



## Lawyers & Conveyancers Act

Its meaning for clients

**On 1 August 2008 new legislation came into force that regulates how lawyers and law firms operate and, significantly, how they must now communicate with their clients. This article looks at the purposes of the Act and its implications for clients.**

The Lawyers & Conveyancers Act 2006 allows conveyancing to be carried out by lawyers and/or conveyancing practitioners and states the obligations with which, in the public interest, all lawyers and conveyancing practitioners must comply.

From a client's perspective the legislation has also totally rewritten the rules of professional conduct for lawyers. The client focussed regulations are now called 'Rules of Conduct and Client Care for Lawyers'.

The principles behind the new regulations are to:

- Maintain public confidence in legal and conveyancing services
- Protect the users (our clients) of legal and conveyancing services, and
- Formally recognise the status of lawyers and to establish the new profession of conveyancing practitioners.

To achieve those objectives, the Act has, amongst other things:

- Reformed the laws relating to lawyers
- Provided a more responsive regulatory regime, and
- Stated the fundamental obligations with which all lawyers and conveyancing practitioners must comply in providing their clients with regulated services.

### How does this affect our clients?

You now need to be aware that before we act for you on any matter, the law now requires us to complete the following:

- A letter of engagement
- Terms of engagement, and
- An Information Sheet (Client Care Rules).

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INSIDE:

TWO

**A Word of Advice –  
the Food We Buy**

THREE

**Workplace Stress**  
Responsibilities for  
both employers and  
employees

FOUR

**Structuring  
Business Equity  
Funding**  
Partnerships and  
company structures

FIVE

**De Facto  
Relationships**  
Be careful with  
property

## Letter of engagement

The letter must be sent to you before we start any of your work. The engagement letter confirms that we will act for you on a particular matter. Also we must name the person who will be primarily responsible for your work, the fees anticipated and note the services to be provided to complete the matter.

## Terms of engagement

The terms set out in more detail the method we use to charge, the expectation we have in completing the work and the method we use to bill for the work done.

## Information Sheet

The Information Sheet provides mandatory information in respect of our firm's professional indemnity insurance cover; the New Zealand Law Society Fidelity Fund, the Law Society and our own complaints procedure and the service available to clients by the New Zealand Law Society. It also details the Law Society's expectations of a lawyer. We must:

- Act competently in a timely way and in accordance with any arrangements made
- Protect and promote your interests as a client, and act for you free from compromising influences or loyalties
- Discuss your objectives and how they should best be achieved
- Provide you with information about the work to be done, who will do it and the way the services will be provided
- Charge you a fee that is fair and reasonable, and let you know when you will be billed
- Give you clear information and advice
- Protect your privacy and ensure appropriate confidentiality
- Treat you fairly, respectfully and without discrimination
- Keep you informed about the work being done and advise you when it is completed, and
- Let you know how to make a complaint, and deal with any complaint promptly and fairly.

These points are generally referred to as

'Client Care Rules' and will be provided to all clients at least once when we act for you. We are only required to give you an additional copy if there is a change to the Rules.

These new regulations follow on from the Land Information requirements that many clients will have already experienced, ie: the obligation for us to obtain a photo ID when we are completing a property transaction for you. This is now even required from clients whom we have known for many years.

## Our obligations

While we hope that we have always maintained a high standard of client care in the past, the law now imposes on us some mandatory requirements.

As is the case with any new legislation, we must work with it. We hope that all our clients will recognise the value that it places on our continued service to you.

If you have any queries about how we work under this new regime, please don't hesitate to call us.

# A Word of Advice – The Food We Buy

**Have you ever bought something from the supermarket only to get home and realise it's past its expiry date? Is it still okay to eat? And can a shop sell items that are out of date? We take a look at what the date labels mean on the food we buy.**

You should always look for the date mark on food before you buy it. The date mark lets you know the end of a food's shelf life. This is the amount of time the food can be kept under proper storage conditions before it becomes unsafe or starts to lose quality.

## Use By or Best Before – the differences

A 'Use By' date shows how long your food should keep for safety if the storage instructions are followed. You shouldn't buy or eat food if the Use By date has passed. It's illegal to sell food with an expired Use By date. If a shop is found to be selling unfit food, they can be fined.

A 'Best Before' date is different in that it refers to the quality of the food. This date gives you an idea of when the food should be eaten if you want to enjoy it at its best quality. After the Best Before date it is likely that the quality of the product may begin to

change. It isn't a safety issue and food can still be sold by shops beyond its Best Before Date as long as it's still fit to eat. Often shops may have goods where the Best Before date has expired, and sell them for a reduced price.

Keep in mind that it's not legally required to date label all food. For example, unpackaged foods such as loose fruit, or food with a shelf life of longer than two years are not required to have a date label.

