Headlines

winter issue 08

THE KEYS TO THE (retirement) VILLAGE

A PRACTICAL GUIDE FOR PROPERTY OWNERS

GREEN LEASES – THE WAY FORWARD?

FISHING IN THE SUPREME COURT

SPARK!

FROM THE TOP

Welcome to the August edition of our client magazine, HHeadlines. Our objective with this publication is to provide you with some practical and accessible articles on relevant legal topics. We also aim to broaden your understanding of our capabilities, our specialist teams and how they are organised, and news of significant events in which we are involved.

Hesketh Henry has long had a good reputation, but there are some areas of the practice which have "flown under the radar". It is not widely known that we have a strong and extremely capable Litigation and Dispute Resolution team. Over the years we have handled many substantial and challenging cases and we have secured numerous victories for our clients. We profile the team, and in a related article, Senior Associate Helen McFarlane, who spent many years working at a prominent law firm in New York, explores the pitfalls for property owners with the Construction Contracts Act.

HESKETH HENRY
The Art of Law

HHeadlines is produced by Hesketh Henry Publications. Editorial enquiries should be made to Philip Hayhoe on 375 8739 or philip.hayhoe@heskethhenry.co.nz. For more information go to www.heskethhenry.co.nz

For many years now we have been a strong advocate of succession planning and have worked hard to raise the profile of this crucial activity in the business community. Many of our clients will be familiar with the "Succeed" publication in which we regularly appear. Partner John Kirkwood explores the fundamentals of succession planning and summarises them in an article geared towards the owners of small and medium sized enterprises.

Our Retirement Villages Team is led by Brian Coburn who is one of this country's foremost experts in this area of the law. In addition to highlighting the provisions of the Retirement Villages Act 2003 we profile the capabilities of the team, which has over the last few years grown in strength to secure its position as a leading provider of legal services to this sector.

We also profile our Spark! team, a group of our talented intermediate solicitors. We have established Spark! with a clear focus on giving these young lawyers the educational support and tools they need to succeed in the marketplace. Supporting our young talent to develop their skills is important to us as a firm. The Spark! team is also focused on supporting the legal needs of young, successful entrepreneurs.

Finally we preview the NZ Sculpture OnShore exhibition which is coming up in November, and give you a glimpse of the recent opening of Emma Camden's spectacular glass work exhibition at Masterworks Gallery.

Erich Bachmann
Managing Partner

Cover image thanks to:
Emma Camden, Artist
(www.emmacamden.co.nz)
Penny Kerr, Photographer

Sculptor Barbara Ward

OUR RETIREMENT VILLAGE SPECIALIST TEAM

Monica Rodgers, Barret Blaylock, Dawn Collins, Lee-Anne Simpson & Brian Coburn

Hesketh Henry has built up considerable expertise and capacity in the specialist area of law concerned with the development, operation and acquisition of retirement villages.

This has been led by Partner, Brian Coburn, who has advised operators in the retirement village sector over the past 20 years. He comments "We are all aware that the population is gradually aging, and this factor, combined with a desire for the elderly to see out their days in increased comfort and security, is driving the phenomenal demand for retirement villages in this country."

"We have made a concerted effort to grow the team and provide comprehensive services to our client retirement village operators. Companies like Metlifecare recognise our abilities to ensure that they remain legally compliant and are well positioned to take advantage of opportunities as they arise."

"The coming into force of the Retirement Villages Act 2003 in May 2007 has seen greatly increased compliance requirements and we are aware that there are existing operators who have not yet achieved registration and are operating outside the requirements of this new legislation. The directors and managers of such facilities run the risk of prosecution and closure of their facilities."

Brian and his team are always ready to advise retirement village operators on compliance issues or any other matters to do with operating retirement village facilities.

THE KEYS TO THE (retirement) VILLAGE

In this Article, **Brian Coburn**, Partner, and **Lee-Anne Simpson**, Senior Solicitor, explore the provisions of the Retirement Villages Act and focus on one of the areas of the new legislation that is causing concern for village operators.

As our population ages the need for aged care facilities and services is increasing. The retirement village sector has experienced sustained growth over the past 20 years and currently provides accommodation for nearly 6% of the age 65+ population. It is expected that this growth will continue in line with our aging demographics.

The age profile of prospective residents and the complex nature of the "investment" has led the Government to introduce the Retirement Villages Act 2003 which became fully operative from 1 May 2007. This Act has introduced not only a new disclosure regime but also a level of statutory consumer protection for residents. The Act provides for:

- an industry wide code of practice which will be enforceable against village operators;
- the appointment of a statutory supervisor on behalf of the residents; and
- the ability of residents to enforce breaches of the Act against operators.

What is a retirement village?

The Act applies to the sale or occupation of units in a retirement village. This is defined as premises containing two or more residential units, providing residential accommodation together with services and/or facilities, predominantly for people in their retirement and that a capital sum is payable as consideration. There are some exceptions, including the standard owner-occupied residential units (unit title or cross lease) which do not provide services/facilities and are not intended to provide accommodation for retired people.

The Statutory Supervisor

An operator is required to appoint a statutory supervisor whose prime duty is to monitor the financial position of the village and report to the Registrar and the residents.

The statutory supervisor has potentially wide powers to prevent an operator publishing advertisements which are regarded as inconsistent with the Act and can require an operator to provide information on the financial position, security of resident's interests and management of the village.

Disclosure Statement

A village operator has to provide an intending resident with a Disclosure Statement before any occupation right agreement can be signed. This document discloses various details of the village and enables intending residents to make an informed decision.

The information required to be contained in the disclosure statement includes details of: ownership, management and supervision of the village; the state of completion of the village, services offered, charges and accounts; occupation right agreements (ORA), terminations, deductions and estimated financial returns.

Code of residents' rights

The Act imposes a Code of Residents' Rights, which sets out certain minimum rights conferred on a resident of a retirement village. We explore this in more detail below.

Continued over page

THE KEYS TO THE (RETIREMENT) VILLAGE, CONT

Code of Practice

The Act provides that the Minister will approve a Code of Practice, as an industry code applicable to all retirement villages.

This must be complied with by every operator of a retirement village and is enforceable as a contract by a resident. It will prevail over any less favourable provision in the Occupation Right Agreement.

An attempt by the Minister responsible for the Act to introduce a Code of Practice last year was thwarted by a successful legal challenge by the Retirement Villages Association of NZ (Inc) which resulted in the High Court declaring the Code invalid. A replacement Code is expected to be issued next year.

Occupation Right Agreement

An "Occupation Right Agreement" ("ORA") is the document which sets out the terms and conditions of the contract between the resident and the operator of the village. There are certain requirements surrounding the entry into an ORA by a resident, including:

- Cooling-Off Period and Cancellation for Delay:
  The ORA must contain a provision allowing the resident to cancel the agreement without reason, by notice in writing, not later than 15 working days after the ORA has been signed. If there is a delay in completion of the unit and it is not finished to the point of practical completion within six months of the proposed completion date, the agreement can also be cancelled.
  If a resident exercises the right to cancel, the operator of the village is entitled to reasonable compensation for services actually provided.
- Deposits and Other Payments to be Independently Held:
  Every deposit or other payment made under an ORA before settlement must be held in an interest bearing account by the statutory supervisor, or by a lawyer nominated by the operator and resident.
- Information Prior to Signing ORA:
  Before any ORA can be entered into, the intending resident must receive:
  - a disclosure statement; and
  - a copy of the statutory Code of Resident's Rights; and
  - a copy of any Code of Practice that may be in force; and
  - a copy of the Occupational Right Agreement.

