



# NEWS BRIEF

Spring 2006

M A C T O D D

BARRISTERS SOLICITORS NOTARIES

## EXPLAINING POWERS OF ATTORNEY

Any individual may give another a power of attorney to manage his or her affairs pursuant to the Personal Protection of Property Rights Act 1988 ("the Act").



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#### **An enduring power of attorney as to property**

This confers upon the person who is appointed ("the donee") the right to act in respect of all the property affairs of the person he or she is appointed by ("the donor"). Alternatively, it can be restricted to certain types of property. For example, a person who is intending to be absent from the country may wish to appoint an attorney to negotiate the sale of a specific asset such as a house or company shares and the power of attorney would therefore be restricted to those assets only.

#### **An enduring power of attorney in relation to personal care and welfare**

This confers upon the donee the right to make decisions concerning the personal care and welfare of the donor of the power of attorney. It can be particularly useful in the case of elderly people who wish to appoint family members to make decisions concerning the sort of care they should receive.

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# EXPLAINING POWERS OF ATTORNEY

## CONTINUED

However, there are certain matters which are specifically excluded. For example, the donee cannot refuse consent on behalf of the donor to any standard medical treatment or procedure intended to save life or prevent serious damage to health.

In both instances, the donor may stipulate that the power of attorney is not to be revoked even if the donor becomes mentally incapable.

### Who should you appoint?

Given the wide powers that the donee of a power of attorney can exercise on behalf of the donor, it is most important that if you are considering appointing an attorney then the proposed person should be someone whom you implicitly trust. You should know them well enough to be confident they will

carry out your wishes and generally deal with your property and personal affairs in a manner that you desire.

Only one person can be appointed at any given time as an attorney for personal care and welfare but two or more can be appointed to deal with property.

In that instance, you should consider whether they should be appointed jointly (which means both attorneys must act together) or jointly and severally (which means they can act either together or separately).

A power of attorney may be revoked at any time by the donor giving written notice to the donee. However, if you wish to do this it is prudent to inform your bank as well as any other third parties who may have dealt with your attorney. A power of attorney is

## NEED POWER

### Do you need a power of attorney?

A power of attorney is useful particularly if you are travelling or living overseas and wish to ensure there is someone available to deal with your affairs in your absence. It is also useful in case of illness or mental incapacity. However, before appointing an attorney, careful consideration should be given as to whether it is appropriate to give the donee general power to act on your behalf or restrict it to specific matters only. The appointment of an attorney is an important step and you should always seek advice from your solicitor before signing a power of attorney.

# SELLING YOUR HOME – THE AGENT’S COMMISSION

If you are using a real estate agent to sell your house then you will have to pay a fee to the agent for their marketing services and the associated costs involved with finding a purchaser for your home.



## How much can I expect to pay?

The Real Estate Agents Act 1976 does not state how much real estate agents can charge for their services or what method of charging they should use. Most agents charge on a commission basis. However, some companies may charge a flat fee which is calculated as a percentage of the purchase price.

There seems to be a slight variation among the real estate agencies but generally the commission charged for selling a residential property is a base fee of \$400.00 plus 4% of the sale price of the property up to \$250,000.00 and a percentage fee of 2.5% on that portion of the sale price which exceeds \$250,000.00. GST is also payable on the fee.

The amount of commission charged does not all go to the agent of the seller. Half of it belongs to the real estate agency. If there is more than one agent involved in the sale

of the property then the commission is split 3 ways with the real estate agency receiving 50% and the remaining 50% being split between the listing agent and the agent who introduces the purchaser receiving.

## Sale by auction

If you elect to sell at auction then there may be an extra fee in addition to the commission. The cost of a sale at auction varies between the agencies depending on what package is being offered but the fee charged may include marketing fees, advertising flyers as well as the cost of the auctioneer. These auction packages can range from between \$300.00 to \$1,200.00.

## Is the agent's commission negotiable?

The commission is owned by the real estate agency so the individual agent is not always in a position to negotiate the commission.

Agents will obviously be reluctant to reduce their fee but nevertheless, it is possible to negotiate a fee.

