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INSIDE THIS EDITION

DRUG TESTING IN THE WORKPLACE	1
COUNCIL LIABILITY FOR LEAKY BUILDINGS	2
GUARANTEES.....	3
FOR RICHER, FOR POORER - CONTRACTING OUT OF THE PROPERTY RELATIONSHIPS ACT 1976.....	4
ALTERNATIVE DISPUTE RESOLUTION	4
THE RISE OF LOOK THROUGH COMPANIES	6
SNIPPETS.....	6
<i>Proposed Introduction of Starting Out Wage.....</i>	<i>6</i>

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

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DRUG TESTING IN THE WORKPLACE

According to the 2012 United Nations World Drug Report, New Zealand has comparably high levels of illicit drug taking, particularly cannabis use. Not surprisingly, this is a concern for employers wanting to maintain standards and safety in the workplace. This issue creates a conflict between an employee's right to privacy, and the rights and obligations of employers to provide a safe, healthy and efficient working environment.

DRUG AND ALCOHOL POLICY

Having an effective drug and alcohol policy is important for employers. This policy, generally found in the employment contract or its accompanying guidelines, specifies the rights and obligations of employers and employees regarding the misuse of alcohol and the use of illicit drugs. The policy should specify the consequences of attending work under the influence of alcohol or drugs and any relevant testing regime. As with all employment issues, there is a general duty of good faith imposed on both parties. An employer may require pre-employment testing as this will take place before the employment relationship and, therefore, before the duty of good faith obligations begin.

RANDOM TESTING

Random or "suspicionless" testing is permitted only in safety sensitive areas of a workplace. The Employment Court noted in a case involving Air New Zealand that pilots, aircraft engineers and flight planners, as employees in safety sensitive areas, might be the subject of random testing whilst HR advisers, in-house lawyers and payroll staff would not. Clearly, there is grey area when determining whether an employee works in a safety sensitive area. In any event, provision for random



testing should be recorded in the drug and alcohol policy and provided to the employee.

REASONABLE CAUSE TESTING

Where a workplace environment is not safety sensitive, a drug and alcohol policy may specify that an employee will be subject to testing if there are reasonable grounds to believe that an employee is impaired at work. Reasonable grounds may include; immediately after an accident or near miss, or where drug use is witnessed. The reasonable grounds must be specifically related to the behaviour of the employee to be tested, and a general suspicion that employees are taking drugs is insufficient. An employee being tested must be presented with any evidence against him or her - hearsay evidence should be treated cautiously as generally this may not be sufficient.

Importantly for employers, a positive drug result will not be taken into account in determining damages for unjustified dismissal if there were no reasonable

grounds for the test. In other words, the mere fact that an employee turns out to be a drug user will not remedy any procedural impropriety by the employer.

DRUG TESTING PROCEDURE

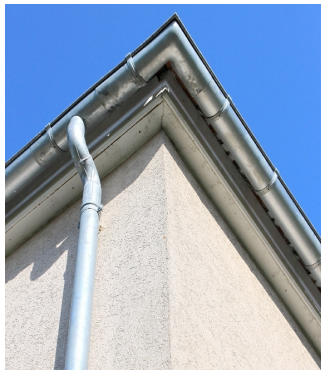
The most common procedure for drug testing is to have a preliminary "screening test" which results in an instant negative/positive result. An employee who returns a positive result should undergo a laboratory confirmation test. The confirmation test is important because the screening test is designed to be highly sensitive and may return wrongly positive results - poppy seeds and some forms of cold and flu medication may increase the chances of incorrect screening test results.

Provided that the delicate relationship between employee privacy and employer standards and safety is balanced, drug and alcohol policies benefit both parties in the workplace.

COUNCIL LIABILITY FOR LEAKY BUILDINGS

A recent Supreme Court decision has altered the scope of a council's liability in relation to the leaky buildings saga.

Body Corporate No. 207624 v North Shore City Council (SC 58/2011) [2012] NZSC 83, held that councils owe a duty of care to all owners of buildings in regards to their relevant functions carried out under the Building Act 1991 ('the 1991 Act').



Previous decisions had drawn a distinction between residential and commercial properties when it came to a council's duty of care.

WHAT DID THE SUPREME COURT SAY?

The case before the Court involved a building that was used both as a commercial property and a residential one – the majority of the rooms were motel rooms, and there were also six residential penthouse apartments. In the judgment, the Court stated that councils owe a duty of care in their inspection role to owners of premises, both original and subsequent, regardless of what the building is used for. It also stated that the same duty applied to building certifiers who were elected to carry out the work instead of a council under the 1991 Act. This judgment only relates to the 1991 Act, as a position with regards to the Building Act 2004 ('the 2004 Act') was not covered by the Judgment.