## Selling unsafe or rotten food

The Food Act says that food that is unfit for human consumption must not be sold. If shops are selling rotten food or food past its Use By date you should contact the New Zealand Food Safety Authority on 0800 393 721. You should also contact the NZFSA if you find foreign objects in food, or mislabeling or misrepresentation of food.

## Can I get a refund for expired food?

You have rights under the Consumer Guarantees Act 1993 which says that any goods sold must be of acceptable quality. If they are not you may be entitled to a full refund from the shop. Check the packaging as the producer may have a money-back guarantee; if you send in the remainder of the food with a receipt they will refund you.

## Storage instructions

Bugs like salmonella and listeria can grow to illness-causing levels if your food isn't stored properly. That's why it's important to follow any storage instructions on the packet, for example, 'refrigerate after opening'.

For more information on food safety and labeling, visit the NZFSA website [www.nzfsa.org.nz](http://www.nzfsa.org.nz)

*Material supplied by the Ministry of Consumer Affairs*

# Workplace Stress

## Responsibilities for both employers and employees

**There's a memorable bathroom scene in the 1999 movie *Rogue Trader*. Ewan McGregor, playing Nick Leeson (the man who brought down Barings Bank) stares at himself in the mirror. With horrified disbelief he intones, "I, Nicholas Leeson, have just lost 50 million quid, in one day!" He vomits in the basin and returns to work. Workplace stress? Off the scale. If New Zealand employment law applied, would Nick have had a claim against his employer? We examine this below.**

The requirements for a claim for workplace stress in New Zealand were established by the Court of Appeal in the 2002 case of *Attorney-General v Gilbert*<sup>1</sup>. The test was recently summarised into four key elements in the 2008 decision of the Employment Relations Authority in *Kirkley v Ora Limited*<sup>2</sup>.

From that case, for an employee to make a successful claim they must show:

- The stress suffered is work-related
- The stress has caused a medically recognisable condition (stress and anxiety are not enough)
- The employer must have known, or ought reasonably to have known, about the stress, and
- The employer has failed to take all practicable steps to deal with the stress.

Let's consider Nick Leeson's chances in light of the test set out above.

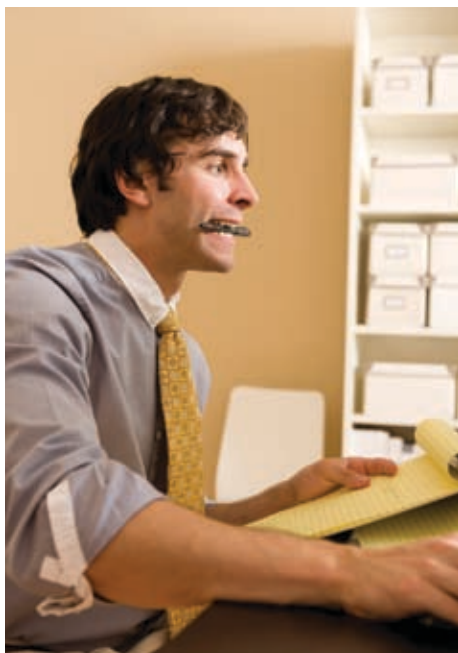
### Grounds for a claim?

*Point 1:* Nick's life, outside his job as a futures trader on the Singapore Monetary Exchange (SIMEX), seemed fine. Nice wife, nice apartment and friends to go drinking with on a Friday night. There were no obvious non-work stressors. Accordingly, if Nick did have qualifying stress, it was likely to be work related.

*Point 2:* Ewan McGregor's portrayal of Nick in the movie shows him vomiting, having nightmares, sweating and generally appearing under extreme pressure. The movie doesn't say whether Nick had a medically recognised condition, such as depression, or a physical condition brought about by mental or emotional stress. However the important point to note is that, of itself, 'stress' is not a diagnosis and is not enough.

*Point 3:* Did Barings Bank know, or should the bank have known, that Nick was under stress?

The law does not require employers to be mind-readers. Where a job is inherently stressful, an employer needs to be more conscious of the risk of stress. However generally speaking, an employee claiming workplace stress needs to show they took proper steps to notify their employer that they were suffering from workplace stress.



In the Employment Relations Authority case of *Thorn v New Zealand School of Travel and Tourism Limited*<sup>3</sup> the employee gave evidence that, "I didn't specifically sit [my employer] down and go through my health issues." The Authority's response was, "In the Authority's view, an applicant seeking to rely on workplace stress needs to do precisely that."

It is likely that Nick's job as a futures trader would fall into the 'inherently stressful' category of jobs in which it is foreseeable those employees may be stressed. As such, Barings Bank's obligations as Nick's employer to take reasonable steps to address the issue of stress in the workplace would be higher than those of, say, your local garden centre.