## Agency agreements

An agency agreement is the agreement between the real estate agent and the seller of the property. The Real Estate Agent's Act states that if an agency agreement is not in writing, then the agent cannot demand payment of a fee or commission. A written agency agreement protects the public to some degree by making sure that people understand their relationship with the agent. It may also prevent disputes between agents as to who is responsible for the sale and who is entitled to commission. The amount of commission paid depends on what the agency agreement says. Before signing an agency agreement, make sure you read the terms and conditions carefully and be certain of what you are contracting the agent to do, particularly if advertising and other costs are payable in addition to the commission.

## General agency or sole agency?

Sole agency (sometimes referred to as exclusive agency) is where the seller chooses only one agent to sell the house. General agency is where the seller chooses several agents to sell the house. It is therefore important that you are very clear with your real estate agent as to the type of agreement you wish to sign and make sure that the agency agreement does correctly record your intention. This was illustrated in a recent decision of the High Court – Radburn v Property Brokers Limited. In that case the seller signed an authority which gave the agent a sole agency for one month. The seller's intention was to reserve his right to sell the property privately once the sole agency agreement had expired but unfortunately, he did not delete the following words from the agency agreement "... thereafter this agency shall be a general agency on the general agency terms set out below". The seller did put a line through the next paragraph headed "General Agency Terms". However, the court ruled that this was not sufficient to cancel the general agency and that the general agency had continued after the sole agency had expired. The judge reached this conclusion by looking at both the conduct of the parties as well as the terms of the agency agreement.

## DOUBT?

If in doubt as to the meaning of the terms and conditions contained in an agency agreement, contact your solicitor before signing.

# BUILDING CONSENTS – WHAT TO LOOK FOR

When purchasing a property, it pays to investigate the history of the buildings on the land. If there are no records of building consents having been issued by the council, then at best the buildings may have been constructed without council approval and may not comply with the building code. At worst, they may be dangerous for use and occupation.



## Background to the building consent process

The Building Act 2004 ("the Act") governs all building works in New Zealand. It states that such work must comply with the building code. The code is made up of regulations which prescribe the functional requirements for buildings and the performance criteria they must comply with for their intended use.

Before undertaking building work, the owner of the property needs to obtain approval from a building consent authority. In most cases, the building consent authority is the local council. Council approval for building work is known as a "building consent".

Once construction is complete, the council will inspect the work to ensure compliance with the conditions of the building consent

and the building code. If the council approves the work, then it issues a code compliance certificate.

Under the Act, it is an offence to carry out any work that is not in accordance with the terms of the building consent. Also, until such time as a code compliance certificate has been issued, it is an offence to occupy the building.

## What happens when building work has been done without a building consent?

Building consents cannot be issued retrospectively. However, if the work has been completed and a building consent was required but not obtained, then an application to the council for a "certificate of acceptance" may be made. This involves the council inspecting the work to determine if it complies with the building code. If it does, then it may issue a certificate of acceptance. However, such a certificate cannot be issued if the building work was carried out prior to 1992 as the building code was not in existence prior to that date.

It is not uncommon to come across properties where the buildings on the land have been constructed with a building permit or consent but the work has either never been completed, or if it has, the council has not approved it. If the work was carried out prior to 1 January 1993 and provided that the building is not "dangerous" or "unsanitary" as defined in the Act, then the council cannot take any action to require the owner to complete the work in accordance with the original building permit.

## LIM REPORTS

The best way to check that there are no unauthorised buildings on a property is to obtain a Land Information Memorandum (known as a "LIM report") before you buy it.

This includes a summary of all records held by the council in relation to the property including details of building permits, consents, code compliance certificates and certificates of acceptance.

It is worth remembering that although the absence of permits or consents may not pose a problem while you live in the property, it may well become a problem once you decide to sell it.

For that reason, a **LIM report is money well spent. It could save you a great deal more at a later date.**

# BUYING A BUSINESS



You have had enough of working as an employee, and wish to take advantage of the benefits of owning your own business. You are about to make an offer to the vendor of a business and to instruct your lawyer to deal with the matter on your behalf. What happens next? Some of the issues that need to be considered are discussed below:

## Share purchase or asset purchase?

There are two ways of buying a business. The first is to buy the shares in the company which owns the business. The second is to buy the assets of the business. These include the plant, equipment and the goodwill.

