

*This year Glaister Ennor is 100 years old and to mark our centenary we launched the Glaister Ennor Graduate Art Awards. The awards have been initiated to help emerging artists from Auckland Art Schools and we have been thrilled with the calibre of entries we have received. Please see page 8 for the stunning winning entry .*

**Jack Porus**  
Managing  
Partner



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## REVERSE MORTGAGES

*For many New Zealanders, the family home is their most valuable asset. For some people this can mean they are asset rich but cash poor. It is such people who are being targeted in marketing campaigns for reverse mortgages. These mortgages are relatively new in New Zealand and can have serious implications for the home owner.*

### What are they?

Reverse mortgages usually involve a loan borrowed against the equity in the home owner's property. Generally, the loan is repayable on the sale of the property or upon the owner's death, whichever occurs first. They are particularly attractive to people who have retired and whose home is mortgage free.

### How much do reverse mortgages cost?

Reverse mortgage schemes are often advertised on the basis that there are no regular repayments. Whilst this is true, interest and fees are still charged for so long as the loan continues and are added to the balance, which will ultimately have to be repaid. The interest rate will usually be higher than an average bank loan. There may also be fees payable in addition to interest and these can include a valuation fee, commission (e.g. to a broker), early repayment charges and other costs which may be payable in the event that the home owner decides to sell the home.

### Be aware of the downside

Advertising for reverse mortgages is often presented in attractive terms, which suggest that money can be made available to fund things that most people desire, such as holidays, home renovations and travel.

While reverse mortgages can make it possible to obtain money from the family home for these purposes, it does not come without cost which can vary among schemes.

Most importantly, the increasing value of your home may not keep pace with the debt owed under the terms of the mortgage. Interest may compound. The amount owing will continue to increase the longer the loan remains unpaid. This will not present a problem so long as you continue to live in your home. However, if you wish to sell your home then the mortgage will be repayable and you may find that the amount that you receive after repaying the loan is insufficient to enable you to buy another home of an equivalent standard.

### Seek advice

If you are contemplating taking out a reverse mortgage, it is essential that you obtain independent advice from your lawyer, and fully understand the terms of the loan and the long term implications for you. Reputable companies offering reverse mortgages will require you to take independent advice before proceeding.

Although the Government has indicated that a code of practice is to be established for reverse mortgage schemes, it is not yet in place. Home owners should be wary of any reverse mortgage scheme which does not recommend in strong terms that the home owner should obtain independent legal advice before proceeding. There is nothing sinister about the concept, it is merely one which is unusual and needs to be fully understood.

**For more information contact Norm Cahill (Norman.cahill@glaisterennor.co.nz)**

# DEALING WITH A DECEASED PERSON'S ESTATE

*People are often unsure of the process to be followed when dealing with a deceased's estate. Where the deceased has not left a will, the administration of an estate can be complex and costly. However, this article provides a brief guideline of the process where the deceased has left a will.*

## 1. The Will.

The original will should be held by the firm of solicitors who prepared it. The first step is to contact the solicitor concerned and advise him or her of the death. The will can then be checked to ascertain who has been appointed as the executor of the will and the identity of those named as beneficiaries. As the will may contain special directions as to funeral arrangements, communication of the death should be made as soon as practicable.

## 2. Apply for probate.

The executor must appoint a solicitor to act for the estate who will then make an application to the High Court for probate. Probate is the process whereby the Court determines the authenticity of the will and confirms the authority of the executor named in the will to administer the estate. Generally, it is not necessary to apply

for probate where the assets of the estate are less than \$11,000.

The application for probate must be supported by an affidavit sworn by the executor who must swear that he or she is the person named as executor in the will. He or she must also provide evidence of the death of the deceased (such as producing a copy of the death certificate) and confirm their belief as to the validity of the will. In addition, the executor must undertake that he or she will carry out the instructions contained in the will in accordance with the law.

## 3. Administration of the deceased's estate.

Once probate has been granted, the executor can proceed to administer the estate. The executor's duties include:

- Making arrangements for the burial or cremation of the deceased;
- Preparing an inventory of the deceased's assets;
- Paying the funeral expenses and any other debts owed by the deceased from the assets of the estate;
- Paying any gifts or legacies to beneficiaries named in the will;

- Distributing the remainder of the estate to the beneficiaries; and
- Keeping a set of accounts recording all financial transactions in relation to the estate.

The terms of every will differ. For example, there may be provision for a life interest in a particular asset to be granted to a person during that person's lifetime. This means that the executor will retain ownership of the asset until the person who has the benefit of the life interest has died.

