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NEWSLETTER

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INSIDE THIS EDITION



COUNTERFEIT AND ILLEGAL GOODS – NEW POWERS GRANTED TO THE STATE.....	1
CHRISTCHURCH EARTHQUAKE TO TRIGGER CHANGES TO RESOURCE MANAGEMENT ACT 1991 ...	2
FRUSTRATED CONTRACTS	3
BUYING & SELLING A UNIT TITLE PROPERTY	3
SNIPPETS	4
THE “GIFT OF LIFE”	4
WHEN IS RELATIONSHIP PROPERTY VALUED FOLLOWING SEPARATION?	4

Our office will be closed from 5pm Thursday
22nd December 2011, reopening 8.30am
Monday 9th January 2012
except for pre-arranged business

**We wish all our clients a Merry Christmas
& Happy New Year**

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COUNTERFEIT AND ILLEGAL GOODS – NEW POWERS GRANTED TO THE STATE

The Trade Marks Amendment Act 2011 and the Copyright Amendment Act 2011 were passed on 15 September 2011, bringing changes that give powers to Enforcement Officers, Customs and Police to assist in cracking down on infringements.

The changes target illegal and counterfeit goods. Commerce Minister Hon. Simon Power advises the new powers will allow the Ministry of Economic Development National Enforcement Unit ('the Ministry NEU') and the Customs Service ('Customs') to investigate and prosecute people involved in the manufacture, importation, and sale of illegal goods. These powers came into force in October this year, and are as yet untested.

The impact of the granting of investigative, search and seizure powers to the Ministry NEU and Customs means that these Departments can work together with Police and private individuals, companies and other entities holding rights under copyright or trade marks ('rights holders') to prosecute the criminal offences of importing and selling counterfeit goods and pirated works.

Pursuant to clause 134C of the Copyright Act, Enforcement Officers in their newly created role must "...to the extent it is reasonably practicable, promote compliance with this Act by carrying out the following functions:

- gathering information relating to offences under the Act,
- investigating offences under the Act,
- reporting to the chief executive on any matters relating to the Enforcement Officer's functions."

While the above provision requires Enforcement Officers to promote compliance with all areas of these Acts, the Government is advising that the Ministry NEU and Customs will be focused on counterfeit or other illegal goods, and that “responsibility for protecting and enforcing copyright and registered trade marks still lies with the rights holders”. Rights holders will not be able to rely on or expect the Enforcement Officers to enforce rights on their behalf.

The Acts will allow Customs greater powers at our country’s borders through their increased rights to seize property, question suspected offenders, and investigate goods entering the country that may be counterfeit. The aim of the legislation is to restrict the flow of illicit goods into New Zealand, and thereby increasing consumers’ confidence that they are buying genuine household products and luxury goods. The Government has said that “Illicit traders are moving beyond luxury items and into common everyday household products such as

medicines, car parts, electronic equipment, and food products”, and do not concern themselves with health and safety considerations.

Enforcement Officers will be able to deal with anyone selling goods in public, including markets, stalls and fairs, which are often rife with counterfeit goods. Enforcement Officers have the right to enter any public area, including shops, stalls and markets to investigate without being required to obtain a search warrant. They may also apply for a search warrant to allow them to enter and search private property to investigate non-compliance with the Acts.

The Trade Marks Act now also provides for greater international protection of trade marks, permitting New Zealand to join international treaties such as the Madrid Protocol, which allows protection in up to 84 Countries with one trade mark application, and one fee.

CHRISTCHURCH EARTHQUAKE TO TRIGGER CHANGES TO RESOURCE MANAGEMENT ACT 1991

The Christchurch earthquakes have given cause for the Government to re-examine the requirements of the Resource Management Act 1991 (‘RMA’) with the damage caused to thousands of homes by liquefaction being a significant factor.

The purpose of the RMA is to “promote the sustainable management of natural and physical resources”. The catastrophic effects of the earthquakes have highlighted the importance of the RMA as not only protecting the environment from the impact of people and land use, but also to consider the effect on people from nature.



To achieve its purpose, the RMA requires that decision makers consider matters of “national importance” in their determinations. However, natural hazards are not included as a matter of national importance. As a result it is becoming apparent that the zoning of areas for residential use in district plans, and the consideration of Resource Consent applications do not sufficiently consider natural hazard risks.