A potentially vexatious disputes process

Since 1 October 2006 all retirement village operators have been required to operate or provide access to an internal complaints facility for dealing with complaints by residents. Any dispute that cannot be resolved at the village level may then be referred to the Disputes Panel set up under the Retirement Villages Act 2003. Complaints at this level are determined by an independent person who has been approved by the Retirement Commissioner.

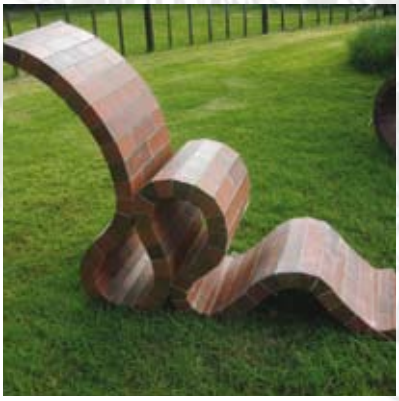
This dispute resolution process at first glance seems to be simple and efficient. However, a review of the complaints that have gone to the Disputes Panel and anecdotal evidence within the industry gives cause for concern.

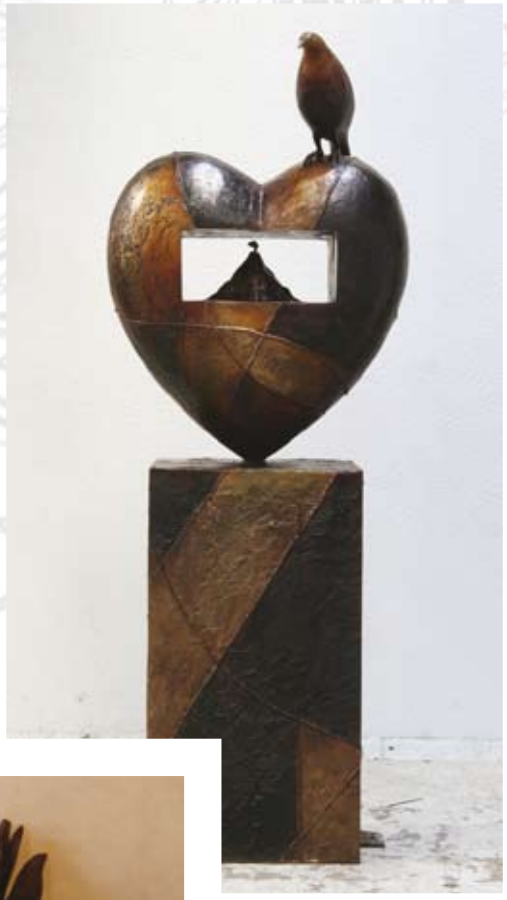
- Residents can bring a complaint to the Dispute Panel without cost to them – the operator must bear the cost of the complaint, even if they have no involvement in that dispute. Although the Act gives the Dispute Panel the power to award costs against the resident, this is considered unlikely, given the perceived power imbalance between the village operator and the resident.
- The legislation sets out the restricted grounds on which a complaint may be made to the Disputes Panel, yet Panel members are not qualified to adjudicate on jurisdictional issues and have shown that they are prepared to hear almost any complaint, regardless of objections that it falls outside the approved test under the Act.
- The disputes procedure does not involve compulsory mediation of the issues, which would give each party a cost effective opportunity to address issues and also provide a forum for maintaining good relationships.
- The quasi-judicial nature of the Disputes Panel pits the village operator against a resident in an adversarial manner.

Village operators have reason to worry about this dispute resolution procedure. The average cost of a Disputes Panel hearing on the basis of lost time and fees is often in excess of $10,000, which may be reflected in increased costs to residents.

The current procedure does not promote good relationships between operators and residents, which is of course is a desirable outcome of any disputes process.

SCULPTURE CARVES A NICHE





Hesketh Henry is once again proud to be the principal sponsor of the NZ Sculpture OnShore event being held this Spring.

The exhibition promises breathtaking big pieces and more intimate works, prominent artists, new talent and a broad scope of materials and styles over the hundred works on display. Fort Takapuna Historic Reserve in Devonport is once again the setting, and following the Gala Opening on November 6, the exhibition will be open every day until November 16.

"We are not just proud to be involved in a great arts event", says Managing Partner Erich Bachmann, "we are also once again particularly pleased that the proceeds will go towards supporting New Zealand Women's Refuges, an organisation which provides essential services to women and children throughout the country."

Curator Rob Garrett says "Because of the size of the exhibition, we can show the breadth and type of sculpture styles in New Zealand, all of which is suitable for display outdoors. We can be adventurous with the selection and encourage artists to take risks. The result will be a show of high quality which I hope will offer new experiences to the audience along with the opportunity to see significant works from major artists."

The exhibition will be physically bigger than previously, so pull out your sensible walking shoes and prepare to be dazzled. The full extent of Fort Takapuna Historic reserve is being used by Rob to create big spaces for sizeable works: over ten sculptures will be big enough to walk into or tower over visitors. The site also provides quite intimate settings for smaller works.

We look forward to sharing some images from this with you in the Summer issue of HHeadlines.

GREEN LEASES – A LOAD OF "GREEN WASH", OR THE WAY FORWARD?

People talk about "green leases" and "green buildings" but understanding has been vague and there has been some "green-wash" in discussions about environmental sustainability. The New Zealand Green Business Council is trying to make green building performance measurable both in the design stage and the use of buildings. Green leases reflect this concept of measurability.

GREEN BUILDINGS

So – what is a "green building"? It's not one painted green!

A green building is one that is designed and operated to achieve some or all of these goals:

- Reduce energy use or use renewable energy, for example passive solar design, chilled beam air conditioning, making maximum use of natural ventilation and sunlight
- Water sensitive design (reusing grey water and storm water for watering gardens and flushing toilets)
- Using where possible recycled building materials for construction fitout that will last the life of the building with little maintenance, or use materials that can be recycled at the end of their useful life
- Healthy internal environments through optimised use of cross ventilation and daylight, and low use of chemicals
- Integrated waste management practices

Green buildings may cost more to build and require higher rents but as the Ministry for the Environment's 2007 paper "Value case for sustainable building in New Zealand" states, these costs can be offset by the potential increased capital value, lower operating expenses, higher productivity and increased occupancy rates.

The green building approach also enables property owners to "future proof" their buildings to improve long term returns on their investments - to some extent. While upfront costs may be higher for property owners they should face lower ongoing maintenance costs. Tenants can benefit from lower operating expenses. When promoting green buildings to potential tenants it is important to

focus on the total cost of the tenancy – rent may be higher, but outgoings are lower, and greater worker comfort should lead to higher productivity for tenants' staff. These days occupying a green building is prestigious and can boost a tenant's profile.

