mml news

MORTLOCK MCCORMACK LAW CLIENT NEWSLETTER

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EDITORIAL

If you are ever asked to become a trustee of a trust be sure you do your homework before you agree. To be an effective trustee and one who complies with the law, you will need to be involved in the management and compliance of the trust, quite aside from any decision making that may be required. This is a significant responsibility to undertake and is not for the faint hearted. In this issue, you can read about trustee duties and the extent to which a trustee must go to satisfy the high standards set by law.

If you do decide to undertake a trustee role it is a very good idea to talk to your lawyer to go over any documentation before you sign.

This is our last newsletter for 2009 and we trust you have enjoyed the many articles provided. Thank you for your feedback, we look forward to receiving it. We take the opportunity to wish you a safe and happy Christmas.

INSIDE THIS EDITION

The Partial Defence of Provocation

The debate over whether the partial defence of provocation should be abolished has gained significant attention since the Clayton Weatherston trial. Many people believe that the defence should no longer be available.

The partial defence of provocation is predominantly set out in section 169 of the Crimes Act 1961 and effectively reduces a charge of murder to manslaughter. In order for an accused to successfully argue provocation they must prove:

- that the provocation in the circumstances of the case was sufficient to deprive a reasonable person of the power of self-control, and
- that the provocation did in fact deprive the offender of the power of self-control and thereby induced them to commit the act of homicide.

Ultimately provocation is a high test to satisfy and although it is often raised, few offenders are successful. Critics argue that it is an archaic and outdated notion about violence. They claim the defence effectively rewards a lack of self-control in offenders who intentionally take another person's life. Historically, the rationale for the defence was to avoid a mandatory sentence for murder (originally capital punishment and later life imprisonment) where factors arising from the circumstances of the case may reduce the offender's sentence. However, by virtue of the Sentencing Act 2002 life imprisonment for murder is no longer mandatory, which begs the question is the defence of provocation still necessary?

It has been argued that accusations of provocation can be dealt with by a judge during sentencing and have no place in the actual trial which determines guilt or innocence. Once an offender has been convicted, a sentencing hearing is held where they can present mitigating factors of the offence (such as provocation) to the judge which may reduce their sentence.

Furthermore, the defence provides the offender with an opportunity to attack and tarnish their victim's character. The resulting experience can be very traumatic for the victim's family and friends.

However, not everyone agrees that the defence of provocation should be abolished. Some argue that removing the defence would be playing around with the basic concepts of criminal law.

Parliament has already taken steps to remove the partial defence of provocation. The Crimes (Provocation Repeal) Amendment Bill 2009 ('the Bill'), was introduced to Parliament on 4 August 2009 and had its first reading on 18 August 2009. If passed, the Bill will effectively repeal sections 169 and 170 of the Crimes Act and therefore abolish the defence of provocation.

There is no indication when or if the Bill will be passed into law, but it is clear that there is a lot of support from both Parliament and the general public for the change.

Mortlock McCormack Law Art Awards 2009

MML loves its involvement in the annual Art Awards competition for students of the CPIT school of Art and Design. It is a time where we are able to view up-and-coming artists' work and be involved in a celebration recognizing the talent of the CPIT Art & Design students. This year we had the privilege of being involved in CPIT's function and next year we intend to have our own function where clients can join us for this celebration of the arts.

There were a great variety of submissions this year with entries coming from across the spectrum of creative works including art, sculpture, design, graphics, craft, visual communications and photography. Students surpassed themselves with imaginative and skilled representations across a wide range of subject matter.

A panel comprising a guest judge and two of the firm's partners chose the winning works. This year's judges were Warren Feeney, Simon Mortlock and Prue Robertson. The judges were impressed with the quality of the work and a number of items were singled out as being worthy of prizes. The winning work will soon be on display in our offices. Next time you visit be sure to ask to view it.

Photograph by Richard Linton

Rebecca Smallridge receiving her prize from Prue Robertson, Partner, Mortlock McCormack Law.

A decision was made to increase the available prize money to include a second prize and the following awards were made:

First Prize	:	Rebecca Smallridge
Second Prize	:	Rebecca Milne
Highly Commended	:	George Glover
		Anzette Viviers
		Louann Sidon

The winning work included four ceramic bowls. It was described by Warren Feeney, Guest Judge as:

"a body of work ideally balanced between tradition and innovation. Tableware as it was crafted 3,000 years ago, but with a narrative that is contemporary and political. Form, function and fine arts all inform this series of beautifully understated, hand-crafted containers."

Changes to the District Court Rules

District Court proceedings are often a drawn out and expensive process for all parties involved. The parties are required to file claims, notices of defence and sometimes counterclaims before the matter is heard. In some cases this process can take months or even years with the parties incurring significant costs. Many potential litigants are deterred by the cost and decide that the process is not worth the effort.

