



We are currently experiencing turbulent financial times and many firms are having to make changes to the way they conduct their business.

In this issue of *MML News*, we take a particular look at the process of redundancy. For businesses it can be an emotional decision to downsize and for the individuals affected by the disestablishment of their position it can become a life-altering event. There are no easy answers but at least if the process is fair and handled in a compassionate and professional way, the parties will be able to move on and maintain their self respect.

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Redundancy

With the world in the grip of a recession, New Zealand is facing challenging economic times. Employers are experiencing the economic squeeze and one of the solutions they are likely to turn to is restructuring and/or redundancy. Unless employers deal with these situations carefully and comply with all legal requirements they may end up facing additional costs in the form of personal grievances. Legal advice at the outset may save time, stress and money.

Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must follow a fair process. It is in the process that employers often come unstuck.

As a guideline employers must be able to show:

- the redundancy was based on genuine commercial reasons
- the provisions of the employment agreement have been followed
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all the circumstances.

Genuine commercial reasons for redundancy

Genuine commercial reasons for redundancy may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing. Where redundancy occurs as a result of restructuring, the employer must make sure that any new positions formed are not substantially similar to the position being made redundant. A position that has a different title, but the same duties, will most likely be substantially similar. The following are just some of the factors that will be relevant:

- substantial changes to duties
- change in level of seniority



- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff.

Process

Having passed the 'genuine reason for redundancy' hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment
- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions
- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation

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SNIPPETS

EARLY RELEASE OF DEPOSIT

If you are a purchaser of a property, have paid the deposit on the unconditional date, and are subsequently asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the stakeholder (usually a real estate agent) is required to hold it for 10 working days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house. The agent can do so, provided the purchaser agrees. Be wary of agreeing to the release, because the transaction might not settle. If the transaction does not settle and the vendor has already spent the deposit, you as the purchaser have no security and your deposit is gone.

Retention of the deposit until settlement by the stakeholder has merit, especially where there is a mortgage on the title. If there is a mortgage, be aware that the deposit might be needed to settle the vendor's mortgage debt, and if released early and spent in other ways by the vendor, then the vendor might not be able to discharge the mortgage.

The key is to consider the issues carefully before agreeing to the early release of the deposit, particularly where the title is encumbered.

THE SALE AND SUPPLY OF LIQUOR & LIQUOR ENFORCEMENT BILL – UPDATE

Introduced to Parliament in August 2008, the Sale and Supply of Liquor and Liquor Enforcement Bill is a response to public demand for Government action regarding youth drinking and alcohol related offending. The Bill proposes to amend the Sale of Liquor Act 1989, Summary Offences Act 1981, and the Land Transport Act 1998.

The Bill takes a multifaceted approach towards encouraging a moderate drinking environment and reducing the normalisation of youth drinking. In summary, it proposes to:

- Improve community input into liquor licensing decisions. Local councils will be able to restrict the number of liquor outlets in an area, as well as their location and proximity to other community buildings such as schools.
- Require grocery-selling stores seeking a liquor licence to be at least 150 square metres or more in size. Existing outlets of less than 150 square metres will be ineligible to renew their liquor licence.
- Make it an offence for anyone, other than a parent or guardian, to supply a minor with alcohol.
- Reduce the blood alcohol limit to zero for drivers under 20 who do not hold a full drivers licence.

Mortgagee Sales – put your ducks in a row before you put pen to paper

If you buy a property at a mortgagee sale be aware that you are entering into a contract that is quite different in its nature to an agreement entered into in other circumstances. The agreement is likely to be weighted heavily in the mortgagee's favour as they generally involve factors outside the mortgagee's control that it will want to protect itself from. This may include an unwilling owner occupier who is being forced to leave their home by the mortgagee that assisted them to purchase the property in the first place. In such circumstances the mortgagee is usually unwilling to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

Common issues for purchasers at mortgagee sales can include:

- Difficulties after settlement, such as having to evict a previous owner occupier or having to deal with damage caused to the house by the disgruntled owner. In one instance the occupier took all the chattels from the property and sold them to pay other sundry debts, leaving the purchaser out of pocket.
- Less protection as the agreement usually does not include standard provisions. For example, the mortgagee will have removed clauses relating to the vendor's warranties and the right for the purchaser to approve title. Often purchasers will not be able to view the property beforehand as the owner does not allow an inspection, so it will not be clear whether work has been carried out that would have required a permit.
- Purchasers may not be able to claim against the mortgagee for late settlement/possession as there may be situations where the mortgagee is unable to evict the owner. The mortgagee does not guarantee that it will give vacant possession on the day of settlement.
- Once the contract is signed it is unconditional and so requires thorough due diligence prior to signing. Even though the contract is unconditional on the part of the purchaser, the mortgagee may be able to cancel the agreement prior to settlement if the owner repays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.



MORTGAGEE SALE

- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.

Mortgagee sales offer an opportunity to buy a property at a reduced cost. To lessen the chances of problems occurring you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement. You should seek legal advice before the auction, as well as checking the title, council records and the property in advance, if possible. However, there may still be some issues that arise that are out of your control as purchaser.