As buying shares in a company can also mean acquiring that company's debts and liabilities, the second method is the most commonly used in the purchase of a business. By acquiring the assets, you have the freedom to incorporate your own company to become the owner of the business, thereby enabling you to start with a "clean slate".

## Due Diligence

"Due Diligence" describes the process of investigating the business and ascertaining whether it is in fact as the vendor has represented it. The vendor should provide access to the company's books and accounting records. You should then undertake an

investigation (preferably with your accountant) to satisfy yourself that the business is profitable and that any projections as to earnings which may have been provided by the vendor are realistic and achievable.

The due diligence process can be carried out either before or after an agreement for sale and purchase is signed. Where it is to be carried out after an agreement has been signed, the agreement will need to include a "due diligence" clause which provides, amongst other things, that if the outcome of your investigation is unsatisfactory, for whatever reason, then you can cancel the agreement.

## Warranties

"Warranties" are representations made by the vendor about the business. The sale and purchase agreement will include standard warranties but if the vendor has made specific representations about the business that have played a major part in your decision to buy it, then the agreement should

specifically record these. It is vital to communicate such matters to your lawyer who can then ensure any such representations are included in the agreement.

## Lease

If the business is being operated on leased premises, then the lease will need to be transferred to you or your company. This is known as an "assignment of lease". As part of your due diligence investigation, you should check the terms of the lease carefully to ensure they are acceptable. In particular, beware of a lease that only has a short term to run and has no right of renewal. You may find the landlord has other plans for the building and you will be unexpectedly faced with expensive relocation costs.

The above is an outline only of some of the issues that arise when purchasing a business. You should seek legal advice in relation to those issues which are particularly relevant to your transaction.



# EMPLOYMENT ISSUES – THE BILL AND JOHN CASE STUDY

John is employed as a mechanic and has been working for the same employer for around six years. One day John arrives at work 10 minutes late and finds his employer, Bill, looking very unhappy. Bill says to John that he is sick and tired of John being late and then shouts at John, “That’s it – go home”.

John works the standard 37.5 hour week from Monday to Friday and is paid \$14.50 per hour. He receives a tool allowance for hours worked and minimum statutory leave entitlements as set out in the Holidays Act 2003. The employment agreement between John and his employer is not recorded in writing. As far as John can recall Bill has never commented on the time that John arrives at work.

## What Should John Do?

John believes he has been dismissed.

All employment relationships are governed by the Employment Relations Act 2000 (“the Act”). The Act sets out that the parties to employment relationships have obligations to deal with each other in good faith. It also sets out that all employment agreements must be in writing and provides the minimum details that an employment agreement must contain – such as hours of work, place of work and rate of pay.

The Act provides a number of grounds upon which an employee can raise a personal grievance claim against an employer including unjustified dismissal. It also stipulates time limitations within which an employee must raise his/her personal grievance claim. Outside of the statutory time limitations and unless the employer

agrees to extending them, the employee may make application to the Employment Relations Authority (“the Authority”) for leave to raise the claim out of time. In John’s case, he has 90 days from the date on which he believes he has been dismissed.

To be successful in his personal grievance claim, John must first establish that he has in fact been dismissed. Once this has been established, the onus then shifts to Bill who must show that there was good cause to dismiss and that John’s dismissal was implemented in a procedurally fair manner.

## What Should The Employer, Bill, Have Done?

Putting aside the issue of whether John’s lateness to work justifies dismissal, there are a number of basic elements to procedural fairness in the context of managing employment relationships that Bill may have failed to carry out. These are:

- John should have been warned of the misconduct and given an opportunity to improve or correct the conduct. If the misconduct is serious, John should also have been told that he may be dismissed for ongoing misconduct.
- Bill should have carried out a full and fair investigation of the facts before taking any action and then communicated his findings to John.
- John should have been given a real opportunity to be heard and to offer an explanation as to the alleged misconduct.
- The reasons for John’s dismissal should have been given to him before the dismissal was effected.