At that point the asset then becomes part of the "residuary estate" and can be distributed to the remaining beneficiaries.

## Conclusion

The administration of an estate may take some months depending on the number and the nature of the assets involved. The solicitor who has been instructed to administer the estate will be able to provide a more specific timeframe

**For more information, contact June Edgen  
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**June Edgen**



**Tim Jones**

# BUYING AN APARTMENT – THE MYSTERIES OF BODIES CORPORATE

**First published in Heraldhomes,  
New Zealand Herald December 2006**

***For the average Kiwi, until about fifteen years ago, “a new home” would have meant a house on a section of its own.***

Very few owned an apartment or a terraced house. Now in 2006, for a variety of reasons including the decreasing supply of land, increased population, and change in lifestyles and priorities, this is far more common. Both the national Government and the Territorial Authorities have woken up to this fact and realised that Kiwis need to be better informed as to what apartment living is all about.

The title to this article is taken from a booklet issued by the Auckland Regional Council (ARC) in 2003 which is available from the ARC through its website or by calling the ARC directly. It is a hugely useful booklet along with its sister booklet entitled “What to look for when buying a terraced house or apartment” to explain to New Zealanders what is involved.

Having been involved in assisting the ARC in some aspects of both booklets and the revision of the Unit Titles Act I can provide some guidance and advice to people looking to buy a unit title property, whether it is a single storied house, a terraced house as a unit title or a high rise apartment all of which might be on unit titles.

Buying a property within a unit title has uniquely different features from a freehold house in the suburbs. There are often common facilities within each unit title property such as driveways, gardens, lifts and stairways which are used by everybody. As a result the Unit Titles Act provides for a body corporate of owners and a committee. From a social and living amenities point of view owners in unit title properties must appreciate that they live in closer proximity to each other than they might

do normally and therefore the way they live and the way they interact with their neighbours has a heightened degree of importance and implication than it might do in a classic Kiwi bungalow.

To recognise this, under the Act there is an agreed set of rules. Those rules affect everybody and establish some guidelines between all of the owners, as well as setting up the body corporate committee of owners. That committee in turn must meet and manage the body corporate whether it is a cluster of houses, terraced housing development or a high rise apartment block. Also that committee will manage the finances of the body corporate.

Each owner must pay into the body corporate kitty. That kitty will pay for a broad range of common expenses (which may be ongoing or one off) such as exterior painting, common area maintenance, lift maintenance or even lift replacement. Owners need to be aware when buying a unit title property that they have financial responsibilities over and above the Local and Territorial Authority rates. Each property has a unit of entitlement value determined for it. That entitlement determines the share of the annual body corporate budget that is attributed to each unit. Often the units’ contribution is paid on a monthly or quarterly basis. That fund is managed by the committee usually through the body corporate secretary or a body corporate manager who are employed by the body corporate committee.

Owners can attend committee meetings or the Annual General Meetings (AGM) and Extraordinary General Meetings (EGM). At the AGM the annual budget is set, rules are discussed and altered and general gripes and concerns about the body corporate are aired by members. Owners should be aware of the rules and always have a copy of those rules available. You can obtain a set of your body corporate rules through your solicitor for merely the price of the Land Information

New Zealand search fee by just quoting your body corporate number.

Owners should insist on receiving from the body corporate committee monthly reports so they can check to make sure their levies are being spent wisely, the rules have been adhered to and concerns about the way the body corporate is being run are being attended to. Also AGM and EGM minutes should be circulated to all members by the body corporate secretary but there is no substitute for attending those meetings.

Those looking to buy into an apartment property should:-

- Obtain a copy of the booklets referred to above
- Get full advice from their lawyer about body corporates and body corporate rules
- Get a copy of the body corporate rules and familiarise yourself with those
- Find out what the current levies are and whether the body corporate is on budget or has blown its budget
- Find out whether there is any major capital expenditure being considered or upcoming which they may have to contribute towards
- Check all body corporate AGM and EGM minutes for the past several years to look out for anything extraordinary or unusual e.g. Is there any suggestion that there is any leaks or problems with the building.
- Also check the unit plan to ensure that on the plan the outline of the unit conforms with what is physically built.

Apartment ownership is becoming much more popular but proper checks should be made before buying. The Unit Titles Act and the body corporate needs special attention.