Parliament's radical new changes to the District Court Rules ('the Rules') are an effort to streamline the proceedings, reduce the volume of paper filed in Court and reduce the cost of filing fees. The new rules completely revamp the District Court process by focussing on the speedy and inexpensive determination of proceedings. Emphasis is now placed on reaching negotiated settlements at an early stage.

The new Rules came into force on 1 November 2009. The main changes include the following:

- new court forms which are designed for non-lawyers to understand
- online access to court forms
- online examples of court forms to guide non-lawyers when drafting their own documents
- strict deadlines for filing documents to speed up the court process
- access to shorter trials
- pre-hearing matters are removed
- parties only have to provide copies of documents they plan to rely on in the proceedings

At present there is a significant disparity between the maximum amount of a dispute able to be determined by the Disputes Tribunal and the level that practitioners perceive to be the minimum amount of a dispute that is economically viable to be resolved at the District Court. The new Rules seek to close this gap.

The Rules will provide more of a focus on the dispute itself rather than legal procedure. This will make it easier for non-lawyers to understand and engage in the process.

Pre-hearing matters that are often used by parties to draw out the process will be removed. Parties will have to comply with strict timeframes that will lead to more predictable timetabling for hearings.

The pre-hearing process of discovery is all but eliminated. This has historically been an expensive and time consuming process whereby parties must produce for inspection all documents that relate to the proceedings. This included documents that were adverse to the parties' case. The parties will only have to produce documents that they plan to rely on.

The focus of the new Rules is for parties to exchange their evidence and arguments at an early stage and reach a settlement with minimal intervention from the court. Before a hearing, parties will be required to attend a judicial settlement conference. These will last for 90 minutes, be presided over by a Judge and will focus on mediation of the issue. If settlement is not reached during the conference then a trial will be allocated according to the complexity, size and value of the dispute.

Launchpad Students come home

Bianca Nuku and Amy Sutherland

MML is delighted to have two former Launchpad students rejoin the firm. Amy Sutherland was the first student to undertake a scholarship in 1999 and Bianca Nuku did her year in 2001 both as juniors at Simon Mortlock Partners. These young women now work in the firm's litigation team, Amy as a Legal Executive and Bianca as a Personal Assistant. Amy and Bianca are very much a part of the MML extended family.

It is really gratifying to have these two very capable young persons back in the fold and an indication of the value of Launchpad in educating and supporting new recruits into the workforce.

Launchpad continues to operate in Christchurch and MML is about to place its twelfth student in the role. The firm is a strong supporter of the programme and has been actively involved in its operation and administration since it was first established.

If you would like to know more about Launchpad and how it works, contact Jan Connolly the regional Co-ordinator on 027 653 5725 or check out the website on www.launchpad.org.nz

Trustee Duties

The duties of a trustee need not be onerous, but a failure to carry out those duties may, in a worst case scenario, result in a claim against you by a beneficiary who has suffered a loss as a result of your actions or omissions.

For those readers who have consented to act as a trustee for a friend or family member without really understanding what that role entails - the list below, while not exhaustive, sets out some of the most important trustee duties.

The duty of efficient management

- Whether you are an original, substitute or additional trustee you must first become familiar with and abide by the terms and conditions of the trust deed.
- Know the extent of the assets and liabilities of the trust and make sure that these are properly held in the name of the trustees.
- Ensure that the trust is managed and administered properly and that the trustees meet to discuss and agree on issues. Do not be a rubber stamp of the settlor's wishes. Take minutes of these meetings and record all resolutions.
- Make sure that the administration costs of the trust are kept to reasonable levels.

The duty to keep and render accounts to beneficiaries

- Make sure that a clear audit and paper trail is kept of all decisions and transactions. This will involve secure storage of the trust deed, minutes of meetings and resolutions, financial accounts, correspondence and other trust documents.
- If the beneficiaries request information, the trustees have a duty to make certain information available, such as the trust deed, financial statements and investment strategies.

The duty to act personally

- Carry out your trustee duties personally.
- You may instruct an agent to carry out your decisions but you must make your own decisions and not be dictated to by other trustees, the settlors or beneficiaries.
- Trustee resolutions must be unanimous.

The duty of loyalty

- Always act in the best interests of both present and future beneficiaries and be impartial between beneficiaries.
- Avoid conflicts of interest.
- Do not benefit or profit from your position as trustee unless authorised to do so.
- You must always protect the interests of the beneficiaries.

In all things, a trustee's standard of care is measured against that of an ordinary prudent business person managing the affairs of others. A higher standard is required if the trustee is a professional person such as a lawyer or accountant.

