

Newsletter

December 2007

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Internet Banking Fraud – Are You Protected?

Code of Banking Practice

If you do your banking on the Internet, then you should be aware that the risk associated with Internet banking increased as of July 2007. The New Zealand Bankers Association (of which all the main trading banks are members) has introduced a new Code of Banking Practice, which includes a section on Internet banking.

If an Internet banking user becomes the victim of fraud and has contributed to the Internet fraud by either:

- a) having a computer or device that does not have appropriate protective software and operating systems installed and up to date; or
- b) failing to take reasonable steps to ensure that the protective systems such as virus scan, firewall, anti-spyware, operating system and anti-spam software on the computer are up to date; or
- c) failing to follow reasonable security warnings about the appropriate processes and safeguards to follow when using Internet banking;

then the bank is not liable for any loss.

The code provides for the bank to have the right to request access to the user's computer in order to verify all reasonable steps to protect the computer had been taken. If access is denied then the user may be held liable.

The effect of the new code is that the onus to safeguard a computer has been shifted to the user although the banks retain the responsibility to inform the user of the best way to do so. The Code has been criticised for not being specific enough as to what constitutes adequate protection. However, as matters now stand, users are obliged to update their computer security systems in accordance with their bank's recommendations. Failure to do so means that the Internet user will be liable for losses up to their overdraft limit.

The Bank is responsible for fraudulent transactions that are not caused by the user if they are promptly advised of the fraud or advised that the customer ID, password or other security information is, or may be, known to another person or that there has been unauthorised access to the banks site for Internet banking information or accounts.

Remedies

If you become involved in a dispute with your bank over liability for Internet fraud, then you should initially attempt to resolve the matter through the bank's internal complaints procedure.

If this is unsuccessful, a complaint may be made to the Banking Ombudsman, provided the amount at issue is less than \$200,000. The Banking Ombudsman in turn can refer complaints to another party such as the

Insurance and Savings Ombudsman, the Privacy Commissioner or the Human Rights Commissioner. Banks are bound by recommendations made by the Banking Ombudsman.

If a claim is unsuccessful with the Banking Ombudsman, or it is for an amount exceeding \$200,000, then an application will have to be made to the Court. Either way, it would be advisable to consult your lawyer at the outset.

Greater Security Surrounding Finance Companies

In the wake of the collapse of a number of finance companies, cabinet made swift changes to the Securities Regulations 1983. The Securities Amendment Regulations 2007 ("the regulations") came into effect on 21 September 2007.

The regulations affect finance companies that continuously offer debt securities to the public and either lend money or provide financial services. The changes do not affect finance companies that are building societies, credit unions or co-operate companies.

The regulations add clauses that are deemed to be included in both existing and future trust deeds of

finance companies. Under the new clauses, finance companies have more stringent obligations in terms of reporting their financial position to trustees, regular certification of compliance with trust deeds requirements, and keeping the trustee informed of matters relevant to the trustee's duties.

The new clauses will also give the trustee the power to appoint an independent auditor to audit the financial statements of a borrowing group and the power to appoint an expert to assist the trustee in determining the true financial position of an issuer.

Conditional Agreements – Home Buyers' \$300,000 Mistake

Background

Mr and Mrs Fleming owned a house at Beachlands, South-East of Auckland. They signed a conditional contract to buy a lifestyle block near Whangarei, owned by the trustees of the Mana Trust. One of the conditions of the contract provided that the Flemings had 90 days within which to enter into an unconditional agreement for the sale of their Beachlands property.

The Flemings failed to secure a contract for their house within the 90 day period. They therefore considered the contract with the Mana Trust to be at an end. The trustees disagreed.

In due course, the trustees found an alternative purchaser for their block. However, the purchase price was less than the amount the Flemings had agreed to pay.

The trustees successfully sued the Flemings for the difference between the contract price and the eventual sale price (approximately \$100,000) together with interest (approximately \$225,000) and costs. The interest exceeded the damages, due to the length of time before the original settlement date of the agreement and the date of judgment some two and a half years later. Furthermore, interest was calculated at the rate specified in the agreement of 14%.

The law

The agreement for sale and purchase between the trustees and the Flemings included a provision requiring the Flemings to "do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment".

The question for the Court was whether the Flemings had tried hard enough to sell their Beachlands home. Had they done "all things which may reasonably be necessary"? Unfortunately for the Flemings, the Court found that they had not and were therefore in breach of contract.

The requirement to take reasonable steps to fulfil any condition e.g. to obtain finance or sell your house etc, is generally implied by the courts. The Court of Appeal described the clause in the Flemings' contract as making explicit what had previously been implicit.

This means that in most conditional contracts to buy and sell property there is an express or implied obligation to take all reasonable steps necessary to satisfy any conditions. Without such a requirement, a party could use a condition to avoid their contractual obligations simply by taking no steps to satisfy the condition and allowing the contract to lapse. This would effectively undermine the certainty of the contract for the other party.