The decision applies not only to leaky building cases, but to everything councils do in their inspection role. However, it is expected to be heavily relied upon and tested in leaky building litigation.

LIMITATIONS ON CLAIMANT CRITERIA

There are some hurdles to benefitting from this judgment:

- This judgment applies only to building carried out while the 1991 Act was in force (prior to the 2004 Act),
- Civil proceedings may not be brought against anyone under the 1991 Act 10 years or more after the act or omission in question (for example, up to 10 years after the date of the council issued code compliance certificate, if that is the document relied upon in litigation),
- The council's responsibility is limited to the exercise of reasonable care solely in terms of ensuring construction in accordance with the building code.

These constraints may be troublesome for claimants. At this point, proceedings relating to acts or omissions before January 2003 may be time barred, and given that parts of the 2004 Act came into force in November 2004, the window for claims under the 1991 Act is small and constantly getting smaller.

On the other side of the coin, the judgment opens up claims for past and present owners of buildings, and it does not only apply to leaky buildings.

WHERE TO FROM HERE?

This decision has widened the scope for civil claimants with regards to a council's duty of care in their inspection role, and will likely lead to litigation. Potential claimants need to act quickly in identifying and filing any claim, as timeframes are running out. It will also be a case of waiting to see what the position is with regards to the 2004 Act, as this will be of utmost importance for owners of buildings constructed under the new Act.

BUILDING CASES

We have acted for clients involved in a number of building disputes over recent years. This has included leaky homes litigation, disputes over building contract matters such as interpretation of building contracts, disputes arising as to payments to be made to contractors and subcontractors; and a multitude of other matters which arise in the context of construction of buildings. These disputes usually require expert evidence to be given on your behalf.

We recommend if you are thinking of entering into a building contract that you let us peruse it for you before you sign anything. The specialist wording involved in different types of building contracts can give rise to subsequent difficulties if you do not have a clear understanding of what you want to achieve.

We advise that you must pay particular attention to invoices rendered by your builder. The Construction Contract Act sets out a procedure for the invoicing of progress payments, and the procedure for making and responding to payment claims. If you receive an invoice and do not respond to it within the required time, the invoice cannot subsequently be disputed. It may be possible to invoke the adjudication process under the Act, but that can become an expensive pastime. Also, it is difficult to have an Adjudicator's Determination set aside.

The lesson from all of this is: take some time to consult us before entering into construction contracts.

GUARANTEES

Acting as a guarantor for someone, often in respect of payment of money, means that you agree to meet their obligations if they do not. Guarantee clauses are common in leases, hire purchase agreements, and in general dealings with a bank. There are potential pit-falls for you to consider when agreeing to be a guarantor.

SIGNING A GUARANTEE

A guarantee agreement must be in writing and must be signed by the guarantor. It is advisable that, if a party is signing in another capacity as well, they sign the contract twice, once in their capacity as borrower (e.g. as a director of a borrowing company), and once as a guarantor.



TYPES OF GUARANTEES

There are many different types of guarantees, varying from a specific guarantee to cover a particular transaction, a continuing guarantee limited to a fixed amount through to a continuing guarantee where the guarantor agrees to meet all obligations of the other party. Many guarantee documents include both a guarantee and an indemnity, which means that not only is the guarantor guaranteeing the obligations will be met, the guarantor also agrees to protect the receiver of the guarantee from any harm or loss.

In most contracts where there is more than one guarantor, they are treated as being "jointly and severally liable". This means the creditor can choose to pursue whomever it likes to recover the debt.

Even if you are only one guarantor amongst many, you may find yourself held liable for all of the debt. In this case you may have a right to compensation from co-guarantors, but enforcing this right can be a lengthy and costly process.

RIGHTS AND OBLIGATIONS OF THE GUARANTOR

As a guarantor who has been called upon by a creditor to pay a debt, you have a right to require repayment by the original debtor. Of course in practice, this right may not amount to much protection as often the creditor is enforcing the guarantee due to the inability of the debtor to make a payment. A guarantor can, however, use the securities available to the original creditor. In other words, if a debt secured by a mortgage is paid in full by a guarantor, the guarantor is entitled to take over that mortgage security.

INDEPENDENT LEGAL ADVICE

Creditors rely on a guarantor making an informed decision. To ensure their guarantee is enforceable creditors should disclose to the guarantor information about the obligations they are guaranteeing and be satisfied that the guarantor appreciates the risk they are assuming. The *Code of Banking Practice* goes further, by requiring that prospective guarantors be advised to seek independent legal advice. The party providing legal advice is then required to confirm the guarantor understood the obligation they were assuming at the time they entered the guarantee.

DILIGENCE REQUIRED

If you decide to act as a guarantor for someone, including close friends and family, you should familiarise yourself with their financial position, read the contract very carefully and obtain legal advice to

determine what your liability might be. Everyone is naturally optimistic when it comes to their family and friends, but it is vital to be aware of the risk you are assuming and make an informed decision.