The management of trusts often come under scrutiny and all of the benefits of having a trust may be lost if the trust records and procedures do not meet the required standard. It is therefore important to keep a clear audit and paper trail and to bear the above trustee duties in mind. It is also important to insist that you, as a trustee, are kept up to date with all of the trust's affairs.

SNIPPETS

HAND-HELD CELL PHONE BAN FOR VEHICLE DRIVERS

From 1 November 2009, motorists are no longer able to text or talk on a hand-held cell phone while driving. This comes from a change in the New Zealand Road Rules.

The change will see drivers using hand-held cell phones behind the wheel incurring an $80 fine along with 20 demerit points. This change is seen by many as a welcome relief and a step towards making New Zealand roads safer.

New Zealand will join at least 50 other countries who all have bans or partial bans on the use of hand-held phones by drivers.

However, drivers will still be able to use cell phones if they do so with a hands-free device and two-way radios. There will also be an exemption for 111 emergency calls.

MAORI LAND – CURRENT ISSUES

Land Information New Zealand (the Land Transfer Office as it was once known) is in the process of updating its records so that all current Maori land is identified clearly. Historically it has been difficult for Land Information New Zealand to maintain its records so that all Maori land is identified as such, following Maori Land Court orders being issued.

The Maori Land Court can make orders converting general land to Maori land. When this has happened in the past, Land Information New Zealand has not had a system in place to update its records. However, with the introduction of the electronic land transfer environment, when Maori Land Court orders are made, the land will be flagged as Maori land.

IMPORTANT NOTICE

New REINZ forms

Andrew Logan - Partner

In the last newsletter, I advised of the significant changes to the way properties are to be bought and sold with the advent of a new form of Agreement for Sale and Purchase of Real Estate prepared by the Real Estate Institute of New Zealand (REINZ).

The significance of the changes are twofold; first there would be two forms in the market available for vendors and purchasers to use with the "standard" Auckland District Law Society form and the "new" REINZ form competing with each other and second, the terms of the REINZ form were new and most importantly, untested. This could mean that what people might have expected out of the new form, based on their experiences with the "standard" form were not the same.

Because of the overwhelming negative reaction to the new form by the property industry, lawyers, bankers, the Consumers Institute and importantly real estate agents themselves, REINZ is undertaking a review of the new form.

For the present time it is still too early to comment and it will be a case of 'watch this space'. In the meantime the "standard" form continues to be used.

We will keep you updated.

Unit Titles Law Change Updated

The Unit Titles Bill ('the Bill') was introduced to Parliament on 5 March 2009 and if passed into law will repeal and replace the Unit Titles Act 1972 ('the Act'). The Act governs multi-unit developments such as apartment blocks, townhouses, and office buildings. The Act was not designed to deal with the complex, large scale developments of the present day and the Bill goes a long way to revamp the outdated legislation.

A major change to the Act will be the specific disclosure requirements for vendors and developers of unit title properties. Vendors especially will need to be aware of the proposed disclosure requirements as it is mandatory for them to provide disclosure statements to a purchaser on the following occasions:

- before a Sale and Purchase Agreement is signed
- 5 working days before settlement
- at any time before settlement if the purchaser requests it

Vendors need to be aware that if a disclosure statement is not provided to the purchaser within the specified timeframe, the purchaser may be able to defer settlement or even elect to cancel the contract. Vendors will need to be careful to provide purchasers with accurate information as purchasers will be entitled to rely (in a legal sense) on that information.

Developers will be required to provide the body corporate with disclosure statements dealing with the construction systems of the buildings and their compliance with the Building Act.

Another major change is the move from the need for a unanimous resolution of the members of the body corporate to a 75% majority. The purpose of this change was to prevent voting on important matters from being blocked by one unit owner.

The common property of unit titles will now be owned by the body corporate. Presently, common property is owned by the unit owners as tenants in common. It is proposed that unit owners should still have a beneficial interest in the common property.

The body corporate will be required to make a long-term maintenance plan which must include expected maintenance requirements for the following 10 years, an estimate of costs involved with those maintenance works, and the basis for levying the costs from the unit owners.

The Act is very inflexible regarding unit entitlements that determine voting rights and how much unit owners contribute towards body corporate costs. The Bill seeks to address this by separating unit entitlements into two elements:

- ownership interest – which is determined by the value of the unit
- utility interest – which is determined by the extent to which the unit owner uses the shared facilities and services

Another major change is the way in which disputes under the Act are dealt with. Under the Bill any disputes will be referred in the first instance to mediation and then adjudication through the Tenancy Tribunal. Disputes were previously resolved solely through the courts.

As apartments and townhouses become a preferred style of living in the modern world, having a knowledge of unit owners' rights and obligations under the Act is necessary. After the Bill is passed, all existing unit titles and bodies corporate will have 15 months to bring themselves in line with the provisions of the new Act.

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