The recent Canterbury Fact Finding Project (‘the Project’) has investigated how much was known about liquefaction and lateral spreading risks in Christchurch, and the impact of such knowledge on zoning and development decisions. Since 1991 there have been reports available on the significant liquefaction risk in Christchurch, including “clear maps that are uncannily accurate” on the locations where liquefaction would occur.

Hon. Dr Nick Smith, Minister for the Environment noted in a speech given recently that a significant number of

resource consents, covering about 20% of the severely liquefied properties in Christchurch, were approved after the area specific reports funded by the Earthquake Commission (EQC) and GNS Science (GNS) were released in 1991 and 1992 respectively.

The Project has found that Resource Consents issued under the RMA for the development of land in some areas did not take into account identified liquefaction risks. Even post 2004, it is considered consents were being granted without any regard for this significant and by then well documented risk. Not only was the information regarding identified risks non-existent with the zoning and consent decision making with the development of these areas, but the risk of liquefaction was not clearly identified on Land Information Memorandum Reports (‘LIM Reports’) for the affected properties.

The identification of liquefaction risk has now been incorporated into LIM Reports in Christchurch, and these risks will likely be considered with future residential development and zoning. The problems in Christchurch have however identified a shortcoming in the current consenting process, which must be readily addressed.

The Government is to continue with their changes to the Resource Management Act, and have indicated that further substantial changes will be proposed to ensure the risks of natural hazards are considered in planning decisions.

Perhaps these amendments will ensure all Councils look to address the risk of natural hazards beyond flooding when approving applications under the Resource Management Act, and be vigilant in protecting residents from real identified risks.

The inclusion of detailed information in LIM Reports will also assist in giving notice to property owners of the natural hazard risks to which the property may be subject,

allowing them to account for such risks when building upon or otherwise developing their property.

FRUSTRATED CONTRACTS

The common law 'doctrine of frustration' allows a contract to be discharged on the occurrence of certain events beyond the control of the parties which would make the performance of the contract impossible. As the doctrine is a departure from the traditional view that contractual promises are absolute, its application in law must satisfy strict legal tests in order to be successful. It requires an event to occur that is firstly unforeseen and one which significantly alters the relationship between the contracting parties.



CATEGORIES OF FRUSTRATION

Although not exhaustive, the following are five situations where the doctrine of frustration has been successfully applied.

1. **Where the subject matter of the contract ceases to exist:** In *Taylor v Caldwell (1863) 3 B & S 826*, a hall which was hired to host a series of concerts burnt down before the concerts could commence. Both parties were relieved of their obligations as the contract was held to be frustrated.
2. **Non-occurrence of events - the purpose of the contract has become impossible to attain:** In *Krell v Henry [1903] 2 KB 740* a flat was rented for the purposes of viewing the King's coronation procession. The procession was cancelled due to the King's illness and the contract was discharged as the sole purpose for which it was rented ceased to exist.
3. **Death or incapacity of a party where the contract involves obligations of a personal nature:** In *Robinson v Davison (1871) LR 6 Ex 269*, a contract by a pianist to perform on a specific day was held to be frustrated when the pianist became too ill to perform.
4. **Delay and obstruction of performance:** Where caused by external events, delay and/or obstruction may be held to be frustration if the delay is so long, or

the obstruction so extreme that it would make the result of the contract fundamentally different from what had been contemplated.

5. **Performance is rendered illegal by legislation:** If a change in legislation that comes into effect after the creation of the contract renders its performance illegal, the contract is held to be discharged.

FRUSTRATED CONTRACTS ACT 1944 ('FCA')

The doctrine of frustration is supported in New Zealand by the FCA, which addresses the effect of the discharge of obligations on the areas of the contract already fulfilled. It confers three major benefits on parties that

are supplementary to the common law doctrine.

1. It provides the right to a party to recover money paid in consideration of the contract despite payment being made before the date of frustration, and
2. It allows a party to claim compensation for work done and/or expenses incurred for the purposes of a contract up until the date of frustration, and
3. It permits the benefits received up to the date of frustration to be taken into account when determining the recovery of monies paid or expenses incurred.

The FCA can be contracted out of by including within the contract provisions addressing the event of frustration. In such instances, the provision will apply instead of the FCA.

The doctrine of frustration and FCA are examples of options or resolutions that may be available to a party following the breakdown of a contract. Legal advice may assist in identifying resolutions of a dispute or breakdown through remedies available outside the contract.