In New Zealand there are two key tenant drivers which will stimulate the construction of green buildings.

Government departments and Ministries have specified that all new A grade office buildings being built to house Government staff in the CBD must have a minimum 5 Green Star NZ rating. B and other grades of office buildings are required to be 4 Star.

Also, there are multinationals whose head offices require them to adopt sustainability strategies in terms of the property occupation and have a triple bottom line.

GREEN LEASES

A green lease is similar to a standard lease but it usually includes an Environmentally Sustainable Design schedule ("ESD") which will include the aspects to minimise environmental impacts, and agree energy and water use outcomes and associated reduced operating costs. The ESD includes the assumptions and requirements for meeting outcomes. If you are a tenant a requirement will be that your fitout is consistent with the principles of the base building and the requirements of an environmental management plan which is an integral part of the process.

For a building to be green, ESD standards need to be adopted at the initial stage and reflected in all construction contracts and development agreements as well as the leases, covering not just materials for construction and design but passing on obligations to occupiers and managers as mentioned.

One option is to go for a "best endeavours" approach, but most parties currently require measurable targets to be set for environmental performance. These support the mutual (and preferably annual) evaluation of performance by both landlord and tenant. Lease terms can include:

- Obtaining an agreed Green Star NZ rating and score for the base building and fitout.
- Requiring the landlord to measure each tenant's energy use and water consumption – this might be part of a "Green Management Plan" recording landlord and tenant strategies to ensure that target ratings are achieved.
- A management committee may be established to support the parties to meet the sustainability requirements of the lease and the Green Management Plan.
- Appointing an independent consultant to monitor utility usage and to assess

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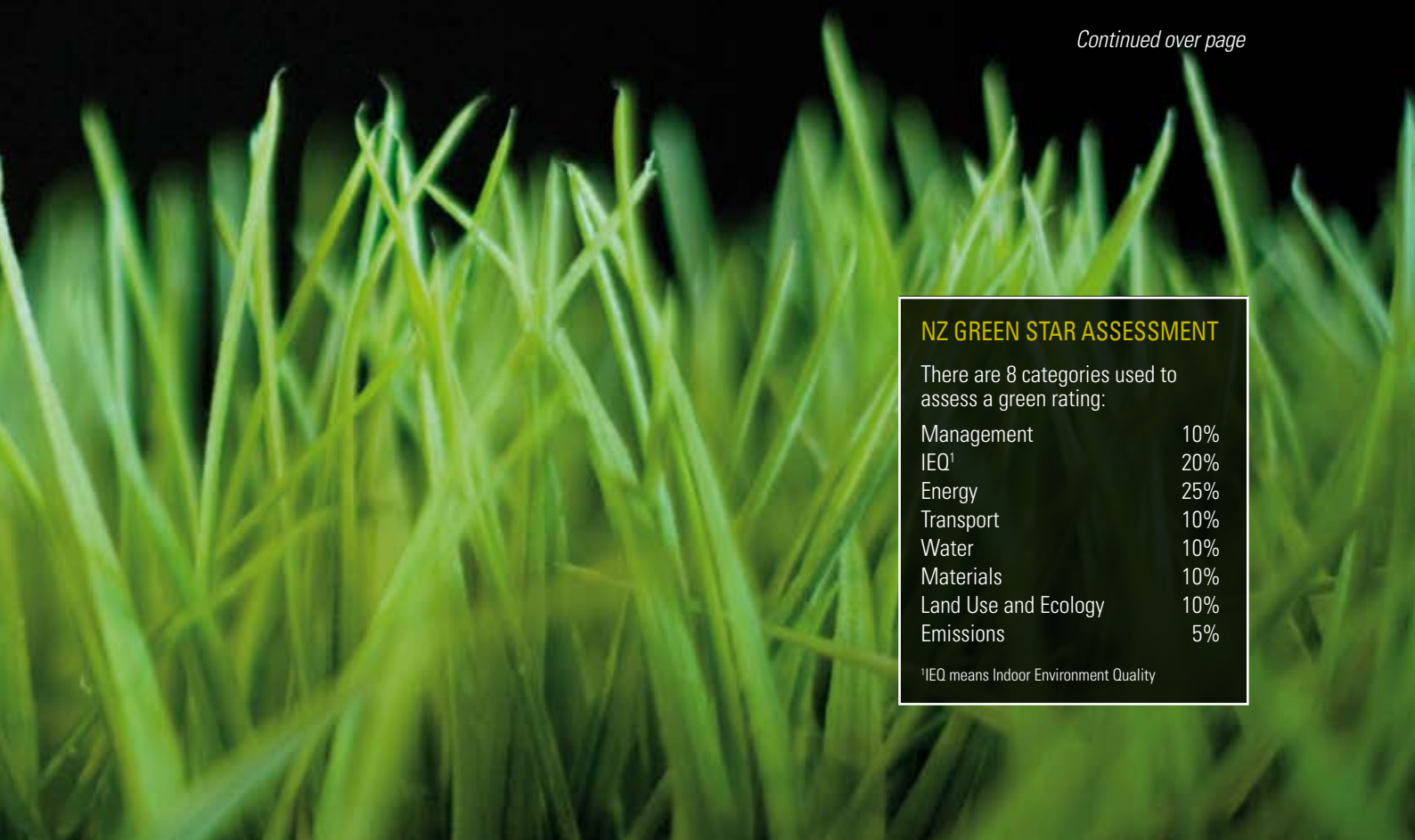


NZ GREEN STAR ASSESSMENT

There are 8 categories used to assess a green rating:

Management	10%
IEQ[1]	20%
Energy	25%
Transport	10%
Water	10%
Materials	10%
Land Use and Ecology	10%
Emissions	5%

[1]IEQ means Indoor Environment Quality

GREEN LEASES, CONT

compliance with required outcomes as set out in the lease at regular intervals.

- A Green Expert (an independent engineer) may also be used to resolve disputes, advise on technology enhancements or adjust a rating if parties have taken all necessary measures to fix a problem.
- Setting out a calculation formula for failing to comply with the lease obligations or to achieve the required ESD outcomes. Financial incentives can be agreed to encourage compliance – rent might be reduced or offset to compensate the tenant for increased operating expenses stemming from the landlord's failure to achieve ESD outcomes. This formula needs to be fair and take into account factors that will influence energy use that are beyond the control of the landlord, for example an unusually hot summer.

GREEN STAR RATING SYSTEM

The New Zealand Green Building Council has developed a star ratings system which covers new design, as built, in use/performance and interior fitout (see box). These are currently used for office buildings and have yet to be developed for industrial, retail or mixed use buildings.

Recently The Meridian building in Wellington and 80 Queen Street, Auckland have both achieved a 5 Star Green Star NZ rating. Retrofitted buildings can also obtain ratings. Brian Coburn, Commercial Property Partner of Hesketh Henry recently acted for a client who purchased 92 Albert Street Auckland, which is the first refurbished office building in New Zealand to obtain a 4 Star green rating denoting best practice.

