky) client will have the peace of mind of knowing that their house has been assessed by an independent Government-backed expert and that they will be able to provide that assessment to any potential purchasers should they ever choose to sell.

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## **Company Rules to be Tightened**

Last year an Auckland registered company, SP Trading Ltd, was linked to the sale of arms from North Korea to Iran. When investigations commenced, the Director of SP Trading Ltd, Lu Zhang, was unable to be found. The Companies Office records showed the sole shareholder of SP Trading Ltd to be Vicam (Auckland) Ltd, whose shareholder was GT Group Ltd. The registered office of all three companies was the same Queen Street address.

This case raised concerns that New Zealand's reputation as one of the best countries in which to conduct business may also have opened it up for abuse.

Currently there are no requirements to provide proof of identity or to verify a company's address when completing company registration. However, there is concern that increasing compliance requirements will affect our ability to do business and increase costs for honest business people. There is a fine balance between ensuring that it is easy to do business and protecting ourselves from risk.

On 9 September 2010 the Commerce Minister, Hon. Simon Power, announced that the Government will tighten up the requirements around company directors and the registration process in an effort to prevent overseas interests using New Zealand registered companies to undertake criminal activity.

A Bill is expected to be introduced into Parliament next year that will include the following key changes:

- All New Zealand companies will be required to have either one New Zealand resident director or a local

agent, who will be responsible for ensuring that accurate information is given to the Registrar of Companies ('the Registrar').

- The resident director or local agent will be held liable if any of the above information is found to be misleading.
- The powers of the Registrar will be increased to provide a greater ability to take action where there is any doubt about the accuracy of information. This includes having the ability to make note or 'flag' on the register any company that is under investigation.
- The Registrar will be able to remove a company from the register or prohibit a director from acting for up to five years if it is found that they have breached companies related legislation or if they have been misleading in any way.

It is anticipated that these changes will make it easier to deal with compliance issues around company registration and to remedy issues surrounding the authenticity of directors and shareholders of companies. Individuals will be able to check the Companies Office records if they have any concerns surrounding a company with which they are doing business. Mr Power states that this will shore up the integrity of New Zealand's company registration process against increasing criminal activity from overseas. Most importantly, it will ensure that New Zealand upholds its reputation as one of the best places in the world to do business.

## An Update on the Cambodia Charitable Trust

The Trust continues to support the 8 schools in Cambodia and the children have all settled back into the new School year. The trainees at the Teachers Training College the the trust helps are also working well.

The Trust has arranged sponsorship of at risk girls - girls who are from very poor families and are unlikely to complete Primary School education without some help. It costs \$35 a month to replace the wages the girl would earn if she was taken out of school. An educated girl has choices and is much better equipped to lead a life where she can contribute to society.

Doug and Denise are off to Cambodia (self funded) on Boxing Day to visit the schools and the lawyers the Trust helps. They will be taking some Christmas presents for the children if you would like to contribute. Pens and pencils are best.

Denise was recently Highly Commended for the College of Law Community Law Award. It was great to see her efforts in Cambodia with the lawyers

recognised by her peers and the partners and staff are very proud.

Denise has been invited to attend a conference in Kuala Lumpur at the end of January on the Rule of Law. She will be away for 3 days.

The Cargo Shed on Dive Crescent has a whole lot of new stock on display which would make great Christmas Gifts. If you would like to come and see the goods from Cambodia the Cargo Shed is open 10 to 4 Saturdays, Sundays and Cruise Ship Days. If you have some spare time we would love to have you as a volunteer. Many of our volunteers work during the week so it is doubly hard to fill the roster during the week. Please let Denise know if you would like to join the band of friendly volunteers.

Creative Tauranga on Willow Street will host the Trust and its Cambodian products from Tuesday the 14<sup>th</sup> of December. Come along and see what we have for sale.

## 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.

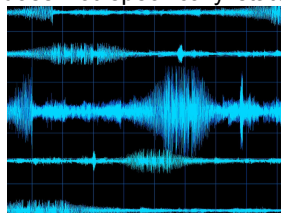
### Government Response to Canterbury Earthquake

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.

Our offices will be closing for the holiday period on Thursday 23 December and will re-open on Monday 10 January 2011.  
We wish you all a very happy festive season.



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