Turning now to the question of whether Bill had good cause to dismiss John in these circumstances, it is unlikely that

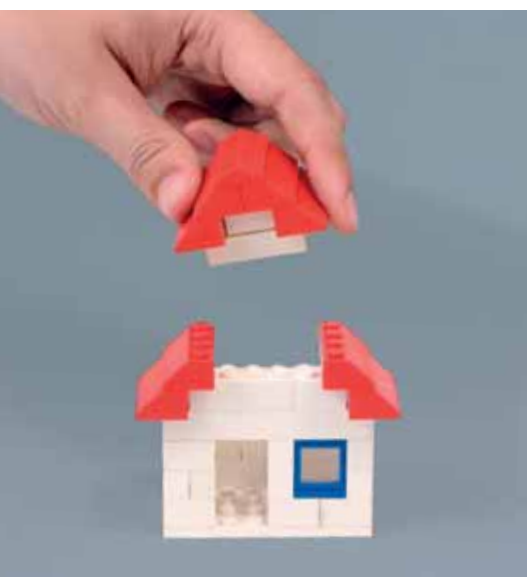
the Authority and/or the Employment Court would consider lateness to work as a justifiable basis for John’s dismissal. In December 2004, amendments to the Act saw the addition of a statutory test to determine whether a dismissal or other action by an employer is, are, or was justifiable. Simply, the objective test would consider whether Bill’s actions were those of a fair and reasonable employer (in all the circumstances) at the time that John’s dismissal occurred.

As it transpires and although John claims that he cannot recall Bill having spoken to him about persistent lateness to work, Bill believes the issue had been addressed with John before. On investigation, it became apparent that the reason John was 10 minutes late every day was because his bus arrives outside the workplace at that time. Having considered John’s explanation for ongoing lateness, Bill believes he reasonably requested John to catch an earlier bus and ensure that he was at work on time. Bill also believes that since this request it was necessary to speak to John on several occasions without any improvement on John’s part.

## NEXT EDITION

In the next edition will examine (with reference to Bill and John’s situation) the remedies John may be entitled to if he is successful in his personal grievance claim for unjustified dismissal and the implications for Bill in not having a written employment agreement setting out the terms of the employment relationship with John.

# PARENTS WHO GUARANTEE HOUSING LOANS FOR THEIR CHILDREN BEWARE!



## QUOTE from the Banking Ombudsman

In today's economic climate, characterised by sharp increases in house prices and interest rates, many young people need more money than they can personally afford to borrow and turn to mum and dad for financial guarantees, for housing finance in particular. Although banks advise persons seeking to offer financial guarantees to obtain legal advice, such persons frequently neglect to do so, and often do not appreciate that they may be letting themselves in for more than they had imagined possible. Here is a cautionary tale for all parents who follow their hearts into financial arrangements to benefit their children. Most parents are more than willing to help their children, but this willingness should not blind them to the possibly unforeseeable consequences of entering into such financial commitments.

## ... Guaranteed trouble?

Mr and Mrs C agreed to help their son and daughter-in-law financially by guaranteeing a loan of about \$175,000. Their liability would be limited to \$63,000, with their own home as security. Although they took legal advice before signing the bank guarantee, it subsequently became clear that they lacked an understanding of the full legal and financial implications of what they had done. About a year later the son and daughter-in-law separated, and their home was sold. After all costs of the house sale had been deducted, less than \$150,000 was available to meet their debts. At this point Mr and Mrs C found that the son and daughter-in-law, and in some cases the daughter-in-law alone, had taken out other loans from the bank. They had an overdraft of about \$7,500, in addition to credit card debts amounting to about \$4,500. The bank wanted to use the proceeds from the house sale to settle these additional debts as a first priority, and to use any remaining money to pay off the housing loan. This left a debt of about \$55,000, which their son undertook to pay. Mr and Mrs C were surprised and disturbed to discover that, if their son defaulted, they were legally liable for debts unrelated to the housing loan. Mr and Mrs C erroneously believed that their

guarantee related only to the housing loan, and that they would consequently be liable only for any difference between the amount realised by the sale of the house and the amount outstanding on the loan, in this case about \$27,000. They also felt that the bank had been remiss in not telling them about either the loans already in existence when they gave their guarantee or about the loans taken out later. As the law states that a bank does not have to disclose to an intending guarantor any information relating to the financial position of a loan applicant, Mr and Mrs C were labouring under a misapprehension when they assumed that the bank was legally obliged to disclose information about other loans or debts accruing to the applicants in this case their son and daughter-in-law.