CONCLUSION

At the moment green leases are being driven by government and environmentally conscious multinationals, as they have a powerful emphasis on sustainable management. As climate change becomes an ever more important consideration in everything that we do, we will see more green leases for new purpose built buildings and existing buildings, and better relative affordability. We can also expect the Building Code to contain higher environmental standards than it does at present.

While immediate commercial returns are important, landlords should begin to take a long term view with their properties. If you own a commercial building and you have lease negotiations on the horizon, you need to ensure they have the capacity to undertake a green retrofit.

Please contact **Joanna Pidgeon**, Partner in Hesketh Henry's Commercial Property Team if you are interested in constructing a green building or creating green leases for your property.

NZ STAR RATINGS

For new Office Design projects, the following ratings can be achieved:

★★★★ 4 Star Green Star NZ Certified Rating (score 45–59) signifies 'Best Practice'

★★★★★ 5 Star Green Star NZ Certified Rating (score 60–74) signifies 'New Zealand Excellence'

★★★★★★ 6 Star Green Star NZ Certified Rating (score 75–100) signifies 'World Leadership'

SPARK! SUCCESSFUL YOUNG LAWYERS LIFTING THEIR GAME

In the past, law firms have relied on their lawyers to pick up client skills simply by working alongside a partner and observing what they did. In the modern business environment this is no longer good enough. We have created Spark! to address that issue and to support our intermediate lawyers to develop their client relationship skills.

It's all about supporting, growing and retaining our young talent.

Spark! is a group of Hesketh Henry's intermediate lawyers, ranging in experience from two years post qualification experience up to and including senior solicitors. The group operates under its own governance structure with inputs from management and senior legal staff as appropriate.

Spark! empowers and enhances the client development and management skills of this group. Our lawyers will always develop their legal knowledge and expertise but this initiative also provides support to develop their abilities in client care.

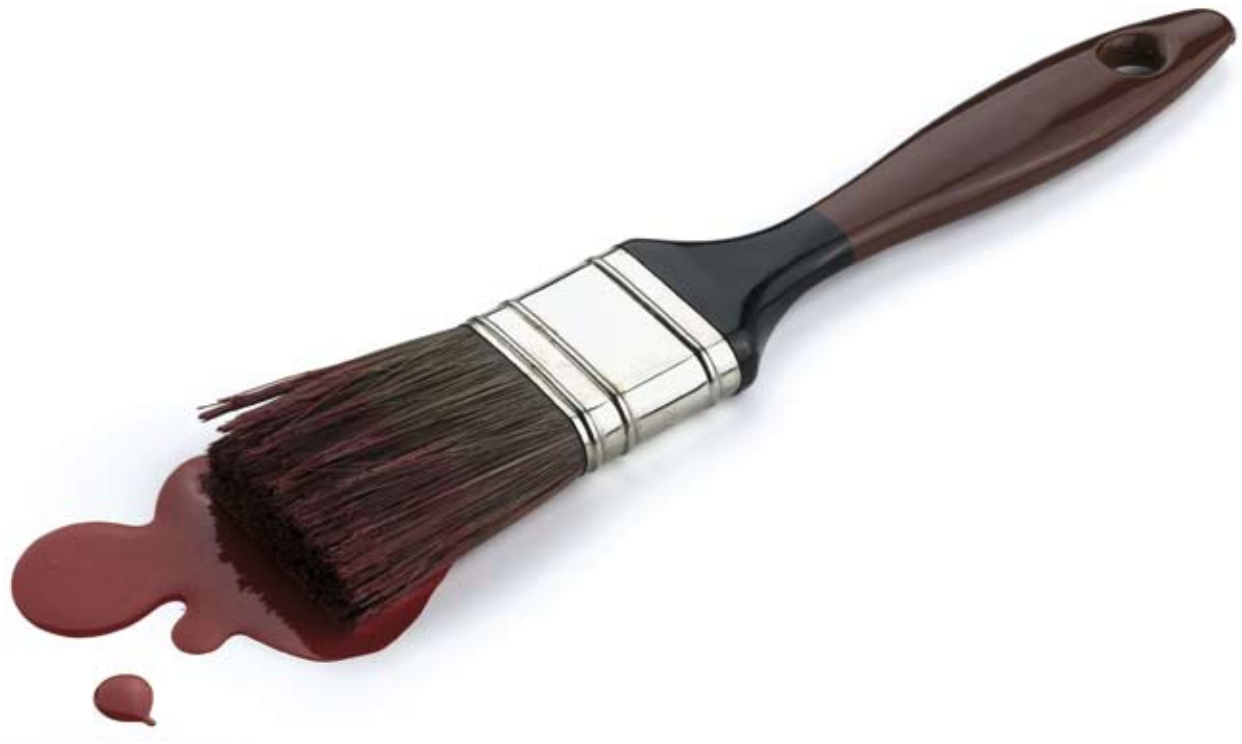
Spark! also seeks to open up new business development channels and opportunities in new markets and new businesses. It encourages collegiality and opportunities for interaction with the business community.

It's about developing strong multi-disciplinary teams to provide comprehensive services to clients who appreciate a fresh approach, such as Generation Y entrepreneurs who are experiencing great success in businesses especially in the restaurant, media, computing, IT, fashion and entertainment fields.

Often these clients have rapidly built up businesses and may not have created the optimal structures to protect their interests and provide the solid foundation for growth into other businesses and markets. There can be employment issues which are creating liabilities. There may be a need to raise capital. There may be a nasty dispute brewing that requires an astute litigation advisor. A lease may be on the table and the client needs to understand the real implications of that innocuous little paragraph which could cost them thousands of dollars.

Spark! provides these clients with a great resource for cost-effectively and thoroughly managing any or all of these issues.

We have developed a relationship with the Restaurant Association and Spark! lawyers are delivering educational workshops to their membership, as well as developing their contacts and client work in this dynamic sector. We are creating other opportunities for Hesketh Henry clients to meet Members of the Spark! group. **Watch this space.** HH



THE LITIGATION AND DISPUTE RESOLUTION TEAM – Our best kept secret

Of all the areas of the firm, our Litigation and Dispute Resolution Team has consistently – and some would say deliberately – flown "under the radar". The team has notched up some excellent outcomes for clients over the years, but the very nature of their work does not lend itself to wide publicity.

If a client has endured either bringing or defending an action, they may not wish for this to be publicised, and they may be bound from doing so in any case due to the terms of a settlement. As a result a great deal of excellent work remains confidential.

Our large litigation capability in particular is not widely known. We have at times established teams of up to fifteen lawyers and support staff to deal exclusively with extraordinarily complex, multi-million dollar litigation matters. We have developed and refined our systems and capabilities in e-discovery and document management, as we have mentioned in previous issues of HHeadlines magazine.

This has resulted in very efficient and cost-effective management of these cases, and the development of sound methodologies that provide a robust level of control and sophisticated analysis. This in turn means that we offer the very best advice on litigation strategy and possible negotiated solutions.