FOR RICHER, FOR POORER – CONTRACTING OUT OF THE PROPERTY RELATIONSHIPS ACT 1976

The Property Relationships Act 1976 ('the Act') applies to all relationships including marriages, de facto relationships and same sex relationships.

The defining feature of the Act is that it provides for the equal sharing of the assets and liabilities of the relationship irrespective of the differing financial contributions of either partner throughout the relationship. In many cases this includes situations where one party may have brought significantly more assets into the relationship than the other.

The equal sharing provisions of the Act apply to all relationships exceeding three years' duration.

Parties may enter into an agreement to contract out of the equal sharing provisions of the Act ("Contracting Out Agreement"). In order for a Contracting Out Agreement to be enforceable, it must be in writing. Each of the partners must also have obtained legal advice before signing the Contracting Out Agreement. Each lawyer must also sign, certifying that they have provided independent legal advice and witnessed their client's execution of the document.

Contracting Out of the Act becomes especially important when there is a disparity in the financial positions of the partners. This disparity in the financial positions of the parties arises where one party brings greater net assets into the relationship than the other.

In the absence of a properly signed Contracting Out Agreement the equal sharing provisions of the Act will apply. In the event that the partners separate without entering into a Contracting Out Agreement the effect can be a net transfer of assets from the wealthier partner to the less well off partner.

This can be particularly upsetting for the wealthier partner if that separation occurs close to retirement age where there is limited opportunity to recover financially.

The impact of the equal sharing provisions on the wealthier partner is magnified if that person has the misfortune of experiencing two or more separations without protecting their interests by entering into a Contracting Out Agreement. This can have the effect of halving that person's net worth each time they separate from a three year relationship.

Inheritances and gifts are generally considered to be the separate property of the partner to whom the gift or inheritance was given. However, when for example this gift or inheritance is applied to repay the loan for the family home and the partners go on to separate, the non-inheriting partner is entitled to benefit from half of the inheritance applied to reduce the borrowing for the family.

Assets in a family trust are not necessarily protected from potential relationship property claims. In circumstances where the family trust was settled during the course of the relationship or where relationship property has been applied to sustain trust assets, the trust can become tainted as relationship property. This most commonly occurs when the income of one or both partners is used to meet the loan obligations for property owned by the trust.

A Contracting Out Agreement is fundamental for anyone in a relationship wishing to secure his or her assets, especially a partner entering into a second or subsequent relationship.

ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution ('ADR') is a collective term that describes a wide range of processes used to resolve civil disputes. They are an alternative to the more traditional means of resolving disputes by way of litigation.

Court litigation is adversarial by nature. Judges impose their own decisions on the parties so the process tends to be formal and requires strict rules of procedure and evidence. In this environment the parties' positions often become polarised and this can lead to an increasingly expensive and protracted resolution process. ADR seeks to avoid this by

enabling the parties to achieve their own solution. The most common examples of ADR are Mediation, Negotiation, Conciliation and Arbitration.

MEDIATION

Mediation employs a neutral third party (the mediator) to assist the parties in negotiating a settlement.

- It is fast – a mediation can be convened relatively quickly and the time needed to achieve a result is usually much less than through the Court system,
- It is cheap – while mediators charge a fee the costs are usually much less than the parties would incur by going to Court. When the use of mediation services is directed by the Court itself mediation is usually free.

NEGOTIATION

Negotiation creates a dialogue between the parties intended to achieve mutual agreement.

- It is often assisted by the involvement of professional third parties, usually lawyers, who represent the parties' interests rather than being neutral,
- Tactics – negotiation is often thought of as tactical. In the context of a dispute the parties may see one another as adversaries, which leads to "hard-bargaining" as each tries to give away as little as possible. However, many disputes arise between parties where the relationship between them needs to be preserved and in these circumstances negotiation may be more integrated and focused on mutual gain.



CONCILIATION

- Conciliation involves a neutral third party acting as a "go between". The conciliator meets the parties separately in order to conciliate and reach a solution usually by way of concession.

ARBITRATION

Arbitration most resembles the Court process and is adjudicative rather than consensual.

- Disputants submit their case to an independent arbitrator who will make a binding decision. While the parties must agree to arbitrate (often by way of prior contract) they are then bound by the decision of the arbitrator,
- The parties can agree on who the arbitrator will be, the rules of procedure and evidence, and other issues to be addressed.