***For more information contact***

# EMPLOYMENT ISSUES – THE BILL AND JOHN CASE STUDY CONTINUED

*tim.jones@glaisterennor.co.nz*

*You may recall from the last edition of the newsletter that John believed he had been dismissed from his employment as a mechanic due to his persistent lateness to work.*

He also believed his employer, Bill, had not discussed this issue with him prior to Bill taking action which resulted in John being sent home from work during the course of his employment. Bill, on the other hand, took an entirely different view of what occurred on the day in question. He believed that he had reasonably discussed John's ongoing lateness with John and had reasonably requested that John catch an earlier bus to ensure that he arrived at work on time. Bill also believed that following this request, it was necessary to speak to John on several occasions about his lateness, but that this had not resulted in any improvement on John's part.

You may also recall that for John to successfully establish that he has been unjustifiably dismissed, he will need to establish that he has in fact been dismissed. The onus will shift to Bill to show that there was good cause to dismiss John and that John's dismissal was implemented in a procedurally fair manner.

Assuming that John successfully argues in the Employment Relations Authority ("the Authority") that he was unjustifiably dismissed, the question then arises as to what remedies John may be entitled to.

The Employment Relations Act 2000 ("the Act") sets out statutory remedies that the Authority or the Employment Court ("the Court") may order in John's favour. These are briefly set out below.

## **Reinstatement**

If John has sought reinstatement as a remedy, the Authority or the Court (collectively referred to here as "the Court") must provide for John's reinstatement to his former position or to a position no less advantageous to John. It must be "practicable" for the Authority or Court to make any such order.

## **Reimbursement of Lost Wages**

If John can show that he has lost wages, the Court must order Bill to pay John the lesser of a sum equal to actual wages lost by John or up to three months ordinary time remuneration. However, the Court also has the discretion to order Bill to pay John a sum greater than this.

## **Compensation**

An award for compensation in John's favour can be made at the discretion of the Court. Average awards for compensation are approximately \$5,000.00.

## **Employee's Contributory Conduct**

The Court must consider whether, and to what extent, John's actions may have contributed towards his unjustified dismissal. If John's actions are found to be contributory then the Court must reduce the remedies accordingly.

## **Lack of Written Employment Agreement**

Finally, you may recall from the first article that there was no written employment agreement setting out the terms and conditions upon which John was employed. The Act provides

the Court with the full and exclusive jurisdiction for the recovery of penalties under the Act. In this situation, given that John had been employed for approximately six years, oral terms of agreement must have been in existence. Failure to have a written agreement may result in Bill being subject to a penalty issued by the Authority.

An obvious consequence of not having a written employment agreement is that there is no conclusive evidence to establish the terms upon which John was employed, including a term as simple as John's hours of work.

## **Best Practice**

Employers should ensure that employees sign an employment agreement before commencing work and also ensure that they take legal advice before taking any action against an employee under the terms of their agreement.

**For more information contact Brett Vautier**  
**([brett.vautier@glaisterennor.co.nz](mailto:brett.vautier@glaisterennor.co.nz))**



**Brett Vautier**

# SHAREHOLDERS' AGREEMENT

***A shareholders' agreement is one made between the shareholders of a company which deals with issues arising out of ownership and management of the company. The absence of such an agreement can lead to serious problems and may result in the company's failure.***

Strictly speaking, a company's written constitution regulates the relationship between the shareholders and between the shareholders and the company. However, a constitution is a document which is available for public inspection, whereas a shareholders' agreement is normally confidential.

Consideration should be given to having a shareholders' agreement in the case of any company where there is more than one shareholder. This is especially so where the shareholders are family members and the potential for disagreement can sometimes be greater. The purpose of the agreement is to ensure that decisions are taken by consensus and discussion.

## **Issues covered in a Shareholders' Agreement**

The most important benefit of the agreement is that it provides a mechanism for resolving disputes between shareholders, whether by mediation, arbitration or some other dispute resolution processes.

Matters covered in a shareholders' agreement may also include the following:

- Dividend payment policy.
- Management and control of the company.
- Allocation of key roles and responsibility between the shareholders.
- Nature and amount of initial financial contributions to the company.
- A procedure for dealing with the breakdown of the relationship

between the shareholders.

- The circumstances in which shareholders can exit the company.

## **Shareholder "deadlocks"**

A shareholders' agreement is particularly useful when dealing with a "deadlock" situation with shareholders. Where the shares are owned in equal proportions by the shareholders, a disagreement will create a "deadlock" which means the company is effectively prevented from making decisions. A shareholders' agreement can include a mechanism to ensure this situation does not occur.

