mml news

MORTLOCK MCCORMACK LAW CLIENT NEWSLETTER

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EDITORIAL

Increasingly more and more people are signing up to social networking sites such as Facebook and Twitter and sharing personal information and photographs across the internet. Employees are searching these sites for information about potential job candidates and relying on that information to shape their hiring decisions. This is one good reason for people to be very concerned about the nature of the information they post online. This information is public and could be ultimately used against the person.

There was also a recent case where Virgin Atlantic dismissed several employees for making derogatory comments about their employer and customers on Facebook. Another case of this nature involved a former Wellington ambulance service worker who was dismissed after an altercation with a co-worker. This person may have won her job back but for abusive comments she texted and posted on Facebook.

This is a really interesting, developing area of employment law and one that MML will be watching over the coming months. Our advice is to make sure you use the resource to your advantage by conveying a professional image at all times.

INSIDE THIS EDITION

Hutton Shearwater Charitable Trust

One of MML's core values is social responsibility. We do this through providing time pro-bono to various projects within Canterbury and the South Island. One of the organisations we have recently been involved with is the Hutton Shearwater Charitable Trust (HSCT) which together with the Department of Conservation and the Kaikoura Charitable Trust has been working to establish a predator proof enclosure for the endangered Hutton Shearwater birds.

MML worked alongside Paul McGahan, Geoff Harrow and Lindsay Rowe from HSCT, three fantastically driven individuals dedicated to saving the Hutton Shearwater. These birds have formed a key part in New Zealand history being part of the mahinga kai (food basket) for a number of generations. Once prolific in New Zealand, they are now reduced to two colonies and are constantly under threat of extinction.

The Kaikoura Charitable Trust was a key player in this project. The Trust has a reputation for working with wildlife and is better known for its whale-watch operation. It takes its role of Kaitiakitanga (Stewardship) of the land seriously and has worked alongside the HSCT and other organisations to provide a location for the birds to allow them to nest, breed and secure their future survival. Prior to the installation of the predator fence on the foreshore site, the birds were breeding in the mountains inland from Kaikoura and their survival was uncertain. Birds were painstakingly removed from their homes to the new location and there is now evidence of breeding taking place.

Simon Ford and his family attending the opening of the predator proof fence in Kaikoura.

Recovering Hutton's shearwater chicks from burrows high up in the Seaward Kaikoura mountains for translocation to the Kaikoura Peninsula.

MML appreciates the opportunity to work with organisations for such a good cause. The people involved in the Kaikoura Charitable Trust and the HSCT were great to deal with and made it a joy to be involved.

MML is also a proud supporter of the following projects:

- Canterbury Youth Development Programme;
- City Mission;
- Silver Ribbon Trust;
- Wairewa Runanga's V5 Application.

Paths, Terrain and Automobiles - What is Reasonable Access to Land?

The Court of Appeal recently considered this issue in Murray and Tuohy v BC Group (2003) Limited and Ors. The appellants and their neighbours owned adjoining properties in the Wellington hillside suburb of Ngaio. The properties were created by a subdivision in 1963. The appellants purchased their property in 1989 with the only access to the property via a steep council owned pedestrian footpath.

Twenty years later and suffering health problems, the appellants sought an order under Section 129B of the Property Law Act 1952 (since repealed) requiring their immediate neighbours to provide access through a right of way easement, on the basis their land was landlocked. Section 129B is the remedial provision available to a landowner whose land is landlocked.

The Court of Appeal said that the approach in Section 129B cases is well settled and involves three stages (briefly) stated as:

- deciding whether the claimant's land is landlocked within the meaning of the section,
- if yes, determining how the discretion given to the Court by the section should be exercised, and
- if the Court decides to grant access to the landlocked land, to determine the terms of access.

The High Court, from which the appeal came, held in February 2009 that the appellant's property was not landlocked for the purposes of Section 129B (and accordingly there was no need to consider the second and third stages).