ADR is growing in use and acceptance in New Zealand and around the world. The recognition of ADR as an effective means of resolving disputes has meant a number of jurisdictions, including New Zealand, often require the parties to undertake ADR as part of the ordinary judicial process. The Family Court and Tenancy Tribunal regularly make use of mediation services, and Judicial Settlement Conferences (a type of Judge led mediation) are also used in dealing with other civil disputes. Although ADR will always require the parties consent in order to resolve disputes, the parties may be required to undertake ADR in the hope an agreement can be reached before the Court will consider the dispute.

HIGH COURT PROCEEDINGS

Alternative dispute resolution is alternative to what? Generally it means alternative to the Court processes which have evolved over time to assist members of a society which exists under the Rule of Law to have a just and efficient Court system which deals with civil as well as criminal cases. This assists in the evolution of a body of law which can be relied on by possible litigants to settle their disputes.

Because alternative dispute resolution outcomes are not recorded there is no body of law such as decided court cases which can be relied on.

The High Court has recently introduced new rules to assist with the speedier adjudication of civil disputes. The objective is to achieve targeted and proportionate case management, assisting the parties in managing the costs of litigation by focusing case management on discovery and identification and refinement of issues, and by providing prompt hearing dates.

These new rules require parties to cooperate with each other at an earlier stage concerning methods relating to the discovery and inspection of documents. From 1 February this year when a plaintiff files a Statement of Claim it now has to be accompanied by a bundle of the principal documents which that party has relied on when preparing the pleading. Discovery must now be given electronically unless an exemption is granted by the Court.

What all this is supposed to mean is that litigants should be able to have their cases brought on for hearing in the High Court much sooner than has been the experience of the past decade. It is to be hoped that the District Court processes will be aligned with this High Court process.

THE RISE OF LOOK THROUGH COMPANIES

WHAT IS IT?

A Look-Through Company ('LTC') is similar to a traditional limited liability company, however its income and losses are treated differently for tax purposes. The tax structure of an LTC allows the company to transfer income and expenditure to its shareholders directly. In other words, the shareholders of an LTC become liable for income tax on the company's profits while also being able to offset the company losses against any other income. There are many advantages to utilising an LTC, some of which are discussed in this article.

BACKGROUND

In 2010, the LTC was introduced to replace the former Loss Attributing Qualifying Company ('LAQC') and Qualifying Company ('QC'). The need for such a change as identified by the Policy Advice Division of the Inland Revenue Department centred mainly around issues relating to arbitrage opportunities and the lack of loss limitation rules.

KEY FEATURES OF THE LTC REGIME

LTCs are governed by Subpart HB of the Income Tax Act 2007 ('the Act'). Some of the features and requirements for an LTC are:

- Shares can only be held by a natural person, trustee or another LTC. Additionally, all company shares must be of the same class and provide the same rights and obligations to each shareholder;
- An LTC must have five or fewer owners (ownership interests of relatives within two degrees of relationship are combined);
- An LTC's income, expenses, tax credits, rebates, gains and losses are passed onto its shareholders. Such allocation to the shareholders will usually be in proportion to the number of shares they have in the LTC;

- Any profit is taxed at the shareholder's own marginal tax rate. The shareholder can use any losses against their other income, subject to the loss limitation rule; and
- The loss limitation rule ensures that the losses claimed by a shareholder accurately reflect the level of that shareholder's economic loss in the LTC.

Companies can elect to become an LTC, and existing LAQCs and QCs can elect to become an LTC without a tax consequence in the income years commencing 1 April 2011 and 1 April 2012. All shareholders of a company must elect for the LTC rules to apply in order for the conversion to be effective.

ADVANTAGES

Some of the advantages of utilising an LTC as opposed to other business structures are:

- An LTC allows a shareholder to hold an investment in defined shares with other parties. A trust on the other hand (generally a discretionary trust) would not provide for such definitive shares to be held,
- Shareholders have the ability to sell their shares or bring other investors into the LTC (provided the relevant LTC disposal provisions are followed under the Act),
- Added creditor protection is offered by the LTCs limited liability, and
- An LTC can be particularly useful where investors have varying tax positions.

For more information on LTCs, please contact us.

SNIPPET

PROPOSED INTRODUCTION OF STARTING OUT WAGE

The Minimum Wage (Starting-out Wage) Amendment Bill was introduced into Parliament on 9 October 2012.

The Bill proposes to change the way in which minimum wage rates may be prescribed to workers between the ages of 16 and 19, and in limited cases workers over 20. It will open up the ability for the Government to identify multiple classes of eligible youth, and set minimum starting out wages for each class. The rate must not be set at less than 80% of the adult minimum wage, and the period of payment at this rate will last for a maximum of six months of

continuous employment with the same employer, or until the worker no longer satisfies the Act's rate criteria, whichever comes first.

There is divided public opinion on the Bill, with its supporters on the one hand claiming that it will incentivise employment of young workers, and its detractors seeing the reduced wages as a failure to ensure a reasonable standard of living for young workers.