A shareholders' agreement can also deal with the situation when a shareholder dies or become mentally or physically incapacitated. This may mean the remaining shareholders will have to work with a family member of that shareholder and who may have little or no knowledge of the company and its business. A shareholders' agreement can deal with this by allowing the shares to be sold at a fair price to the remaining shareholders by the family member so that the company can continue to trade without disruption.

## **Summary**

If you do not carefully consider and provide for situations which may arise between the shareholders, then you could be risking serious disruption and even the ultimate demise of the company. A shareholders' agreement can avoid this and your solicitor will be able to advise you on the terms of one which best suits your particular requirements.

***For more information on shareholder agreements contact Stephanie Harris (stephanie.harris@glaiasterennor.co.nz)***



**Stephanie Harris**

# DEBT COLLECTION

***Are you owed money or has your property been damaged? Are you at the point where you need to look at your options for recovery? This article will cover in general terms the various options open to you, depending on the nature of the debt and the amount you allege is owed.***

## Options for Landlords

***If you are a landlord and you are owed money by your tenant, you have the option of making an application to the Tenancy Tribunal. Normally parties represent themselves, although in some circumstances a lawyer is allowed.***

The application is heard by a tenancy adjudicator who will listen to your side of the story and that of your tenant. They will also hear any other witnesses and evidence you or your tenant want considered.

The decision is recorded as a Tribunal Order. The kinds of orders that can be made include:

- possession order – which means the tenancy is terminated and the landlord takes back possession of the property
- monetary order – whereby the tenant is ordered to pay the landlord a sum of money.
- work order – which requires the tenant to do specified work on the property.

However the making of an order in your favour does not necessarily mean you won't still be out of pocket so read on for enforcement options later in this article.

## Nasty Dispute?

While you may believe you are out of pocket this does not necessarily mean the other side agrees. If there is a dispute about whether, or how much, money is owed you may have the

option of filing a claim in the Disputes Tribunal. The Disputes Tribunal can hear a claim of up to \$7,500 or up to \$12,000 if both parties agree.

Disputes are heard by a referee who will either help you to come to your own solution or if you can't, will determine the dispute for you. The referee's ruling is binding and if necessary, will be enforced by the Courts. No lawyers are involved at the hearing.

There are limitations on the types of dispute the Tribunal can hear. For example, the Tribunal cannot determine disputes about wills, relationship property, or ownership of land.

## Claims in the District Court

If you have sent a letter of demand to the person who owes you money and have not been paid, then a further option is to file a statement of claim in the District Court. Most people will instruct a lawyer to assist with this process as there are procedures and rules of evidence that must be adhered to. If the other party does not defend your application you may be awarded judgment by default. If the other party does defend your claim a hearing may be required.

## No defence?

Another method of obtaining judgment is through the summary judgment procedure. This can be used if you believe the other party has no arguable defence to your claim. It can be a more efficient way of obtaining an order in your favour.

## Got your Order but still out of pocket?

As stated above, a judgment or order in your favour does not necessarily mean the other side is going to pay up. A

common method of enforcement is to apply for the debtor to attend an examination. The debtor appears in Court and is required to give evidence as to their financial means. If an order is made you can also apply for an attachment order which ensures the money is paid directly from the debtor's wages or benefit to you. If the debtor fails to attend the examination a warrant for their arrest can be issued.

Another enforcement option is a Distress Warrant. This authorises the bailiff or constable to seize the debtor's money, goods or chattels to satisfy the judgment sum.

Other options include charging orders over land and bankruptcy. Unfortunately some enforcement procedures are time consuming and costly so it is helpful to have an idea of the debtor's means prior to embarking on an enforcement option. Private investigators, credit checks or company and title searches can be used also.

In summary, it pays to research the options before embarking upon the debt collection process to ensure the most cost effective process is used.

**For more information, contact Paul McKendrick**  
**([paul.mckendrick@glasterennor.co.nz](mailto:paul.mckendrick@glasterennor.co.nz))**



**Paul McKendrick**

# THE “ANTI-SMACKING” BILL

## The current position

**Section 59 of the Crimes Act 1961 (“Section 59”) allows parents and any person in place of a parent justification to use reasonable force against a child for correctional purposes.**

## The proposed changes

In June 2005, the Crimes (Abolition of Force as a Justification for Child Discipline) Amendment Members Bill (“the Bill”) was introduced to Parliament by Green Party MP Sue Bradford. The Bill originally sought to repeal Section 59 entirely, removing reasonable force used against children for correction purposes as a defence to offences involving assault. The effect of repealing Section 59 is that the defence of reasonable force against a child for the purposes of correction would not be available to parents. Instead, the use of force against a child would have the same legal ramifications as the use of the force against an adult.