As a result of undertaking these cases we have built up a team of lawyers with strong levels of experience which encompasses the often demanding requirement to understand and become expert in complex financial, medical, engineering, environmental, employment and maritime concepts, and the law specific to these areas.

As Partner Alan Sherlock says "Our team is one of the largest in Auckland, and has built up its expertise over a long history of contesting major cases. We are confident that we have the expertise and resources to meet the sternest challenges".

BUILDING OR RENOVATING – READ THIS!

A practical guide for property owners

Senior Associate Helen Macfarlane from our Litigation and Dispute Resolution Team examines the problems that can befall unwary property owners when they are billed with a payment claim under the Construction Contracts Act.

The Construction Contracts Act provides mechanisms by which contractors can ensure that payment for ongoing work is not held up by disputes with owners and developers. It is primarily used in the commercial construction context, but it can also apply to residential construction contracts. The extent to which the CCA applies to residential construction contracts can pose pitfalls for residential occupiers.

As an owner or occupier building or renovating your home, you may have no idea that the CCA applies to your project. The first you learn about it is when you get an invoice bearing the statement "this is a payment claim under the Construction Contracts Act" with an attachment explaining what you must do to respond.

If you want to dispute any significant amounts claimed by the contractor, the first thing you should do on receiving a payment claim is call a lawyer. The CCA has very specific and draconian requirements for responding to payment claims, relating to both timing and the content of the response.

If you do not respond with a "payment schedule" within the time set by the CCA you may find yourself facing a summary judgment action for the amount claimed, against which you cannot raise any counterclaim or set-off. If your payment schedule does not explain all your reasons for any deductions made and how you calculated them, you may find yourself facing an adjudication claim against which you cannot raise any reasons that were not mentioned in your schedule. This can all be extremely stressful for the beleaguered home-renovator.

And so it is sensible for you to discuss your disputed issues with a lawyer and have them review the payment schedule before sending it out to ensure that all bases are covered.

If the amount withheld is large, it is possible that the contractor may start adjudication proceedings under the CCA. This is a rapid-fire procedure that can result in you (at least temporarily) having to pay the contractor some or all of what is claimed. In that event, although you are free to bring other dispute resolution proceedings challenging the contractor's claim, the contractor will have the use of the disputed funds pending determination of such proceedings and you will be out of pocket.

Frequently a contractor will sit on your payment schedule for anything from several weeks to several months, using the time to prepare detailed papers and legal submissions for adjudication proceedings. Once the papers are substantially completed, the contractor will serve you with a notice of adjudication and a statutorily required "Form 2" containing information on how the adjudication procedure works.

At that point, very short timeframes kick in to nominate and appoint an adjudicator. If you are in this situation

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BUILDING OR RENOVATING – READ THIS!, CONT

you need to know that the Form 2 information concerning timeframes for nominating an adjudicator is misleading. It suggests the parties have five working days to agree on an adjudicator after which appointment by a nominating body can be sought. In fact, the CCA requires a request to have been made to a nominating body no later than five working days after the notice has been served. As a result a prudent contractor will seek appointment by a nominating body in parallel to notifying the owner of its proposed adjudicators.

As a practical matter, this means that if you have a preference for one of the adjudicators suggested by the contractor, you shouldn't wait the full five days to notify the contractor of your agreement to the preferred person, lest your choice be trumped by a prior appointment through a nominating body.

Upon the adjudicator's nomination and acceptance, the contractor has five working days to serve the details of its claim. However, the well-prepared contractor will not wait for that period to expire but will immediately serve its full claim with supporting documents and witness statements. In contrast to the contractor, who has prepared its submissions at leisure, you will then have only five working days in which to respond.

Because the timing of the process is weighted so heavily in favour of the contractor, prudent residential occupiers who dispute and withhold significant amounts from a payment claim should do what they can to prepare for the possibility of an adjudication. Obviously, in doing this, it is desirable to keep costs down since it is not certain that the contractor will pursue that route. Without incurring significant expense, however, there are several steps you can take.

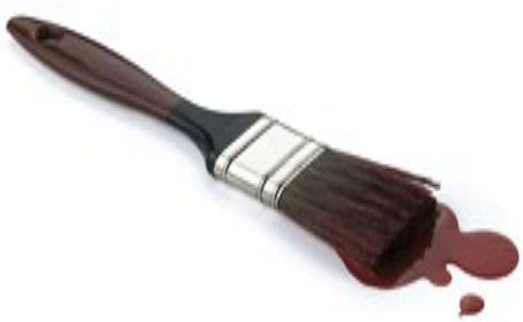
At the time of completing the payment schedule, you should ask your lawyer what supporting evidence you will need if the matter proceeds to adjudication. The lawyer should generally describe the documents needed, identify the people whose evidence will be relevant and provide a brief outline of the subjects each witness should cover. With experienced counsel, this should be a streamlined and not overly costly process.

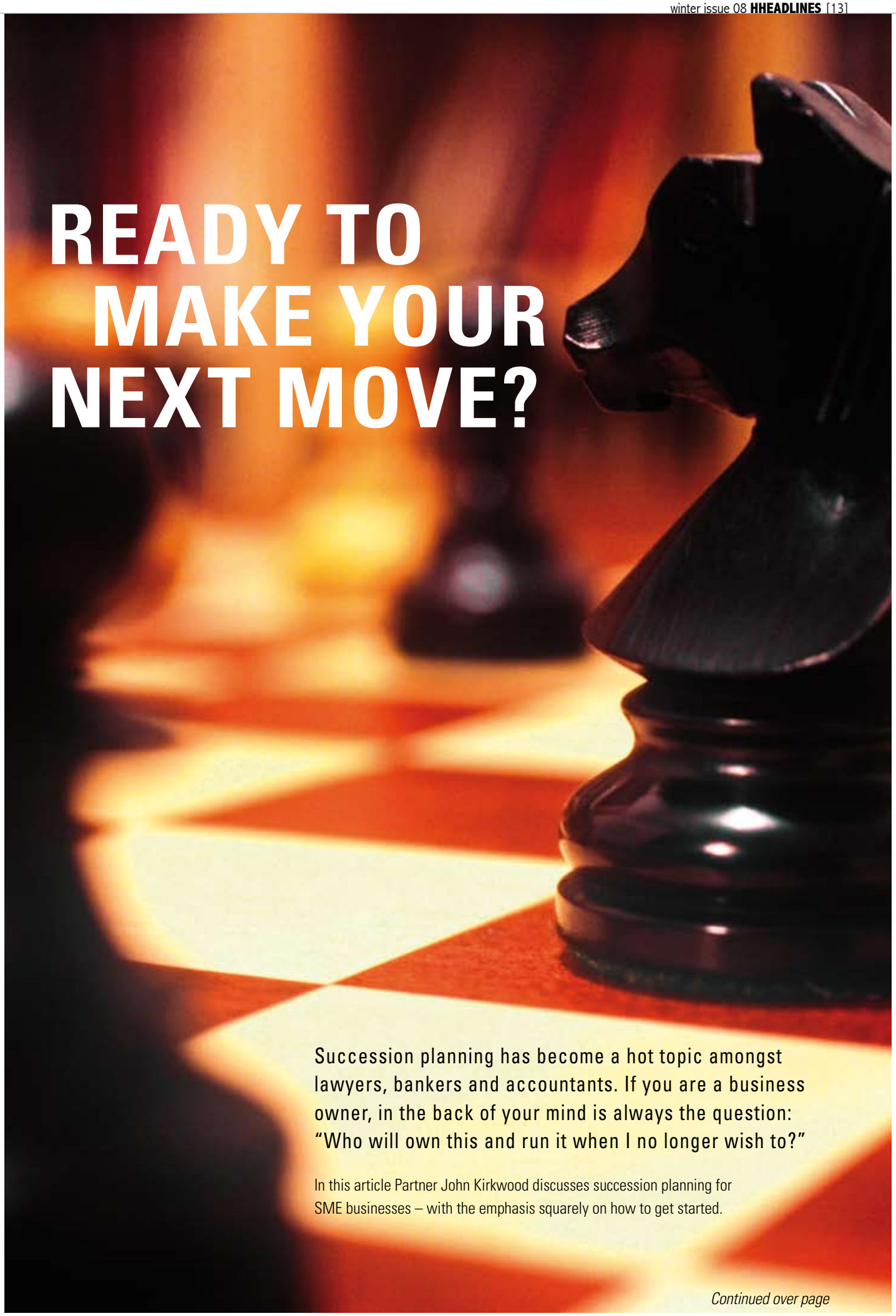
Based upon what your lawyer has said, you can then do the following. First, assemble supporting documentation concerning each of the disputed matters in an organised form. Second, dictate or write out a summary of the circumstances and events that support your reasons for not paying the amounts withheld. (This can be a bullet-point outline or verbatim account – the key is to provide information.) Third, ask any potential witnesses you need in support of your case to do the same. Finally, depending on the nature of the dispute, it may be sensible to line up a quantity surveyor to be used in the event of an adjudication.