The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to put your ducks in a row before putting pen to paper.

More than just a lawyer – Christine Gabagat

The Editor interviews Christine Gabagat

Christine is a Senior Solicitor with the firm working in the Commercial/Property area and having a strong interest in Resource Management matters.

Christine is the firm's shoe Queen. She absolutely loves shoes and has an outstanding collection some of which have travelled with her around the world! I talked to Christine about some of her interests.

“What is it you like most about your job?”

“The interaction with the clients, especially when I feel like my contribution in the transaction has made a real difference to their position.”

“How do you like to spend your leisure time?”

“The list is endless - reading, cooking, working on my vegetable garden, spending time with family, knitting, eating, shopping.”

“What's the latest book you have read?”

“I am currently working my way through the Whitcoulls 100 List. I have read about 60.

The last one I read was the Curious Incident of the Dog in the Night Time, by Mark Haddon.”

“If you were allowed a month off to do charitable work what would you choose to do?”

“I'd like to volunteer for Habitat for Humanity, specifically building houses in the Philippines. I feel a really strong need to one day give back to the country that I am from. While I am in New Zealand I have always tried to give back to the community (Law Centre, City Mission, Civil Defence), as I feel really privileged having been given the opportunity to make a life here. Having visited the Philippines after 13 years away and seeing the poverty that friends and family live in, given the opportunity I would volunteer in a heartbeat.”



Christine Gabagat

Look before you leap - Family Trusts and the Family Protection Act

Family trusts can be an ideal way to protect assets from various threats, including claims under the Property (Relationships) Act 1976 and rest home subsidies. However, in the recent case of *X v X*, the Court of Appeal has highlighted the risk of losing control over assets placed into a trust and the difficulty in getting that control back once it is gone.

Section 182 of the Family Proceedings Act 1980 has been described as being a trust busting mechanism whereby the Court can go behind the provisions of a Trust Deed in situations where there has been a significant change of circumstances since the Trust Deed was entered into.

In *X v X*, the husband and wife settled a trust that, by the time of their separation, owned assets worth between \$7-9 million. During the course of the relationship the couple had moved to Australia and, in order to make their trust more efficient under Australian tax law, Mr and Mrs X had resigned as both appointors and trustees of the trust.

The trustees have the authority to deal with the assets of a trust. This includes the



ability to sell or purchase trust assets, allow charges and mortgages to be registered over trust assets and distribute trust assets or trust income to beneficiaries. The appointors of a trust have the authority to appoint or remove trustees.

By retiring as both trustees and appointors of their own family trust, Mr and Mrs X effectively gave control of their assets to independent third party trustees.

Following separation, Mr X applied to the Court under section 182 of the Act to have the assets of the family trust resettled onto three new trusts. Mr and Mrs X would each control a trust containing 25% of the assets. A third trust would be created with the remaining 50% of the former trust assets for the benefit of the couple's children. Despite the fact that the Trust Deed contained express provisions to allow the family trust to be resettled, the Court of Appeal dismissed the application by the husband.

One effect of this decision is to limit the applicability of section 182 of the Family Proceedings Act and make it more difficult for the Court to intervene in trusts that have been set up for a legitimate purpose.

The case highlights that when considering placing assets in a family trust, or dealing with family trust assets, it is crucial to take great care to consider the legal and practical implications of the decisions that you are making. Mr and Mrs X would have had fewer problems if they had retained the ability to control the trust, either by acting as trustees or, at the very least, by retaining the power of appointment.



MML announces that Prue Robertson became a partner on 1 April 2009.

Prue joined the firm's litigation team as an Associate in September 2006 and has become an integral part of the firm.

Prue is well known in Christchurch as an experienced and effective court litigator. Over her 20 years in practice she has been involved in several high profile cases including the Cave Creek Commission of Inquiry where she represented the victims and their families. Prue's main area of expertise is civil litigation.

Prue is an active member of several Law Society committees.

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- advising the employee of their right to representation and offering support, and
- where possible, providing counselling, career, financial and retraining advice.

Whether the process has been fair will depend on all the circumstances of the case.

Both employers and employees should be aware that the Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and those already receiving the maximum accommodation supplement along with help to secure new employment. A redundancy tax credit is also available that makes taxing redundancy payments fairer when the redundancy payment has pushed the employee into a higher tax bracket as a result of receiving a lump sum redundancy payment.

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Hints on Keeping Warm this Winter

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Here in Christchurch we have already had our first frost. Here are a couple of resources that may help you keep warm this winter:

1. PowerSwitch is a free calculator from Consumer that allows you to input your location and power usage, and find out which the cheapest electricity plan is. Switching to an alternative supplier is seldom more complicated than making a phone call and filling in a new direct debit form, so it is well worth checking out that you are on the best rate.
2. If you are thinking about installing insulation or a heating appliance, check with your local council about whether any grants or loans are available in your area. In Canterbury the Clean Heat Project offers subsidies and interest free loans if you switch from an open fire to a cleaner form of heating. There are grants available nationwide through the Energy Efficiency and Conservation Authority, which you can find out about on the Energywise website.



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