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MORTLOCK MCCORMACK LAW CLIENT NEWSLETTER

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In this issue of *MML News* there are articles concerning proposed or recently introduced legislation and the processes of Government.

It is certainly an interesting time when a new Government steps up to the plate and New Zealanders will be looking with interest to see what decisions are made and how things are managed. In a way it is like a new set of Directors and Managers taking over a very large company and having to report to its shareholders. We, the public, are those shareholders and as such it is our right and, some would say, obligation, to keep up with the play and make sure the new rulers maintain New Zealand's integrity and business sense. Lets hope they do, particularly in these turbulent financial times.

INSIDE THIS EDITION

How Urgent Is It Really?

The election year of 2008 saw the 48th parliament of Helen Clark's Labour led minority Government use parliamentary urgency to conclude its legislative programme. Similarly the 49th parliament of John Key's National led minority Government turned to parliamentary urgency to commence the implementation of its election promises within its first 100 days of office. Government use of parliamentary urgency to advance its business has been available since 1903 and has been a key tool since the late 1920s.

So what is parliamentary urgency and how does it fit within the democratic processes? Parliament, or 'the House', is governed by its own rules. These are known as Standing Orders and Speakers' Rulings. The House is responsible for making its own rules.

Towards the end of a parliamentary term the Standing Orders Committee may recommend changes to the Standing Orders. The House may adopt these, ready for use in the new term. These rules, put in place over time, are designed to ensure our parliamentary processes allow for fair and reasonable consideration before final decisions are made. As we all know, these final decisions determine the legality of an individual's action in the community.

Rules 54, 55, 56, 57 and 58 of the 2008 Standing Orders provide for parliamentary urgency and extraordinary urgency. Urgency may be moved by a Minister without notice and is decided without amendment or debate. A brief explanatory statement must be given by the mover. The use of urgency is a valuable mechanism for any Government as it allows all stages of a bill (or bills) to be processed in the same sitting day.

If urgency is taken and the debate continues into the next day, the House still operates as if it were the same sitting day on which urgency was taken. So under urgency one sitting day can conceivably span more than one calendar day.

One of the most significant features of moving into urgency is that the select committee process is either truncated or lost altogether. Select committees work on behalf of the House and report their conclusions back to the House.

When considering a bill sent to it, a select committee invariably invites the public to

make comments or submissions on the bill so that the committee members can take into account what the public, experts and organisations think about the bill and how it might be improved. In the past, select committees have suggested bills be completely rewritten and, on occasion, scrapped altogether.

At the end of its enquiry the select committee furnishes a report and the chairman of the select committee makes the report available to the House and answers any questions members of parliament may have about the committee's recommendations. The bill then goes to its second reading in the House.

The select committee process is widely regarded as a very important part of Parliament's work, as it is through these committees Parliament can obtain the opinions and advice of the general public, experts and organisations when making law.

The use of urgency must be carefully considered as the opportunity cost of fast tracking the legislative process for political expediency is the loss of public participation at the select committee stage of the process and, possibly, better drafted and considered legislation.

Directors Beware
– A Cautionary Tale Of Investment Gone Wrong

A recent High Court decision of Justice Stevens decided the quantum of damages in the six-year saga of Mason v Lewis. The judgment is of far broader significance as a reminder of the potential risk of personal liability of directors for company losses.

The Facts

Global Print Management was incorporated in 1999 to operate as the print management arm of Corporate Express New Zealand Limited (CE). With a significant estimated income, Mr and Mrs Lewis were persuaded to invest $100,000 in the company for 10,000 shares. Mr and Mrs Lewis were subsequently appointed as directors of the company. There were three further executive directors as well as the wife of the senior manager, Mrs Grant.

The company was not successful and in early 2000 lost its contract with CE. The three executive directors promptly resigned their directorships. The company continued to trade for a further two years with its financial position going from bad to worse to utterly dire. Both Mrs Lewis and Mrs Grant resigned their directorships in September 2001 with Mr Grant taking up a directorship at that time.