Because most of the work is being done by you during this preparatory stage, you will not be incurring significant legal fees. However, the supporting documentation and statements that you collect will provide a useful jump-start for your lawyer if adjudication proceedings are commenced. This will in turn probably reduce the legal costs of preparing a response.

In summary, from the residential occupier's perspective the keys to dealing with disputed payment claims under the CCA are:

- early consultation with a lawyer to make sure that the payment schedule complies with the CCA and sufficiently explains the reasons for withholding payment, and
- advance collation of evidence so that your lawyer can best make use of the limited time available to respond to an adjudication claim if made. HH





READY TO MAKE YOUR NEXT MOVE?

Succession planning has become a hot topic amongst lawyers, bankers and accountants. If you are a business owner, in the back of your mind is always the question: "Who will own this and run it when I no longer wish to?"

In this article Partner John Kirkwood discusses succession planning for SME businesses – with the emphasis squarely on how to get started.

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READY TO MAKE YOUR NEXT MOVE?, CONT

First, the context

New Zealand is a country with many small to medium enterprises ("SME's"). These are classified as being closely held companies with fewer than 20 employees. There are over 300,000 SME's nationally and business commentators agree that these businesses form the backbone of the New Zealand economy.

As baby boomers are beginning to retire, the next 5 to 10 years will see an unprecedented wave of business sales. Conservative estimates set the value of this sale and transition of businesses at about $24 billion over that period ($8.4 billion in Auckland alone).

So, what is "business succession planning"?

You may be wondering what the term "**business succession planning**" really means.

Ultimately, the transition of a business from one owner to the next is an inevitable path – unless of course there is little or nothing to sell when the time arrives.

Business succession planning is about building profitability and value in your business and getting the fundamentals right so that the ultimate transfer of control and ownership to others is swift and rewarding. You may not be thinking about your exit right now. Planning can take three to five years from conception to full implementation.

What SME business surveys tell us

A survey of SME business owners undertaken by accounting firm Hayes Knight (using comparable Australian data) found that:

- 40% expected to sell in the next 5 years
- 33% expected to have difficulty selling
- 50% expected to rely on the proceeds of the sale to assist their retirement
- 62% didn't have a succession plan

Who will buy your business?

Many commentators suggest that ultimately there will be more businesses for sale than buyers. Applying the simple laws of supply and demand, high numbers of businesses on the market and low numbers of buyers translate into lower prices and longer sale cycles.

Some businesses simply won't exist in 5 years. However, future focused and well managed businesses with an established succession plan and which have been groomed for exit will continue to not only survive but will prosper and command excellent sale prices on exit.

What are my exit options?

Ownership transition can take many forms including:

- a sale to an unrelated third party (commonly known as a **"trade sale"**)
- passing the business from one generation of owners to the next (**"generational succession"**)
- a sale to management (**"management buy-out" or "MBO"**)
- a structured liquidation – when no one is willing to buy what you have on offer (often called the **"worst case scenario"**).

Kick start the process

How are you placed for your own business succession? Have a look at the following statements and see how you and your business measure up:

- I understand my industry, where my business fits and the competitive edge that makes my business stand out in the market.
- By implementing strong management structures over time I can leave my business for a day, a week or a month at a time and it keeps running just as if I was there.
- If a buyer came along tomorrow or my circumstances changed my business would be "deal ready".
- I understand the effects that technological, regulatory and economic change will have in the future.
- I am preparing my business to maximise profitability in the medium to long term while I continue to own and operate it and to ensure a profitable and timely exit on my terms when the time comes.
- I understand my options for succession and have identified likely suitors.

So why do so many SME owners struggle to start a plan?

- **Emotion** – many business owners started from scratch, built the business and struggle to deal with the inevitable

truth that at some point ownership of their business will need to transition.

- **Value proposition** – Many business owners struggle to invest now for returns which may be many years in the future. However, those investments in time and money will pay dividends.
- **Trust** – perhaps most importantly, SME business owners are not sure where to turn, who to trust or how to take the first step.

How to start

Here's how we suggest you start:

- **Get help** – you can't do this alone. Talk to your lawyer and accountant. Make sure they have experience in succession planning. If not, seek out ones that do, such as Hesketh Henry and Hayes Knight.
- **Undertake a business diagnostic** – this is a thorough review of your business – warts and all. It assesses where the business is currently at, analyses risk exposure and identifies areas where the business can improve.
- **Complete a valuation** – there is commonly a considerable gap between a business owner's view and that of a buyer.
- **Start on the housekeeping** – Sorting out practical issues like your employment contracts, HR records, leases, supplier agreements, shareholder agreements and office systems make the eventual evaluation of your business a straight forward proposition.
- **Business enhancement** – based on the diagnostic, start making changes in the business that will cause permanent and measurable improvements, including growing your sales, building value in your brand and growing your export markets.
- **Get your reporting right** – create the reporting and results trail that tracks the improvements achieved.

Important points from a legal perspective

- Review inward/outward supply agreements and other agreements which affect the operations of your company. Get everything in writing. Can these be assigned to a purchaser?
- Consider building ownership and/or lease arrangements. If you own the building you operate from you may want to keep it as a longer term investment.
- Identify the goodwill and intellectual property (i.e. brands) associated with or owned by the business. Do you own something unique that enhances value? Would the business (and ultimately the sale price) benefit from trade marking some of these brands or patenting systems, process or other IP?
- What are the current employment contracts and are these compliant with current laws?