The problem

The Court found that the Flemings had behaved unreasonably when they adopted an unconventional approach to marketing their house by using covert strategies. This involved minimal marketing and, although there were discussions with real estate agents, there was no formal listing.

The main reason the Flemings adopted the low profile marketing approach was concern about the effect the sale of their house might have on their local lawn mowing business.

However, when the Judge weighed up the importance of protecting the lawn mowing business against the obligation to attempt to sell their house, he concluded that there was an obligation on the Flemings to take a

much more proactive approach to achieving a sale of their house.

Conclusion

If you sign a conditional contract to buy a residential property, you need to be aware that you must be proactive and do all things reasonably necessary to ensure the conditions are fulfilled within the permitted time frame.

There is no set formula as to what is reasonable. It will depend on the circumstances of each contract. However, to avoid the problems faced by the Flemings, you should discuss the steps you are proposing to take to satisfy the conditions with your lawyer at an early stage.

Don't Get Caught Napping – Changes to the Personal Insolvency Regime

For the past 40 years personal insolvency has been governed by the Insolvency Act 1967. That is about to change. A new Insolvency Act has been passed and is likely to come into force by January 2008 (at the time of writing no date has been set by the government).



According to the Insolvency and Trustee Service (the government agency which administers

insolvent estates) there has been a change in the nature of people going bankrupt since the 1967 Act was passed. Now, unlike then, almost two thirds of bankruptcy estates involve debtors with few, if any, assets that can be sold for the benefit of creditors. Similarly, these debtors seldom have sufficient income to make any meaningful contribution to the creditors during the three years of bankruptcy.

One of the changes to the personal insolvency regime aimed at addressing this problem is the "no asset procedure" (NAP). This is a new addition to insolvency law in this country.

NAP

If a person satisfies the five criteria set out in section 363 of the new Act, they may apply to the Official Assignee to be accepted for the NAP. To qualify, the debtor must have:

- no realisable assets (excluding certain necessities of life);
- not previously been admitted to the NAP;
- not previously been adjudicated bankrupt;
- total debts (excluding any student loan balance) of not less than \$1,000 and not more than \$40,000; and
- no means of repaying any amount towards the debts.

Once a person is accepted into the NAP, they are protected from creditors for 12 months, during which time creditors may not begin or continue any recovery or enforcement action against them.

The debtor is automatically discharged after 12 months. At that time, the debtor's debts are cancelled and the debtor is not liable to pay any part of the debts. However, some important exceptions to note are: fines, maintenance obligations, child support and student loans. These remain payable.

During the 12 months it operates, the NAP may be terminated for a number of reasons. These include the debtor misleading the Official Assignee or concealing assets, or a change in circumstances which enables them to repay part or all of the debt. Upon termination, all of the debtor's debts become enforceable.

Summary Instalment Order (SIO)

At present, there is a limited right for a debtor to apply for an order that they pay their debts over time. If an SIO is made, it prevents creditors from taking action to recover their debts, provided the debtor makes regular payments.

Under the existing legislation, SIOs are made by a District Court, generally operate over a three year period, and are only available if the debtor's total debts are \$12,000 or less.

Under the new Act, the application will be made to the Official Assignee and the debtor's total debts may be up to \$40,000 (excluding any student loan balance). The time frame for repayment may be extended for up to five years. The Official Assignee will have discretion to determine whether the debtor must repay all, of just a part, of their debts.

There will be a public register of NAP and SIO debtors.

Conclusion

In general, if the debtor is in a position to pay money towards their debt, then the SIO procedure is available

as an alternative to bankruptcy. If the debtor is not in a position to make any payments to creditors, then the NAP may be more appropriate.

Anti Spam Law



and services.

The computer age has introduced many new words into the English language and the word "spam" is a good example. It describes the unsolicited emails that appear with monotonous regularity on our computer screens promoting an endless range of products

The Unsolicited Electronic Messages Act 2007, which came into effect on 5 September 2007, seeks to put a stop to spam.

The matters covered by the Act include the following:

- The Act applies to all commercial emails that have a New Zealand link.
- The sending of unsolicited emails is prohibited unless the sender is clearly identified and can be readily contacted.
- The information contained in the email must be "reasonably likely" to be valid for not less than 30 days after the message is sent.

- The sender must genuinely believe the recipient has consented to receiving the email and the onus of proving that is on the sender.
- The email must include an "unsubscribe" facility.

Failure to comply with these requirements can result in a fine of up to \$200,000 in respect of an individual and \$500,000 in respect of an organisation.