In November 2006 following referral to Select Committee, the Justice and Electoral Committee (“the Committee”) reported back to Parliament recommending by majority that the Bill be passed subject to recommended amendments. The substantive amendment recommended by the Committee does not envisage an outright repeal of Section 59. Rather, the Committee recommends that Section 59 be replaced with a provision enabling reasonable force to be used against children for purposes such as protecting a child from harm, providing normal daily care and preventing a child from doing harm to others.

## The international position

The United Nations Convention on the Rights of the Child (“the Convention”) was ratified by New Zealand in March 1993. The UN Committee on the Rights of Child issued a general comment in June 2006 concerning the

use of violence against children. The comment emphasised elimination of violence and humiliating punishment of children through law reform and other measures as an immediate and unqualified obligation for ratifying states of the Convention. More than a third of European countries now afford children equal protection from assault including Germany, Norway and Sweden. The Bill, if adopted by Parliament, will be a step towards aligning New Zealand with its commitments under the Convention.

Interestingly, United Kingdom legislation is at odds with this trend towards equal protection for children from assault. United Kingdom legislation that came into force on 15 January 2005 allows the assault of children to continue to be justified as “reasonable punishment”. The United Kingdom has twice been rebuked by the UN Committee on the Rights of the Child since it ratified the Convention in 1991 for failing to afford children equal protection from assault.

## Conclusion

It is clear that parental rights to chastise children and the rights of children to be protected from violence are at odds with one another. It is also clear that the issues the debate raises are sensitive and topical having received a fair degree of media attention. The Committee received 1,718 submissions on the Bill prior to issuing its report of which 1,471 came from individuals and 248 from organisations. However, it does appear likely that the Bill will be adopted by Parliament in one form or another.

**For more information contact Sarah Vyles ([sarah.vyles@glaiasterennor.co.nz](mailto:sarah.vyles@glaiasterennor.co.nz))**

# INTRODUCING

**Sarah Vyle, who specialises in Personal Litigation and Family Law and has over 8 years experience in this area. Sarah's practice includes all parenting, adult relationship and relationship property matters including agreements and court proceedings. It also includes estate litigation and protection of personal property rights. Sarah can be contacted on [sarah.vyle@glaiasterennor.co.nz](mailto:sarah.vyle@glaiasterennor.co.nz)**



**Sarah Vyles**

## NEW ZEALAND LAW AWARDS 2006

Thank you to all the clients who voted for us in the NZ Law Awards late last year. We were finalists in 10 categories and runners up in 7; Resource Management, Property, Litigation and dispute resolution, Corporate and Commercial, Innovation, Boutique law firm and Mid Size Law firm. So close – thank you for your support!

## GLAISTER ENNOR GRADUATE ART AWARDS.

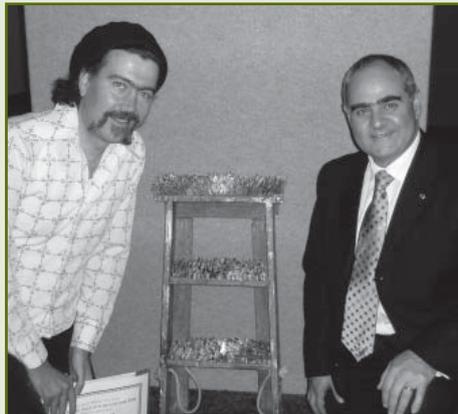
To mark our centennial year, we initiated the Glaister Ennor Graduate Art Awards to help emerging Auckland artists. Entrants were recent graduates who were nominated by their respective Art Schools in Auckland. We were thrilled with the calibre of entries we received and we are delighted to announce the winner – Myah Flynn (graduating from Unitec) with her entry 'Arabian Nights'. Myah won \$3000 and the opportunity to exhibit at the McPherson Gallery in Auckland, later this year. Runner up Melissa Hatton won the Barfoot & Thompson award of \$3000.



**Myah Flynn with her winning entry  
'Arabian Nights'**

## JAMES WALLACE TRUST ARTS AWARDS

Peter Madden and Jack Porus at the James Wallace Trust Arts Awards in September last year. Peter won the GE award for his piece entitled 'Step Lightly'.



*The contents of this newsletter are of a general nature only. While the information is believed to be correct no responsibility is accepted for its accuracy. Readers are advised to establish the applicability of information in relation to specific circumstances and not to rely solely on the text of this newsletter.*

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