mml news

MORTLOCK MCCORMACK LAW CLIENT NEWSLETTER

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EDITORIAL

CHRISTCHURCH ROCKS
– and we'd like to think we do too

The past two months have been very trying ones for Cantabrians with a constant threat of after shocks from the September 4 quake. This and other closely related topics have been the source of many discussions around our staff room table over the past weeks. Almost everyone here knows someone whose property has suffered damage and most of those affected are still waiting to find out when or if their repairs can be started. The housing market is uncertain and difficulties are being experienced with insurance cover and property settlements generally. It all sounds horribly depressing but in the midst of all this uncertainty, our community is surviving and people are putting on brave faces and getting on with their lives.

MML would like to offer its services to any client who might need a friendly voice on the end of the telephone. It may just be a question you have about your house, a sale or purchase, an insurance matter, a lease query or simply some old fashioned advice as to what you need to do. Phone us and we will be happy to lend a hand. We would like to offer this free telephone service as our way of supporting the community.

INSIDE THIS EDITION

90 Day Trial Periods

The Government's proposed changes to the Employment Relations Act 2000 ('ERA') include extending the 90 day trial period to all employers, rather than just those with fewer than 20 employees. A trial period allows an employer to dismiss an employee within the 90 day trial period without fear of a claim of unjustified dismissal.

The Department of Labour conducted an evaluation of trial periods and found that approximately 40% of employers would not have hired their last employee without the trial period and 74% of people hired on a trial period have retained their positions.

The first decision on the interpretation of provisions, Smith v Stokes Valley Pharmacy (2009) Limited, demonstrates that an employer must comply strictly with the provisions of the legislation.

Heather Smith was working in the Stokes Valley Pharmacy when it was sold. Heather was offered a job with the purchaser and on 1 October 2009 commenced work for them. On 2 October 2009, she signed a new employment agreement that contained a 90 day trial period. The new employer quickly became dissatisfied with Heather's performance and, in reliance on the trial period provisions, terminated her employment in December 2009.

Heather commenced proceedings against her employer and, despite the existence of the trial period, the Employment Court found that Heather could make a claim for unjustified dismissal.

Under s67A of the ERA, trial periods only apply to a person who has not previously been employed by the employer. When Heather signed her employment agreement on 2 October she had already commenced work, even if only for a day, and therefore was no longer a 'new employee'. The employer argued that Heather had by her conduct accepted the terms and conditions of the draft employment agreement provided to her on 29 September 2009. The Court rejected this argument holding that the Agreement required execution by signature and until it was signed it remained a draft that could potentially be amended. This meant the trial period was void and Heather could claim unjustified dismissal, the very action the employer thought they were protecting themselves from.

This decision also discussed the requirement of good faith in relation to trial periods. It was held that an employer is not obliged to notify an employee, who is employed under a trial period, of the employer's intention to dismiss them. Once dismissed, if an employee requests an explanation for the dismissal, good faith requires they must be given one.

It was also held that if an employer seeks to rely on a trial period, the employment must be terminated lawfully and in accordance with s67B (1) of the ERA, which requires notice to be given. While there is nothing in the ERA determining the length or form of this notice, Heather's contract required 4 weeks notice. Therefore, the court found that the two weeks notice period given was deficient and the agreement was not lawfully terminated.

This decision highlights that employers who wish to rely on a trial period must comply strictly with the provisions of the ERA.

Company Rules to be Tightened

Last year an Auckland registered company, SP Trading Ltd, was linked to the sale of arms from North Korea to Iran. When investigations commenced, the Director of SP Trading Ltd, Lu Zhang, was unable to be found. The Companies Office records showed the sole shareholder of SP Trading Ltd to be Vicam (Auckland) Ltd, whose shareholder was GT Group Ltd. The registered office of all three companies was the same Queen Street address.

This case raised concerns that New Zealand's reputation as one of the best countries in which to conduct business may also have opened it up for abuse.

Currently there are no requirements to provide proof of identity or to verify a company's address when completing company registration. However, there is concern that increasing compliance requirements will affect our ability to do business and increase costs for honest business people. There is a fine balance between ensuring that it is easy to do business and protecting ourselves from risk.

On 9 September 2010 the Commerce Minister, Hon. Simon Power, announced that the Government will tighten up the requirements around company directors and the registration process in an effort to prevent overseas interests using New Zealand registered companies to undertake criminal activity.