The Act does distinguish between express, inferred or deemed consent. Express consent is self explanatory. An inferred consent is one that can reasonably be inferred from the conduct and the business or other relationships of the persons concerned. Deemed consent is where the recipient has conspicuously published their email address in a business or official capacity and the publication of the address is not accompanied by a statement which says it does not wish to receive unsolicited emails. Furthermore, the message sent is relevant to the business of the recipient.

The Act only applies to emails sent within New Zealand or which have a New Zealand link so it remains to be seen how much impact it will have on the volume of unsolicited emails received from overseas.

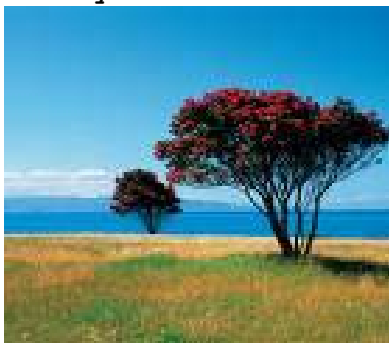
Merry Christmas and Happy New Year

Our New Plymouth office will be closed from 22 December and re-opens on 3 January 2008.

Our Inglewood office will be closed from 22 December and re-opens on 7 January 2008.

We will have a duty Partner over the Christmas/New Year break so feel free to phone us on 758 0884 about any legal query over that period.

We wish all our clients and friends a very Merry Christmas and thank you for your association during 2007.



From The Team at Govett Quilliam

Govett Quilliam News



Catherine Pfister has recently joined our Inglewood office and will be mainly involved in commercial and conveyancing matters. She has lived in New Plymouth for much of her life, attending Sacred Heart Girls' College before venturing to Victoria University where she completed a Bachelor of Laws and Bachelor of Arts. She is enjoying being back in Taranaki and the great lifestyle it has to offer. She is interested in the performing arts and you may have seen her in New Plymouth Operatic Society's production of CATS earlier this year.

GQ Profiles

Our profiles in our last newsletter were on our senior Partner, John Eagles, and his Personal Assistant Jeanie Oxley. This time we have selected our youngest Partner, Paul Shearer, and his Personal Assistant Jocelyn McKee.

Paul being lifted in the lineout



Paul Shearer – Partner and Team Leader for the Family Team

Paul is Taranaki born and bred and comes from a family entrenched in the Law – the right side of the Law that is! There has been a law firm in Inglewood since the early 1900's and has been practising under the name Deem & Shearer since 1954. In January 2004 Govett Quilliam was delighted to be able to merge with Deem & Shearer. One would naturally assume that Paul got his inspiration to become a lawyer from his family – but no, Paul tells us his inspiration came from the TV hit show "LA Law". And thank goodness Paul was inspired, otherwise Taranaki would be without one its most talented family lawyers. Aside from law Paul is a dedicated follower of all things sport. In his "younger days" Paul participated in rugby, soccer, cricket, golf, tennis, basketball and indoor netball. Paul is content now to pass on his knowledge and skills to his eldest boy Jack (6 years old) and newest addition Ben (3 months old). Paul says he hopes for Jack and/or Ben to become famous sportsmen so he can manage their careers and retire. Coming up next week is the Round the Mountain Relay Race, in

which Paul will be running the first leg at 2.30 in the morning! Paul is relying on his "natural fitness" to get him through, although he has taken little Ben out for a few runs in the buggy along the walkway.

Jocelyn McKee – Personal Assistant to Paul Shearer

Jocelyn has been with Govett Quilliam as Paul Shearer's Personal Assistant for 2 years. Originally from New Plymouth Jocelyn and her husband returned 2 years ago after an absence of over 30 years – "All our friends are still here from when we were young". Dairy Farming has taken Jocelyn and her family from New Plymouth to Hamilton to Ashburton to Auckland and then back again to New Plymouth. In between Dairy Farming Jocelyn also worked in law offices and raised 3 children, who have now grown up and had children of their own. Jocelyn's passion for all types of dance, especially Highland dancing, saw her travelling all over the country for competitions and performances. Jocelyn says the best thing about working at Govett Quilliam is the way "everyone gets on (most of the time)", and she loves the great outlook from our office in New Plymouth. Jocelyn says Paul is a "good boss", "he never gets grumpy", and "if he gets stressed he doesn't show it".



Jocelyn at the GQ Melbourne Cup Day. All staff had to make a hat out of GQ deskpad paper.