It transpired that Mr Grant was a fraudster and his general mismanagement contributed to the failure of the company. The company went into voluntary liquidation in February 2002. At the date of the quantum hearing the size of the creditor pool was established at in excess of $3,000,000 but for the purposes of the hearing the liquidators agreed on the figure of $2,102,217. The purpose of the quantum hearing was to decide how much (if at all) the Lewis' should contribute to the company by way of compensation.

The problem

Unfortunately for the Lewis' the message from the Court of Appeal was that "the days of sleeping directors with merely investment interests are long gone". It was held that "directors must actively govern, including monitoring and assessing the company's financial performance, as well as developing viable rescue plans if the company gets into financial strife".

The Lewis' were only too happy to admit they were financially illiterate and relied entirely on the company's accountant and the repeated assurances of Mr Grant that everything was under control. However, Justice Stevens pointed out "that no other person (except perhaps Mrs Grant) owed as high a duty to the company and its creditors than Mr and Mrs Lewis". While the Lewis' were not dishonest they were in breach of their directors' duties to a significant degree. Their lack of assessment and governance meant they failed to take proper steps in respect of the ever-worsening financial situation.

For the Lewis' the failure to ensure the company was properly set up and managed their ignorance of their duties as directors and their complete passivity when it came to guiding and monitoring the management of the company had a disastrous result. The loss of their initial investment is nothing when compared to the level of compensation the Court assessed as reasonable - 60% of the creditor's pool (excluding costs) being $1,261,330.

The Lesson

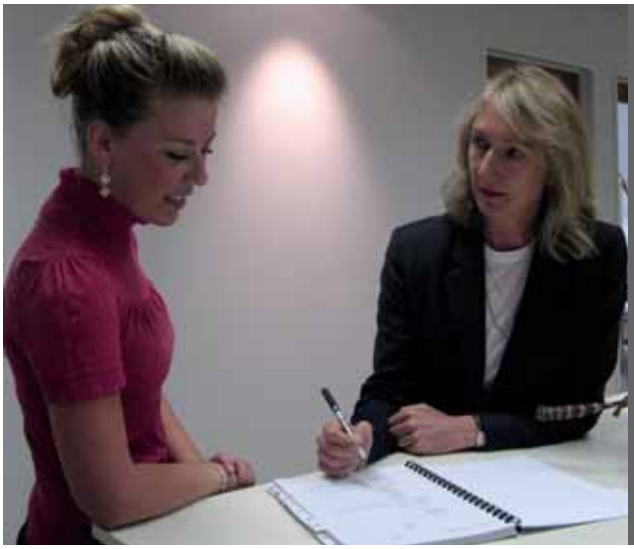
The Court has reiterated that it is a fundamental principle of the Companies Act that directors take proper steps to place themselves in a position to guide and monitor the management of a company. Directors cannot simply leave the duties of running a company and complying with legal obligations to management or other advisors.

This case is a timely reminder that as a director you must be actively engaged in your role. This may include the following:

- Educating yourself or taking advice on the nature and extent of your duties.
- Calling for expert, independent analysis of information provided to you from time to time, particularly where you do not understand it.
- Retaining copies of information provided.
- Requiring acceptable accounting, financial and company records to be maintained to permit the company to be monitored.
- Convening regular directors' meetings to discuss the position of the company and to establish what is happening (and recording these carefully).
- Setting up systems to review and control senior management.
- Being prepared to act early to develop and implement a viable rescue plan when the company looks to be faltering.

Your lawyer and/or your accountant can provide assistance and advice concerning company structures, responsibilities and liabilities. Always seek help from professionals if you are in doubt concerning matters such as these.

This article was prepared by Abigail Little, Senior Solicitor for Mortlock McCormack Law.



Prue Robertson and Kirstin Ross - members of our litigation team

Ann Malloch

In January this year, Ann Malloch retired as a lawyer. Ann was a consultant with Mortlock McCormack Law.