Although the bank guarantee was in this case limited to an amount of \$63,000 (plus some costs and interest), it did not impose any other restrictions on their liability. In particular, there was nothing in the guarantee that would require the bank to use funds realised from the sale of the house or any other source to pay off the guaranteed housing loan before it paid other debts. I had no option other than to find that the bank was legally empowered to require Mr and Mrs C to pay the full outstanding amount of \$55,000. I might add that Mr and Mrs C can count themselves lucky that, unusually, the amount which they had guaranteed was limited.

I am concerned that parents who guarantee housing loans for their children often do not appreciate that they could be accepting legal liability for other debts incurred by the children, irrespective of whether those debts were incurred before or after they provided the guarantee. It never occurred to Mr and Mrs C that they could subsequently be liable for any credit card debt incurred with the bank by their son and daughter-in-law. The bank noted that this was not currently an issue, as the son was repaying the debt, and there was no need to call on Mr and Mrs C under the guarantee for the time being. The bank undertook to reassess the position if it should need to call upon Mr and Mrs C in this way. On this basis I concluded my investigation".



# OUR PEOPLE ...

We are proud to introduce Maxine Knowler who is permanently based in our Cromwell office. Maxine joined Mactodd in December 2005 having decided to relocate her family from Invercargill to Central Otago.

# NEWS IN BRIEF

## Legal Definitions

Letters and documents prepared by your lawyer may contain words which are generally only used by the legal profession.

These words are often referred to as "legalese". In this issue, we explain some of the legal terms which you will find in an agreement for the sale and purchase of land.

## Fee Simple

This term is used interchangeably with the word "freehold". A fee simple estate in land continues until such time as the owner dies without leaving heirs in which case the land reverts to the Crown. In practice this happens very rarely as most properties will pass either by will, or if the owner dies without leaving a will, then under the terms of the Administration Act 1969.

## Land Covenants

These refer to restrictions regarding the use of land. They are particularly common for new residential subdivisions where the developer wishes to ensure a high quality of development and will include such matters as specifications for the materials to be used in the construction of buildings on the land.

## Maxine Knowler

After completing her law degree at the University of Otago in 1988 Maxine joined an existing Invercargill firm as a staff solicitor. In 1993 Maxine and a colleague commenced practice in partnership together where she remained until 2005.

In the post graduation years Maxine's work was centered on all aspects of litigation including Family Court, Criminal Court including jury trials in the District and High Court, appearances in the Court of Appeal and employment litigation.

In recent years Maxine's focus has moved to property matters including general conveyancing, relationship property, family trusts, estate planning and administration.

Maxine was appointed as an adjudicator for the Tenancy Tribunal in 1993; she continues to hold that position and now sits at the Queenstown District Court on a regular basis.

Maxine's personal interests centre mainly on family activities with husband Oscar and children, (Rosannah 11 and Isaac 6), and enjoying the Central Otago environment.

## Leasehold

A leasehold interest in land is created under the terms of a lease. When the lease comes to an end, then the land reverts to the owner of the freehold and the leasehold state is "merged" with the freehold.

## Crosslease Title

This refers to a "composite title" which combines freehold and leasehold interests. It is made up of an undefined share in the freehold of the land and a defined leasehold interest in respect of the buildings on the land.

## Unit Title

Unit titles (or Stratum titles), were created by the Unit Titles Act 1972 to enable individual ownership of units within a larger building complex.

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### Disclaimer

The information and comments contained in this News Brief, while intended to be accurate, are of necessity of a general nature. It is not intended that the newsletter provide legal advice and it is strongly suggested that, where appropriate, specific legal advice is sought on matters of concern. The Editor does, however, welcome comments. These should be addressed to:

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