Under section 129B(1)(a) a piece of land is landlocked if there is "no reasonable access to it". It was the appellant's case that taking into account modern day community expectations and standards, a residential property without vehicular access does not enjoy 'reasonable access' and is therefore landlocked.

In the Court of Appeal, Justice Gendall, who delivered the judgment of the Court, stated "we cannot accept that it is necessarily the case that under modern day community standards vehicular access onto the site of a residential property is necessary for it to enjoy reasonable access".

Further into the judgement Justice Gendall stated "obviously, if people cannot get onto their property it has no reasonable access. If they can access it from a public roadway or walkway through a suitable pedestrian route then such access may be reasonable, depending on the circumstances". In this case there was evidence from the respondents that this was typical of access to properties in Wellington's hilly suburbs.

The Court of Appeal agreed with the High Court's conclusion that, as a matter of fact having regard to contemporary standards, the present access was reasonable and that vehicular access was primarily a matter of convenience for the appellants. Accordingly the appeal was dismissed.

SNIPPETS

BIG BROTHER MAY BE WATCHING YOU!

The internet is an indispensible tool and social networking sites such as Bebo, Facebook and Twitter are the forum of choice for this generation. Personal comments are often posted with little thought as to who the eventual audience may be. It is prudent therefore to think twice before posting that derogatory comment about a work colleague or your employer as it may lead to disciplinary action or at worst dismissal; particularly if the comment was posted during working hours!

The Employers and Manufacturers Association report that they receive a call almost every day from an employer who has found derogatory statements about them on a social networking site. These comments may be viewed by hundreds of people and can damage the reputation of the employer.

In New Zealand this area of employment law is about to be tested in a case where a woman was dismissed from her position with the Wellington Free Ambulance Service Inc. after an altercation with a co-worker spilled over onto Facebook.

THE IMPORTANCE OF A CURRENT WILL

The recent High Court decision in re Trotter is a timely reminder of the importance of having a current will, particularly for parties who have recently separated.

Murray and Christine Trotter separated in May 2001 without a separation agreement or the making of a separation order. In October of that year a matrimonial property agreement was concluded that provided for the transfer of the matrimonial home into the sole ownership of Murray and the payment to Christine of half the equity in the home.

Murray occupied the home until his death in 2009 when he died intestate (i.e. without a will). Christine applied for Letters of Administration on the grounds that she had a sole beneficial interest in the estate.

The court noted the following:

- Regardless of the fact that the parties had executed a matrimonial property agreement, Christine had a beneficial interest in the estate as a surviving wife.
- Murray and Christine separated by mutual agreement and did not obtain a separation order from the Family Court and therefore Christine was not prevented from obtaining Letters of Administration.
- There were no other potential claimants.

The court found that no cause had been shown why Christine should not be granted Letters of Administration. Christine had the sole beneficial interest in the estate and therefore took priority under the High Court rules.

Emissions Trading Scheme in the Agricultural Sector

What is the Emissions Trading Scheme?

The Emissions Trading Scheme ('ETS') is designed to encourage the reduction in greenhouse gas emissions and to promote investment in renewable energy, efficient and clean technology, and the planting of trees that act as "carbon sinks".

It is based on "units". Units are bought and sold between participating organisations and individuals. If a participant sells a product that emits greenhouse gases, for example a natural gas company whose consumers emit greenhouse gases when gas is used, it is required to purchase units from another organisation that has earned units (such as a forestry company that grows trees). Units can be sold either to other participants or on the Global Emissions Markets.

When does the Agricultural Sector enter into the Scheme?

Farmers will be indirectly affected by the ETS from 1 July 2010 due to increased costs of compliance and preparatory/preventative measures prior to entry into the scheme. Farmers will not be directly affected until at least 2015, as meat and dairy processers such as Fonterra will be the initial participants.

The agricultural sector enters the ETS in full on 1 January 2015 as it pertains to the farming sector's release of greenhouse gases. The agriculture sector will have already entered into the scheme from 2012 in relation to carbon dioxide emissions produced by energy and fossil fuel use.