Ann Malloch

Ann practised as a lawyer for 21 years. She became a consultant of the firm when Simon Mortlock Partners merged with McCormack Law in 2006. Before that, she was a partner of McCormack Law.

Ann worked mainly in the area of family law. She helped many clients work through issues involving the care and custody of their children, as well as sorting out property disputes for them. Eventually, Ann established herself as one of the most senior family law practitioners in Christchurch and New Zealand.

Often when a court is required to deal with care and custody issues, a judge will appoint a lawyer to represent the interests of the child. Ann was on the panel of lawyers appointed by the court in such cases. Given her experience and expertise, she was regularly appointed in this role by the Family Court in some of the most difficult cases involving children.

In her role as lawyer for the child, Ann undoubtedly saw many children who had been treated badly by their parents and others. Sometimes, Ann was the only person in the child's life who would stand up for their rights. There are many people whose lives are now better off because Ann acted for them as children during very difficult times.

Ann also acted for refugees who had come to New Zealand seeking asylum. Again, these are situations where Ann's clients were facing one of the most difficult situations in their lives. Ann not only helped these clients to establish themselves in New Zealand, but she supported them emotionally during extremely difficult times.

Apart from the outstanding work that Ann did in advocating the interests of her clients, one of the most striking features of her work was the way she carried it out. Ann is a person of the utmost dignity who inspires the respect and admiration of those around her. She never had a bad word to say about anyone, even though she sometimes encountered people at their worst.

She was a role model for lawyers at the firm and in the profession and was much admired by her colleagues, including the judges whom she regularly appeared before.

The partners and staff of the firm are very sad to see Ann go. However, we wish her well for a long and happy retirement.

90 Day Trial Periods Introduced

On 12 December 2008 the Employment Relations Amendment Bill was passed. The amendment allows employers who have fewer than 20 employees to terminate the employment of new staff within the first 90 days of employment without fear of a personal grievance for unjustified dismissal provided the parties have agreed to a trial period in the employment agreement.

The amendments are effective from 1 March 2009. The date of determining whether the employer has fewer than 20 employees is the date the employment agreement was entered into. The legislation does not specify who is counted as an employee and so, potentially, casual and part-time employees could be counted. The following conditions apply to the trial period:

- It will only apply to employees who have not previously been employed by the employer.
- Both parties must agree to the trial period.
- The trial period must be a written provision in the employment agreement.
- The trial period must not exceed 90 days – so it could be for a shorter period than 90 days.
- During the trial period the employer may dismiss the employee by giving notice of termination.
- The employer must give notice of termination to the employee within the trial period in order to be protected by the trial provision.
- If the employee is dismissed they are not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal.
- Employees will still be able to bring personal grievance claims for unjustified disadvantage, sexual or racial harassment, discrimination or duress.

In all other respects the employee is to be treated no differently from other employees whose employment agreements do not contain a trial period. The obligation of good faith remains during the trial period.

Commentators have mixed views on the amendments. Australia and most other OECD countries allow trial periods.

The Government introduced this legislation in an effort to encourage employers to provide employment opportunities to people without financial risk to the employer if the employment relationship does not work out.

In an announcement on 11 December 2008 the Minister of Labour, Hon. Kate Wilkinson, stated that "By lowering the legal risks employers face, they will be more confident in giving people the opportunity to prove themselves" and that "The 90 day trial will provide real opportunities for people at the margins of the labour market".

Given that the trial period must be agreed between employer and employee, those employees who are in demand and have some bargaining power will no doubt attempt to negotiate the removal of the trial period.

Employment problems can take some time to surface so employers will need to be vigilant to ensure they act within the 90 day period.

SNIPPETS

RESOURCE MANAGEMENT ACT – AMENDMENTS PROPOSED

The National Government plans to introduce changes to the Resource Management Act (the RMA) to reduce unnecessary delays, uncertainties, and costs. On 16 December 2008 the Minister for the Environment, Hon. Nick Smith, announced the appointment of an RMA Technical Advisory Group to support the Government's program of reform for the RMA.