A Bill is expected to be introduced into Parliament next year that will include the following key changes:

- All New Zealand companies will be required to have either one New Zealand resident director or a local agent, who will be responsible for ensuring that accurate information is given to the Registrar of Companies ('the Registrar').
- The resident director or local agent will be held liable if any of the above information is found to be misleading.
- The powers of the Registrar will be increased to provide a greater ability to take action where there is any doubt about the accuracy of information. This includes having the ability to make a note or 'flag' on the register any company that is under investigation.
- The Registrar will be able to remove a company from the register or prohibit a director from being a director for up to five years if it is found they have breached companies related legislation or if they have been misleading in any way.

It is anticipated these changes will make it easier to deal with compliance issues around company registration and remedy issues surrounding the authenticity of directors and shareholders. Individuals will be able to check Companies Office records if they have any concerns surrounding a company with which they are doing business. Mr Power states this will shore up the integrity of New Zealand's company registration process against increasing criminal activity from overseas. Most importantly, it will ensure that New Zealand upholds its reputation as one of the best places in the world to do business.

SNIPPETS

DNA COLLECTION

From 6 September 2010 the Criminal Investigation (Bodily Samples) Amendment Act 2009 extended police powers, giving them the authority to take DNA samples from individuals who are arrested. Previously samples could only be taken with the individual's consent, or where there was a court order, or police-issued compulsion notice, or the person had already been convicted of an offence.

These new powers are being implemented in two stages:

1) From 6 September 2010 the police can take DNA samples from individuals who have committed indictable offences, such as those punishable by more than 7 years imprisonment.
2) At a date yet to be set, these powers will then be extended to include individuals accused of any imprisonable offence.

Justice Minister Hon. Simon Power believes the key benefit will be the ability to solve "cold cases" and identify some of the 8,000 unidentified DNA samples. It is predicted that stage 1 will result in 4,000 more samples a year and 2,800 links to the crime scene database.

On the flipside, safeguards have been put in place. The police have developed guidelines, individuals will be penalised for misusing DNA, and if someone is not convicted their DNA will be destroyed rather than stored.

GOVERNMENT RESPONSE TO CANTERBURY EARTHQUAKE

Parliament moved quickly to pass the Canterbury Earthquake Response and Recovery Act 2010 ('the Act'), which received Royal Assent on 14 September 2010 just 10 days after the earthquake struck. The Act will remain in force until 1 April 2012.

The Act grants the Government wide powers to make Orders in Council ('Orders') to relax or suspend provisions in any enactment that:

- may divert resources away from the effort to respond to the earthquake, or
- may not be reasonably capable of being complied with as a result of the earthquake.

The Orders may be used to temporarily override almost any law and are likely to be used to authorise such matters as the destruction of buildings, regulate drainage and sanitation, and modify or extend town planning provisions. Unlike previous earthquake legislation, the Act does not specifically state what financial assistance the Government will provide and it does not create a right to compensation. Instead it establishes a Recovery Commission that will provide advice to the relevant Minister on Orders in Council and the prioritisation of resources and how funds should be allocated.

MML Art Awards 2010

In conjunction with CPIT, the firm held its 2010 Mortlock McCormack Law awards night at the Rakaia Centre on Campus. Guests of MML and the School gathered to view the many and varied works and to hear the winners announced.

This year's supreme winner was Casey Macauley. Using the humblest and most mundane of material, Casey transformed paper, glue and tape into a work of art that is conceptually challenging and equally accessible and entertaining. This work is impressive in its crafting and construction with the artist reinventing a feather-weight sheet of paper into a monumental and imposing sculpture that commands attention and keeps drawing the viewer back for more.

The winning work will be displayed at MML's offices and form part of its growing collection of emerging artists.

Andrew Logan, Hamish Douch and Tony Herring pose with Casey Macauley alongside the winning sculpture
(Photograph courtesy of Lumo Photography)

Wills and Property Ownership – Things you need to know

The recent High Court case of Rauch & Ors v Maguire & Anor [2010] 2 NZLR 845 highlights two interesting distinctions. Firstly, the distinction between ownership of property as 'joint tenants' and as 'tenants in common' and secondly, the distinction between the duties of disclosure owed to beneficiaries by 'Executors' and by 'Trustees' of a deceased person's estate.

The Facts

The deceased and his son owned two properties they purchased in 1997; mistakenly as tenants in common. The mistake was corrected one year later when the properties were transferred to them both as joint tenants. The effect of owning the properties as joint tenants was that on the death of the father in 2009, the properties were transmitted by survivorship to the son.

The son gained from this correction because the two properties, which together were worth $5 million, were accordingly his and did not form part of his father's estate. This in turn meant that the father's estate reduced in value from $2.5 million to $39,000 - hence the claim by the disgruntled beneficiaries (who did not include the son).