What Costs will there be to Farmers?

To use the dairy sector as an example, Fonterra predicts that by 2015 the total average cost per shareholder will increase by about $10,000. Fonterra's Guide to Climate Change reports that:

- shareholder operating costs will increase by about $2,500 every year from 2013,
- agricultural emissions produced by cattle (methane and nitrous oxide) will cost an additional $2,500 a year from 2015,
- Fonterra itself will face increased costs due to being a participant in this scheme. Costs are estimated to be an additional $25 million dollars per year from 1 July 2010 and $50 million dollars per year from 2013 (these costs are not expected to be exponential),
- from 2015, the average cost increase per shareholder will be in the vicinity of $10,000, or an extra cost of 7c per kilogram of milk solids.

What can Farmers do?

The scheme asks farmers to begin thinking of ways to reduce agricultural emissions. Some options include planting forests, using fertilisers more efficiently, using nitrogen inhibitors, and improving productivity. The New Zealand Government's 'Climate Change Information' website states that for an average dairy farm, the planting of 6 hectares of Pinus Radiata would "offset the cost of the ETS from 1 July 2010 to 31 December 2012".

What are Fonterra's Obligations?

Fonterra is required to monitor, calculate and report emissions. Fonterra is also responsible for reporting on farm emissions. The ETS will require Fonterra to buy emissions units equal to its total reported emissions each year. To reduce costs, Fonterra has invested in research and development programmes and has implemented various business reduction policies.

Government Assistance to the Agricultural Sector

An issue for the agriculture sector is that methane and nitrous oxide are more efficient at trapping the sun's heat than carbon dioxide, therefore pastoral production has a greater impact on global warming than other sectors. In an effort to keep the agriculture sector competitive with other countries the Government will initially provide processors such as Fonterra with 90% of its emissions units meaning Fonterra will need to purchase 10% of its emissions units. The allocation from the Government will reduce by 1.3% per year.

Should farmers require further information on the ETS, the "Fonterra Guide to Climate Change" is an excellent starting point and can be found on the Fonterra website.

Associate Kent Yeoman has experience in this area. If you have any questions about the ETS please contact Kent on 353 5790.

EXHIBITION - MML RETROSPECTIVE

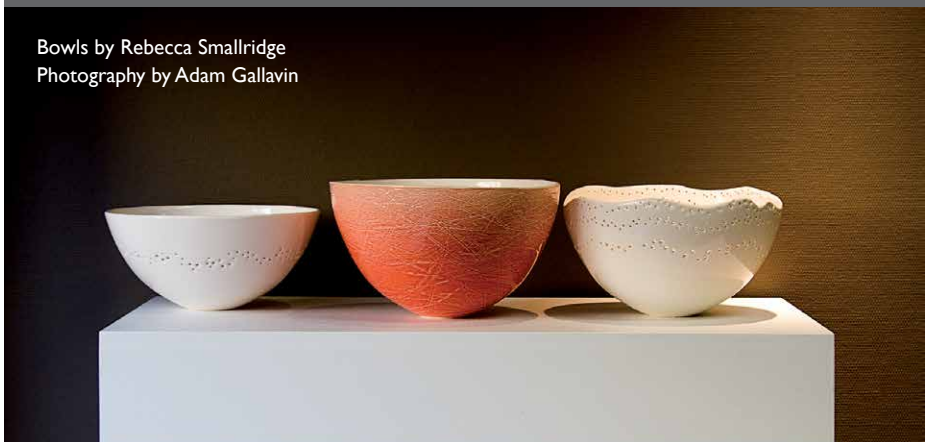
In 2003 Mortlock McCormack Law established an annual Art Award for third year students of the School of Art & Design, Christchurch Polytechnic Institute of Technology. The winning work, judged by MML partners and a guest judge is acquired for the MML collection. The Awards reflect the firm's focus on education and advancement of young people and its belief in partnering with the community.