Continuing Education



The following seminars have recently been attended by members of our firm. It is a requirement that all solicitors attend seminars to keep up with legal developments in their fields of expertise. If you would like information on any of the following topics please contact us:

Client Care Under The New Regime – Paul Anderson
The New Property Law Act – Ross Fanthorpe and Rich Flitcroft
Reading Accounts and Balance Sheets – Andrew Laurenson
Local Government – Lauren Wallace

Govett Brewster Art Gallery

MONICA BREWSTER CLUB

THE MONICA BREWSTER CLUB IN ASSOCIATION WITH GOVETT QUILLIAM THE LAWYERS BRINGS AN IMPRESSIVE ARRAY OF NATIONAL AND INTERNATIONAL SPEAKERS TO NEW PLYMOUTH. IT OFFERS AN EVENING OF EXCEPTIONAL SPEAKERS, ART, FOOD, WINE AND CONVIVIALITY. THE EVENTS ARE ALSO SUPPORTED BY MICHAEL RADICH WINE MERCHANT AND CAFE GOVETT-BREWSTER. ENTRY \$12, FRIENDS OF THE GOVETT-BREWSTER ART GALLERY \$8, STUDENTS WITH ID FREE.

LEN LYE: FIVE FOUNTAINS AND A FIREBUSH

7 December 2007 – 24 February 2008

A gently rotating spray of stainless steel rods, *Fountain* is one of Len Lye's most graceful kinetic sculptures. Five different versions of this work, ranging from table-top sculptures to near-monumental works, come together for the first time in this exhibition alongside a shimmering variation called *Firebush*. *Five Fountains* is a rare opportunity to experience these works simultaneously, offering a new perspective on the importance of scale in Lye's work.

Several of the works featured in the exhibition have not been seen in decades. In 1961 the Museum of Modern Art in New York showed *Firebush*, and now the Len Lye Foundation has reconstructed the work according to the artist's design and wishes. The Govett-Brewster Art Gallery is also proud to present one *Fountain* owned by the Whitney Museum of American Art in New York, and another on loan from Len Lye's grandson, Benjamin Lindenhahn.

PAINTINGS FROM REMOTE COMMUNITIES: INDIGENOUS AUSTRALIAN ART FROM THE LAVERTY COLLECTION, SYDNEY

15 December 2007 – 24 February 2008

An extensive collection of Indigenous Australian art has been built over many years by Dr Colin and Elizabeth Laverty, through longstanding relationships with artists and advisers across several remote communities and with city gallerists. Today it is recognised as one of the most important private collections of Indigenous Australian art. This exhibition comprises paintings by 34 artists including Paddy Bedford, Eubena Nampitjin, Makinti Napanangka, Prince of Wales, Freddie Ngarmaliny Timms and Regina Wilson. Given the inventiveness and diversity of contemporary artistic languages, this exhibition focuses on four groupings: artists of the Central and Western Deserts through Papunya Tula Artists; the Balgo community from the Southern Kimberley; Peppimenarti, Lajamanu, Ngukurr and Darwin in the Northern Territory; and Hall's Creek, Turkey Creek and Kununurra in the East Kimberley. All artists are informed by a deep spiritual connectedness to land. This is the first major exhibition of contemporary Australian Indigenous painting to be held in Aotearoa New Zealand.

TERRY URBahn: THE SACRED HART

8 December 2007 – 2 March 2008

Nestled in the provincial city of New Plymouth, the White Hart Hotel is a legendary landmark with a vibrant past. Its glory days now long gone, the last accessible part of the dilapidated building is the Public Bar, a drinking den that was added in 1970. This venue attracted a diverse crowd, cultivating raucous revelry, a wild music scene and an unruly reputation. Still frequented by a few loyal locals, time lingers within its doors while the surrounding hotel sags and community life moves on.

For his new video installation *The Sacred Hart*, Terry Urbahn returned to his hometown to reunite a handful of White Hart protagonists, bringing together an assortment of patrons for one night of remembrance and celebration. The video pans a laden table, tracing characters and plots as the guests revisit old lives, rituals, memories and what a community stood for.

NGAHINA HOHAIA: ROIMATA TOROA

15 December 2007 – 2 March 2008

Three albatross feathers form the symbol of the Parihaka movement. In *Roimata Toroa* (Tears of the Albatross) Ngahina Hohaia (Ngati Moeahu, Ngati Haupoto) embraces the Parihaka tradition of Poi-Manu associated with Taranaki iwi. This ceremonial application of poi combines the recitation of whakapapa (genealogy) and karakia (ritual incantation) with the movement and rhythm of poi. The poi becomes the Manu – the messenger, or story-teller.

Nineteenth century Parihaka oratory was rich in symbolism, both ancient and contemporary, that expressed the Taranaki people's struggle of passive resistance to European colonisation, intertwining Maori and biblical identities into liberation ideology. The embroidered poi that form the installation are made from New Zealand wool blankets, products of the New Zealand agricultural economy which is built on Maori land. The blanket is a metaphor for the historical imbalance of wealth and power on this land. With *Roimata Toroa*, the woollen poi also become a tribute to the strength and resilience of the Parihaka movement, and to the continued global relevance of the messages of Te Whiti-o-Rongomai and Tohu Kaakahi.

For more information on exhibitions and events Phone 06 759 6060 or visit www.govettbrewster.com

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