The High Court held that the residuary beneficiaries were not entitled to information from the executors and trustees of the estate. The properties were personal assets that were transmitted by survivorship and as such the circumstances were confidential.

Joint Tenancy or Tenancy in Common?

If property is owned as joint tenants it does not become part of a deceased's estate instead transferring by survivorship to the surviving joint tenant. If property is owned as tenants in common, the part owned by the deceased forms part of the estate and is dealt with according to the terms of the Will.

Beneficiaries' Rights to Disclosure of Information

It is common for the executor and trustee named in a Will to be the same person, however beneficiaries' rights of disclosure of information differ depending on whether they seek disclosure from the Executor or the Trustee.

In the above case, the residuary beneficiaries could not compel the Executors to disclose any information because they had no legal or equitable property interest in the unadministered estate. They had no greater right to disclosure after death than during the deceased's lifetime.

The residuary beneficiaries also could not force the Trustees to disclose information regarding the transfers because the information sought was information relating to non-trust assets. The assets were not part of the residuary estate. The Court held that disclosure is at the Trustees' discretion and if asked the Court would intervene in a supervisory role, if appropriate, given the particular circumstances. In this case, the residuary beneficiaries could not show good reason for the court to intervene and order disclosure.

A beneficiary has a right to disclosure of information by the Trustee, provided the information sought relates to the assets of the estate.

Conclusion

Understanding the manner in which property can be owned, including an appreciation of the distinction between joint tenants and tenants in common is crucial to estate planning.

SNIPPET

HILLARY CLINTON'S VISIT TO NZ

Hillary Clinton's visit to New Zealand marked a virtual end to the 25-year-long split over our "no nukes" policy. Some of you will remember the turbulent times when David Lange refused to allow US ships to enter New Zealand waters without first declaring they were nuclear free – which the US refused to do. Since that time New Zealand has maintained its "no nukes" stance and until recently relations with the US were somewhat strained.

While here, Hillary Clinton signed the Wellington Declaration which establishes a framework for a new strategic partnership between the two nations.

FINANCIAL SERVICE PROVIDERS

The Government has been reviewing rules for professionals who provide financial advice. The Financial Service Providers (Registration and Dispute Resolution) Act 2008 requires all persons involved in the provision of financial advice to become registered and to be members of a dispute resolution scheme if they provide financial services to retail clients. If you use the services of a financial adviser, that person is also required to provide you with a disclosure statement detailing their experience and any relevant study they may have undertaken. The changes are to protect you and give you confidence that the person giving advice has integrity and the necessary qualifications to give financial advice. The changes come about following the large number of company collapses where countless individuals lost their life savings. After strong criticism from the public that financial advisors were guilty of providing poor advice, Government instigated a wide review of the financial sector rules including:

- The Financial Service Provider (Registration and Dispute Resolution) Act 2008 which requires financial service providers to register, and join an approved dispute resolution scheme.
- The Financial Advisers Act 2008 which sets minimum standards for those giving financial advice and provides for financial advisers to be centrally regulated by the Securities Commission.

CHANGES TO JURY DUTY

On 4 October reforms come into effect that will mean people summoned for jury service can apply to defer their service for up to 12 months. Jury districts have also been extended from 30 to 45 kilometres from a jury trial courthouse. The Justice Minister, Simon Power has indicated that the changes are to "make it as easy as possible for people to take part in this important civic duty".

The End of Gift Duty - a good thing?

Many of you will be aware of the recent announcement from the Government that it intends to abolish gift duty on 1 October 2011.

The policy decision to abolish gift duty appears to be largely based on the Government's perception that the revenue collected from the tax does not justify the estimated annual $70M compliance cost by tax payers, (eg fees to lawyers, accountants, banks etc) involved with gifting programmes.

While this sounds like good news for those with gifting programmes, there is concern that the Government has no idea of what may replace gift duty and has not fully considered the full range of consequences arising from the abolition.

The Government's decision is based solely on its own consultation with Ministries and Departments. There has been no consultation with the public, lawyers, accountants, the banking sector and a range of other interested parties.

The New Zealand Law Society has raised a number of concerns about the likely consequences of abolition. These relate to claims under the Property (Relationships) Act, the Family Protection Act, the child support regime, the likely explosion of the use of trusts, creditor protection and the tougher line that Banks are likely to take for requiring securities involving Trusts. All of these consequences are likely to have a much greater financial cost to the tax payer than the typical cost of annual gifting of approximately $250 plus GST.

There is also some suggestion that the abolition of gift duty may pave the way to the introduction of a capital gains tax.

It will be very much a case of "watch this space". In the meantime our advice is to continue with your gifting programme as normal. We will keep you advised of changes as they develop.

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