National will introduce a Resource Management Amendment Bill to:

- simplify and streamline the Act by limiting the definition of environment and reducing the consent categories
- provide priority consenting for large projects to reduce delays. The yet to be established Environmental Protection Authority will be required to process large project consents within a timeframe of nine months
- improve consent processing by establishing a new complaints mechanism
- prevent vexatious or frivolous complaints by reinstating the Environment Court's power to award security for costs
- improve consent planning by simplifying council plans
- remove the ministerial veto on coastal consents (This is in response to the controversial Whangamata Marina decision)
- establish an Environmental Protection Authority (EPA) by expanding the existing Environmental Risk Management authority and increasing its responsibilities. The EPA will be responsible for National Policy Statements, National Environmental Standards and major consents.

The Hon. Nick Smith states that the aim of the reforms is to get "good environmental outcomes without the high costs, long delays, and lack of certainty under the current Act".

Phase 2 of the proposed reforms will take place at a slower pace and will include:

- a review of infrastructure regulation and the interaction between the RMA and the Public Works Act
- development of a programme of action with regard to water quality and allocation
- a review of the RMA and urban design in our major cities.

Watch this space for further updates!

HOLIDAYS ACT

Although the National Government is planning to review the Holidays Act, they have promised to retain four weeks annual leave and to allow employees to trade the fourth week for cash.

Subdividing?

Whether you are subdividing a 1000m2 section or a 100 hectare block of land, the basic process is the same. You should become familiar at the outset with the following stages of subdivision.

Due Diligence Phase

Initially, depending on your particular subdivision, meet with either all or some of the following: surveyor, solicitor, engineer, council planner, architect and accountant. Usually your surveyor and solicitor can tell you who will need to be consulted. The title and district plan will be analysed to assess whether subdivision is possible and, if so, what conditions/ restrictions might apply. At this point, the decision will be made as to whether it is feasible to continue with the subdivision on the basis of your original subdivision plan.

Preparation of Scheme Plan and Resource Consent Application

Your surveyor will prepare the scheme plan and resource consent application to submit to council. The scheme plan must show all boundaries on the existing title and the layout and size of the new lots. It must also show the location of buildings, roads, significant natural areas, rivers or streams, reserves, easements, schedules and any other information required to assess the effect upon the environment (as required by the Resource Management Act 1991).

Grant of Resource Consent

Prior to granting a Resource Consent, a site inspection is carried out by the council planner checking that the subdivision complies with the policies, objectives and rules set out in the District Plan. The planner will in most cases carry out consultation with the regional council, council engineers and building inspectors to check that the subdivision meets their requirements. All going well, the council gives its approval and will grant resource consent. Most subdivisions that comply with the district plan will be processed on a non-notified basis and a decision should be made within 20 days.

Implementation of Conditions

In most cases, Council imposes conditions such as provision of water and sewer

connections to new residential lots, formation of rights-of-way and vehicle crossings. These conditions and any others imposed will need to be met before new certificates of title are issued.

Council Approval

When conditions have been met and development levies paid (if required), the surveyor requests section 223 and 224(c) (Resource Management Act 1991) certificates. These certificates are issued when the council is satisfied that the plan and implementation of conditions conforms to the subdivision consent. If any conditions have not been complied with, the council may still issue the section 224(c) in conjunction with a consent notice.

Issue of Title

The final stage involves the surveyor submitting the survey plan for approval and deposit by Land Information New Zealand (LINZ). At this stage the solicitor lodges the necessary documents for the issue of title which might include order for new certificates of title, easements to grant rights of way, drainage easements, water right easements, and easements to create land covenants. The solicitor simultaneously lodges these documents together with the section 223 and 224(c) certificates and consent notices. The titles are usually issued within 10-15 working days.

Finally

Make a point of getting to know the above steps. You will then be able to take more control of the process while relying on the relevant experts to guide you through the finer points of that process.

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