BUYING AND SELLING A UNIT TITLE PROPERTY

Unit Title properties are becoming more common in New Zealand and the ownership structures of these properties are becoming increasingly complex. It is therefore more important than ever that buyers understand the rights, obligations and benefits associated with owning a Unit Title property prior to becoming committed as a buyer under an Agreement for Sale and Purchase.

The Unit Titles Act 2010 ('the Act') came into effect on 20 June 2011 and addresses some of the concerns traditionally associated with Unit Title property ownership. The Act provides for more information to be available to buyers so they can make better and more informed

decisions regarding their purchase of Unit Title Properties.

When a Unit Title is sold the seller must now provide the buyer with pre-contract and pre-settlement disclosure regarding the Unit Title property. The purchaser will also be entitled to request additional disclosure at their own expense.

PRE-CONTRACT DISCLOSURE

Under the Act a pre-contract disclosure statement must be prepared and provided by the seller to any prospective

buyer of a Unit Title property before the parties enter into any Agreement.

Pre-contract disclosure must advise the buyer on:

- body corporate charges,
- proposed future maintenance, including how the costs will be met,
- the balance of any fund or bank accounts of the body corporate as at the date of the last financial statements,
- whether or not the unit or common property is or has been subject to a claim under the Weathertight Homes Resolution Services Act 2006 or any other similar civil proceeding,
- and explain matters such as unit title property ownership, body corporate operation rules, unit plans, ownership and utility interests together with other matters to ensure the information provided is meaningful to the buyer.

The requirement to provide pre-contract disclosure cannot be contracted out of by the parties. All sellers must comply.

PRE-SETTLEMENT DISCLOSURE

After the buyer and seller have entered into an agreement for sale and purchase the seller must provide the buyer with a second disclosure statement with further

information, including a certificate from the body corporate, no later than the fifth working day prior to the settlement date.

ADDITIONAL DISCLOSURE

The buyer of a Unit Title may request additional disclosure from the seller. Any request for an additional disclosure statement must be made by the earlier of either:

- five working days after the date of the agreement, or
- the tenth working day before execution of settlement.

If a request for additional disclosure is made, the seller must provide the additional disclosure to the buyer no later than five working days after the request was made. The seller is entitled to recover any reasonable costs they incur in providing the additional disclosure.

The additional disclosure may be of great assistance to a buyer, and serious consideration should be given to requesting information even though it may incur additional costs.

There are consequences if the correct disclosures are not made within the appropriate timeframes. These can include the buyer being able to postpone settlement or cancel the agreement altogether.

SNIPPETS

THE “GIFT OF LIFE”

A total of 11 hearts, nine lungs, 35 livers, three pancreases, and 50 kidneys were included in transplants from deceased people in New Zealand last year. These donations were given by a total of 41 organ donors.

The donation of organs and tissue in New Zealand is governed by the Human Tissues Act 2008 (‘the Act’). The Act prescribes who may give consent or raise objections to donation of organs and tissue from deceased persons.

Indicating on your drivers licence that you wish to be an organ donor does not constitute consent to the donation of organs; as the decision to donate ultimately rests with your family. It is therefore important to discuss your wishes with them. Where any “close available relative” reasonably objects to the donation of your organs, any consent given could be overridden and the donation will not proceed.

The Act provides that the decision to donate should take into account the family’s cultural and spiritual needs together with their values and beliefs. For further information, please refer to www.givelife.org.nz and www.donor.co.nz.

WHEN IS RELATIONSHIP PROPERTY VALUED FOLLOWING SEPARATION?

The date upon which relationship property is valued for division of asset purposes varies depending on whether the parties or the court decide the division of assets. The Property (Relationships) Act 1976 (‘the Act’) applies to de-facto relationships, civil unions and marriages. The Act provides rules for the division of property for relationships of over three years in duration.

Where the parties agree, they can document their agreement in a Separation and Relationship Property Agreement, and include the values as at the date of separation.

Where agreement cannot be reached, application can be made to the Family Court, where the value of relationship property is determined at the date of hearing, unless the Court exercises the overriding discretion it has to depart from a hearing date valuation.

Be aware of the impact timing can have when disputing the split of relationship property assets following separation. For some people, a quick resolution at the earlier asset value may be a better result than getting a greater share when asset values have fallen.

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