The ultimate sale or transition of your business requires careful planning, preparation and presentation. The key is presenting a well managed business which even after extensive digging by a prospective purchaser will measure up to their expectations.

We have created a workbook with some insights and questions which may assist your thinking. If you would like a copy please contact us by emailing us at john.kirkwood@heskethhenry.co.nz or telephone us on 375 8712.

Our Succession experts: Mary Joy Simpson, Sylvia Cheah, Sarah Kerr and John Kirkwood

Flexible Working Arrangements

Worried about just how flexible you will have to be? Don't be … **Alison Maelzer**, Senior Solicitor in our Employment Law Team, highlights key aspects of the new legislation and finds that it's not as onerous as it first appears…

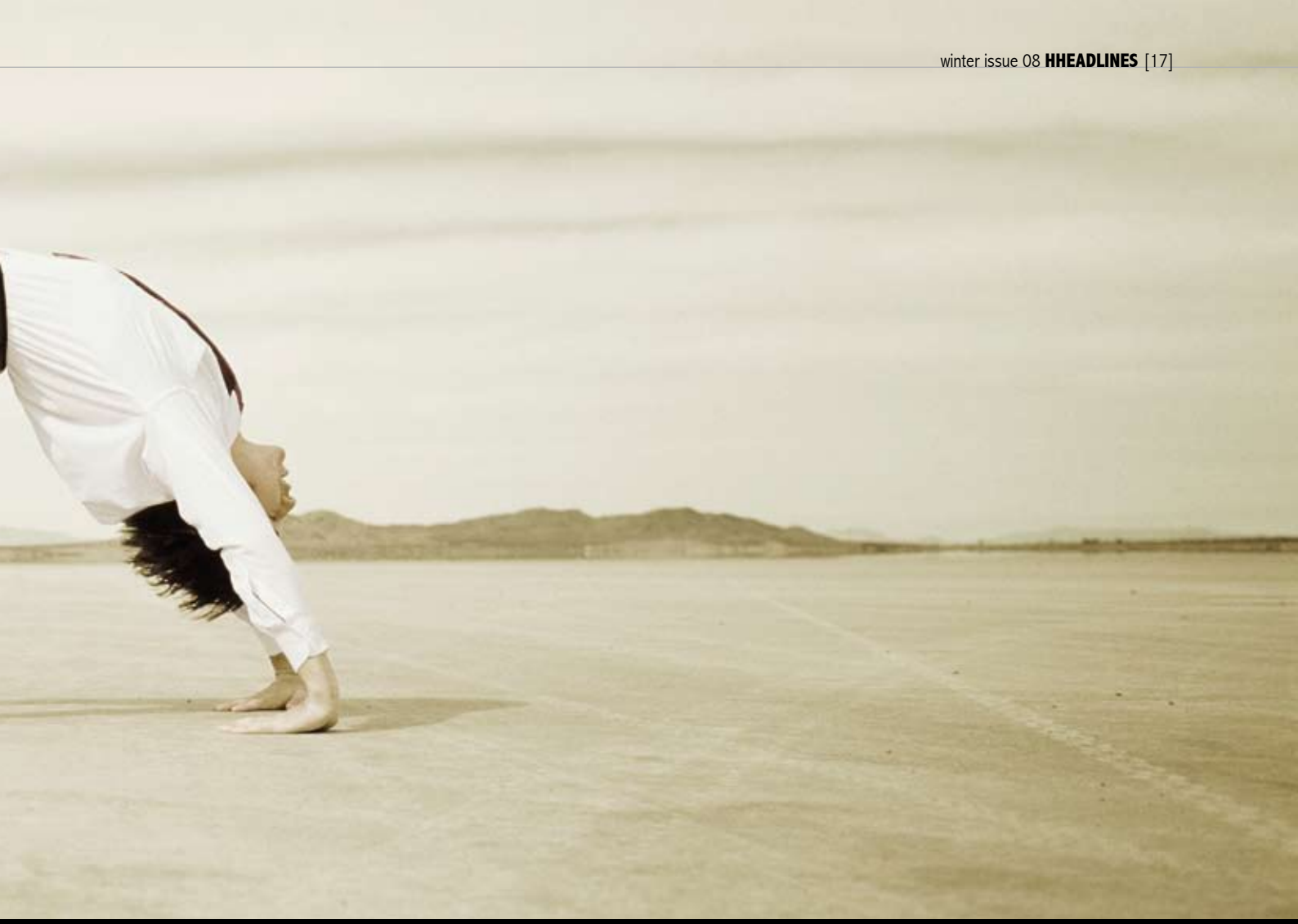
The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 came into force on 1 July this year. This amends the Employment Relations Act, adding in obligations for employers and employees with regard to flexible working arrangements.

From 1 July 2008, eligible employees will have the statutory right to request that their employer vary the hours, days, or place of work, either permanently or for a fixed period of time. To be eligible, they must have worked for the employer for at least 6 months before the request and not have made a request in the last 12 months (whether that request was accepted or declined).

A key point is that they must have the care of any other person (this can be a child, or another dependent such as an elderly parent or disabled family member). The employee must make a request in writing, stating amongst other things:

- The flexible work arrangements the employee is seeking
- Whether the variation sought is permanent or temporary (and the start and end dates, if applicable)
- How the change in hours, days or place will help the employee to better care for the person
- In the employee's view, what changes the employer might have to make to accommodate the change.

Having received such a request, the employer must respond as soon as possible (but within 3 months). The response must say whether the request is accepted or declined, and if declined, needs to say whether it is because the



employee is not eligible or because of one of the grounds set out in the Act, which include:

- Inability to reorganise work among existing staff
- Inability to recruit additional staff
- A detrimental impact on quality or performance
- Insufficiency of work during the period the employee proposes to work
- Planned structural changes
- Burden of additional costs
- A detrimental effect on ability to meet customer demand.

In addition, an employer must decline a request if the employee is covered by a collective employment agreement (CEA), and the requested variation would be inconsistent with that.

If the employee is unhappy with the employer's response, he or she can contact a labour inspector who will help resolve the situation. If the employee is still unhappy, they may request mediation, and if that fails, they can ask the Employment Relations Authority to mediate. The Authority can order the employer to comply with the Act, and/or award a $2,000 penalty payable to the employee. There is no right of appeal from the Employment Relations Authority.

The employee cannot challenge the grounds the employer has used to decline the request. For example, if an employer has declined on the grounds that customer service will be affected, the employee cannot dispute the substance.

In our view …

The legislation is largely process based. It does not grant employees the right to have flexible working arrangements; only to request them. The employer has a great many grounds on which it can refuse, and the substance or truth of those grounds cannot be challenged. The Act is therefore not the scary prospect that some employers have feared. As with most new legislation, there are a number of points that will need to be clarified as we put the Act into practice.

NEW FACES

KAREN MEIKLE – SOLICITOR

Karen is a solicitor in our Litigation and Dispute Resolution team.