This year, MML wanted to share some of its gems with the public and in conjunction with COCA Gallery and CPIT is exhibiting part of its collection. The exhibition runs from 10 August until 5 September 2010 in the Canaday Gallery at COCA.

The retrospective also includes a special focus on 2006 MML award winner Sam Harrison. Harrison graduated from CPIT, Bachelor of Visual Arts in 2006 and in the same year won both the MML award and the Farina Thompson Drawing Award. Harrison had his first solo exhibition at COCA in 2007, has had two solo shows since and is now represented by a leading Auckland art dealer.

Warren Feeney, recently departed Director of COCA gallery had this to say: "Sam is an exceptional talent. He's a consummate craftsman across several mediums and while I think he would have been a successful artist regardless, the [MML] award has definitely been helpful to him. It's a great affirmation for any artist at the start of their career".

We hope you might find the time to visit COCA and view some of these interesting pieces.



Bowls by Rebecca Smallridge
Photography by Adam Gallavin

SNIPPET

LAW CHANGES TO PROTECT PERSONAL INFORMATION

A new law will come into effect on 1 November 2010 that will better protect your personal information on the Motor Vehicle Register.

The new law will permit the release of personal information for the following purposes:

- Enforcement of the law
- Maintenance of the security of New Zealand
- Collection of charges imposed or authorised by an enactment; and
- The administration and development of transport law and policy

All other requests for names and addresses held on the register outside of these purposes will have to make an Official Information Act request to the NZTA.

If you do not wish your name and address to be released to a person who has been granted an authorisation from the NZTA you may ask for your details to be withheld.

Correction

In Issue 8 in the article Mediation we incorrectly reported the success rate of mediations as 50% when the actual rate of success in these cases is 80%.
We apologise to Hugh for this error.

Director's Duties

While companies provide limited liability and are considered a separate legal entity, directors can become personally liable if they breach their duties. These duties have become increasingly important in light of the recent financial downturn. When there is financial uncertainty, directors are more likely to make decisions for which they could be held liable. This in turn gives rise to increased media attention.

Recently there have been numerous reports of the Securities Commission taking proceedings against directors of finance companies for misleading investors. Under the Securities Act these directors face fines of up to $500,000 in civil proceedings, and up to five years imprisonment or fines of up to $300,000 in criminal proceedings. Therefore directors need to be aware of their obligations to the company.

Duties under the Companies Act 1993

The key duties, found in Part 8 of the Companies Act 1993 sections 131-137, include the following:

- The duty to act in good faith and in the best interests of the company.
- The duty to use their powers for the purpose for which they were conferred and not for any ulterior motive.
- The duty to act in accordance with the obligations under the Companies Act 1993 and the company's constitution.
- That a director must not agree to cause, or allow the company's business to be conducted in a manner that is likely to create a substantial risk of serious loss. To determine this the court will look at what an 'ordinary prudent director' would have done in the circumstances.
- The duty not to take on any obligations unless it is believed on reasonable grounds that the company will be able to perform those obligations when required to do so, and
- The duty to use the reasonable care, diligence and skill that a reasonable director would exercise in the circumstances.

Recent Director Liability Cases

Directors must actively ensure that they are meeting their obligations. The recent case of FXHT Fund Managers Ltd v

Oberholster held that directors who are not actively engaged in the company ('sleeping directors') can be liable. In this case the inactive director was held liable for a breach of his duty of care even though it was his co-director who defrauded investors. Initially he was not aware of his co-director's dealings, but as soon as he became aware he reported the matter to the authorities; however he was still held liable.

Similarly in Lewis v Mason and Meltzor the directors relied on a manager and did not exercise sufficient control over the company's financial position or the day to day running of the company. It was found that reliance on a manager does not excuse a director from liability and the directors were ordered to contribute to the Company's debts.

Summary

The above cases show the need for directors to take positive steps to discharge their obligations under the Companies Act, and be proactive directors who are aware of and adhere to the duties imposed on them.

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