As we recall, Nick Leeson went to great lengths to mislead Barings Bank into believing that all was well at the SIMEX. In such a case, Nick may have difficulty in holding his employer liable for workplace stress given he had gone out of his way to reassure his employer that it was all plain sailing.

*Point 4:* Could Nick show that Barings had failed to take all practical steps to deal with the stress? This links back into Point 3. Barings didn't act as they didn't know there was a problem. An employer who is told that their employee is under stress, or should be aware due to the inherently stressful nature of the job, needs to act.

### What happened to Nick?

Over a three year period, Nick Leeson lost Barings Bank £827 million and caused its collapse. He was arrested in Germany and extradited back to Singapore, where he was sentenced to 6½ years in prison. He served four years, successfully battled colon cancer and was divorced by his first wife, Lisa. He has remarried, is CEO of Galway United FC, and is also a sought after motivational and after-dinner speaker.

### Responsibilities for all

As can be seen by the cases mentioned above and Nick Leeson's experiences, both employees and employers have responsibilities relating to work-related stress. Employees must tell their employers if they are experiencing stress, and employers must take all practicable steps to ensure that their employees do not suffer from stress.

<sup>1</sup> AG vs Gilbert [2002] 1 ERNZ 31

<sup>2</sup> Kirkley v Ora Limited (Auckland, AA51/08, 19 February 2008)

<sup>3</sup> Christchurch, CA36/06, 9 March 2006

*Disclaimer: Our references to the movie Rogue Trader and Nick Leeson's fraud with Barings Bank come from two viewings of the movie and a quick scan of Leeson's autobiography, also entitled Rogue Trader. We have taken a slightly light-hearted vignette of a potentially serious issue.*

# Structuring Business Equity Funding

## Partnerships and company structures

When setting up or buying a business, one of the most important decisions to be made is how the business equity funding should be structured. This article examines some of the issues around the differences between a partnership and a company structure.

### Partnerships

#### *Partnership Agreement*

If the partnership model is chosen as the business entity, it is essential that a partnership agreement is drawn up. Many spousal partnerships (including married, de facto and same sex couples) do not bother with a formal partnership agreement. However, it is clear that there are benefits from having an agreement as opposed to relying on the default provisions contained in the Partnership Act 1908. With the Partnership Act remaining virtually unchanged for 100 years, many of its provisions do not suit today's business environment.

#### *Capital*

Section 27 of the Partnership Act states that no interest is payable on agreed capital contributed. However, interest at 5% is allowed on capital contributions in excess of the agreed capital, for example, a loan to the partnership. The Inland Revenue Department (IRD) treats any interest payments on agreed capital as a distribution of profits and will not allow a deduction to the partnership. Interest deduction is however allowed for loans.

Unless a partnership agreement states otherwise, equal profit sharing is mandatory under the Partnership Act. If, for example, there is an unequal labour contribution, the only way to recognise that financially in absence of an agreement, is to have an employment agreement and pay the relevant PAYE deductions.

Another matter that should be addressed in a partnership agreement is that under the Partnership Act, upon dissolution of the partnership, the capital is divided in proportion to the profit sharing ratio and not the actual balance. If one partner has had higher drawings than the others and their capital account balance is lower, then without a contrary



provision in an agreement, the unequal balances will not be recognised.

There is no distinction in partnerships between a partner's capital and current accounts. Under the Partnership Act it is all lumped together as equity, unless otherwise provided for in a partnership agreement.

### Companies

Equity funding in most companies has historically been a small amount of subscribed share capital with the greater proportion attributed to shareholder loans. This facilitated the payment of interest on the loans rather than having to rely on dividends for distribution of profits.

#### *Tax*

In general terms the tax position is:

- Where shareholder loans are proportionate to the shareholding, the Income Tax Act treats the loans as equity and not debt,
- Where shareholder loans are interest free and repayable on demand, and interest is demanded and paid on loans at less than commercial rates,

the Act does not allow a deduction to the company, and

- Where a shareholder has borrowed funds to enable them to lend the funds to the company, current tax rules do not allow a loss to be claimed by the shareholder. Deduction is limited to the amount of income received from the company, so it can only ever be a neutral position.

#### *Shareholders' Agreement*

A comprehensive shareholders' agreement should also be entered into so that the terms of any shareholders' loans, dividend policy, drawings policy, exit and entry rules, pre-emptive rights on shares, and dispute resolution procedures (plus a range of other issues) can be clearly set out and agreed upon.

The decision on which business structure to operate from is one that can only be made by the owner/s; each has its own pros and cons. However, before making that final decision, do talk with your lawyer who will be able to help steer you in the direction that suits your circumstances.