Karen was admitted to the bar in February 2007 after completing her LL.B (Hons) / BSc (Geology) at the University of Auckland.

Prior to joining Hesketh Henry she practised family law as a junior barrister and prior to that was employed in the in-house legal team of a large territorial authority.

Karen has a strong interest in human rights and during her time at university she volunteered for human rights lawyer Deborah Manning. Karen loves to travel, especially around New Zealand. She tells us she doesn't have a favourite spot as every place offers its own unique experience.

DINESH PANDEY – SOLICITOR

Dinesh joined our Corporate and Commercial team in July 2008 following his admission to the bar. He recently completed his LL.B at Auckland University and he also graduated with a B.Com in marketing and management in 2004.

For the last five years Dinesh has worked in a commercial property company as a project manager.

Dinesh enjoys travel – he has already been to over 15 countries! He also enjoys participating in sports, particularly soccer and rugby.

CYNTHIA GARTON – SOLICITOR

Cynthia has recently joined our Corporate and Commercial team as a solicitor. She practises in the area of general corporate and commercial law, drafting and reviewing various corporate documents, but also has a particular focus on mergers and acquisitions.

Prior to joining Hesketh Henry, Cynthia worked for a large national law firm in Auckland. Cynthia completed her LL.B (Hons) and BA at the University of Canterbury and in her final year was the president of the University of Canterbury Law Students' Society.

Outside the office, Cynthia enjoys a variety of sports and dancing, socialising with friends, and is also interested in languages, culture and travel. Cynthia is on the committee of the Auckland District Law Society's Recently Admitted Members' Society (RAMS).

ALEX TRACY-INGLIS – SOLICITOR

Alex has completed a BSc and an LL.B from the University of Canterbury. She went on to do her Professionals in Wellington and has recently joined our Corporate and Commercial team.

Although Alex is originally from New Zealand, she has spent many years growing up in, and travelling through, a variety of countries such as Australia, China, England, Hong Kong, Indonesia, Italy, Papua New Guinea, Oman, Scotland, and Tibet.

In her spare time Alex likes to watch movies, read, cook, dine-out, listen to music, attend various events and generally do what most "20-somethings" like to do… shop!

She is a self-confessed city kid but still loves to make the most of beautiful New Zealand whether it is at the beach, on the ski slopes or in the bush.

KARA WILTON – SOLICITOR

Kara joined our Corporate and Commercial team in June 2008 after three years as a solicitor in a commercial law firm in central Auckland.

While at university, Kara studied intellectual property law, information technology law, company law and other general commercial law papers. She is particularly interested in these areas of law.

Kara majored in politics for her arts degree, and minored in art history. She has a keen interest in the Arts and when she has the time loves to paint. On weekends, Kara enjoys socialising with friends and family, watching movies and going to concerts.

SAM HALSE – SOLICITOR

Sam is a law graduate in our Corporate and Commercial team. He completed a double degree in Law and Commerce at the University of Otago and spent six months on exchange at the University of North Carolina specialising in papers relating to entrepreneurship.

Outside of work he enjoys travel having spent two working summers in Australia and time travelling around Europe in 2006. Sam also enjoys many sports, including rugby and golf, and socialising with friends.

Sam will be admitted to the bar in September of this year.

NEW LEGISLATION

The Climate Change (Emissions Trading and Renewable Preference) Bill is a critical step towards New Zealand playing its part in addressing climate change. The Bill's principal purpose is to amend the Climate Change Response Act 2002 to introduce a greenhouse gas Emissions Trading Scheme in New Zealand. The bill also amends the Electricity Act 1992 to create a preference for renewable electricity generation by implementing a moratorium on new fossil-fuelled thermal electricity generation, except to the extent necessary to secure New Zealand's electricity supply.

The Land Transport Management Amendment Bill will enhance New Zealand's transport planning and funding system established under the Land Transport Management Act 2003 through a variety of initiatives including reserving fuel excise duty for land transport purposes.

The Real Estate Agents Bill replaces the Real Estate Agents Act 1976 and introduces a new regulatory framework for the real estate industry that will promote and protect the interests of consumers in real estate transactions by raising industry standards, improving licensing requirements and procedures, providing mandatory disclosure obligations and providing accountability through an independent, transparent and effective disciplinary process.

The Companies Minority Buy-Out Rights Amendment Bill amends the Companies Act 1993 to clarify the minority buy-out provisions for dissenting shareholders in the context of special resolutions. The main intention of the Bill is to provide an exit regime for dissenting shareholders of a company who have unsuccessfully opposed a fundamental change to the structure or operation of the company.

Fishing in the Supreme Court

Our clients New Zealand Recreational Fishing Council Inc and The New Zealand Big Game Fishing Council Inc lodged judicial review proceedings in 2005 challenging the Minister of Fisheries' decisions allocating Kahawai into the quota management scheme. The case is the first legal proceedings by amateur and recreational fishing interests since the introduction of a quota management scheme to manage fisheries resources 20 years ago.

Partner Stuart Ryan, who acted on behalf of the NZ Recreational Fishing Council in the initial challenge, will again be representing their interests in the High Court. He will once again work closely with Alan Galbraith, QC.

The recreational fishers secured a large win in the High Court in March of last year when the High Court made declarations that the Minister of Fisheries decisions were unlawful as they had set the total allowable commercial catch for Kahawai without taking into account the social, economic and cultural wellbeing of the people – a mandatory consideration in the Fisheries Act 1996.

The second part of the challenge was that the Ministry failed to take into account the special considerations applying in the Hauraki Gulf, due to the Hauraki Gulf Marine Park Act 2000, when fixing the total allowable catch for an area encompassing North Cape to East Cape, including the Hauraki Gulf.

The commercial fishing industry appealed the High Court decision, and were successful last month in the Court of Appeal in overturning in part the High Court decision. The recreational fishing interests have now sought leave to appeal part of the Court of Appeal's decision to the Supreme Court.

Stuart is looking forward to a challenging and stimulating case, the outcome of which has implications for this nation's many thousands of recreational fishers.

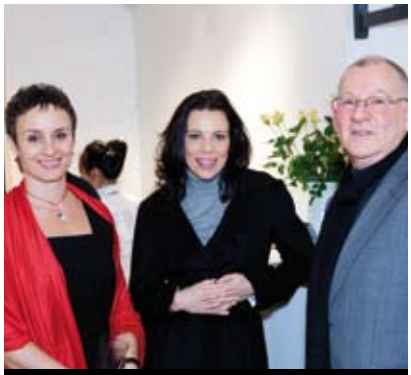
THE VERY SOCIAL PAGE

Hesketh Henry recently hosted clients and friends at the opening of an exhibition of glass sculptures by Emma Camden, held at Masterworks Gallery.

Liz Jarden and Paul Leacock

Mary Joy Simpson and Cynthia Garton

Sara Sadd, Masterworks Gallery Director, Emma Camden, Glass Sculptor and Eloise Kitson



Jennifer Buckley, Simone Barclay and Rex Armstrong

Warren Long

Tony Sandlant