# De Facto Relationships

## Be careful with property

**For most people there is little doubt in their own minds as to whether or not they are in a de facto relationship. However the definition of 'de facto relationship' in the Property (Relationships) Act 1976 might make some people re-assess. This article looks at what constitutes a de facto relationship and what couples need to look out for.**

Jane's boyfriend Mike is a cabin crew member on international flights. Mike rents a room in a flat where he keeps his stuff, but on the three days in 10 he is in New Zealand he stays with Jane in her house. They share the cost of groceries, he helps in the garden and they go overseas together each year on Mike's airline employee account. Jane and Mike have been together as a couple for five years when they decide to call it quits.

To Jane's horror, a month later she receives a letter from Mike's lawyer claiming that he is entitled to half her freehold house, half the furniture, half the difference between his Honda and her BMW, as well as a fair chunk of her superannuation.

What Jane and many others in a similar position do not realise is that the definition of de facto relationships in the Act is not entirely clear cut. In order to be in a de facto relationship under the Act both people must be:

- Over the age of 18
- Living together as a couple, and
- Not married nor in a civil union.

The tricky part is defining when parties are 'living together as a couple'. The Act goes on to say that all of the circumstances of the relationship are taken into account and lists a series of factors (below) which are particularly relevant.

- The duration of the relationship
- Nature and extent of common residence
- Whether or not a sexual relationship exists
- Degree of financial dependence or interdependence, and any arrangements for financial support, between the parties
- Ownership, use, and acquisition of property

- Degree of mutual commitment to a shared life
- Care and support of children
- Performance of household duties, and the
- Reputation and public aspects of the relationship.

Despite these factors, none of these is essential to be present and the court has wide discretion to weigh the circumstances as it sees fit. The definition section is obviously important for determining when a de facto relationship began. A typical scenario is a couple starts (to use common parlance) 'seeing' each other before 'shacking up'; the grey area in between can be a source of disagreement where a relationship is around the three year mark at separation. For Mike and Jane, the situation is not straightforward.

The equal sharing provisions generally only apply to de facto relationships of three or more years duration (unless there is a child of the relationship).

So what has happened with Jane and Mike? They are in court fighting it out. Even if Mike loses, Jane will be significantly out of pocket once lawyers' fees are taken into account.

### What could Jane have done differently?

Jane, knowing she had assets to protect, should have got legal advice early on and insisted Mike signed an agreement contracting out of the property sharing provisions of the Act and identifying what each would keep in the event that the relationship ends. Regardless of how their relationship panned out she could have at least had certainty that her assets would be safe from a claim.

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NZ LAW member firms have agreed to co-operate together to develop a national working relationship. Membership enables firms to access one another's skills, information and ideas whilst maintaining client confidentiality.

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Wilkinson Adams – Dunedin  
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# Postscript

## New societies and trusts website

A new look societies and trusts website was launched in October. The website will continue to be the place to search for incorporated societies and trusts, upload financial statements and maintain details. The online services available on the website will not change. Check out [www.societies.govt.nz](http://www.societies.govt.nz)

## People with disabilities lives improve

The rights of people with disabilities were further improved with New Zealand's ratification of the United Nations Convention on the Rights of Persons with Disabilities on 26 September.

The convention sets out in practical measures what member states should do to ensure people with disabilities can enjoy human rights on an equal basis with others. It places obligations on member states to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all people with disabilities, and to promote respect for their inherent dignity.

New Zealand is one of the few countries in the world to have a disability strategy. Earlier this year New Zealand was awarded the 2007 Roosevelt International Disability Award, recognising countries that have made sustained improvements (over time) in the lives of people with disabilities through economic, humanitarian and social efforts.

## New legislation

In a flurry of pre-election activity, a number of new pieces of legislation were passed in September including those below.

### *Minority shareholders now protected*

Minority shareholders who are faced with a company takeover they do not support have been given greater protection with the passing of the Company (Minority Buy-out Rights) Amendment Act passed on 5 September.

The bill provides a way out, at a fair price, for shareholders who oppose a fundamental change to a company's structure and want the company to buy back their shares. The bill provides guidance on determining an appropriate price for those shares.

### *Reserve Bank now regulator of non-bank deposit-takers*

The Reserve Bank's responsibility to become the regulator of non-bank deposit-takers was legislated in the Reserve Bank Amendment Bill (No 3) on 3 September. The framework will apply to finance companies, building societies and credit unions. The new legislation is intended to raise standards across the industry and to improve the future resilience of the sector.

The requirements include a credit rating from a rating agency approved by the Reserve Bank (which must be obtained by March 2010), maintaining a minimum amount of capital and a minimum capital ratio, maintaining an adequate level of liquid assets, restrictions on lending to persons related to the deposit-takers, and new governance requirements which include at least two independent directors.

Also passed was a rewrite of the price control provisions of the Commerce Act 1986 providing infrastructure businesses with more incentive to innovate and invest in their future growth.



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