

WILLIAMS EASON

incorporating BRASSINGTON & CO

BARRISTERS & SOLICITORS

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NEWSLETTER

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We are pleased to announce we have purchased the practice of Brassington & Co, effective 31st December 2008, and from 1st January 2009 we will be practising as “Williams Eason incorporating Brassington & Co”.

In terms of new legislation we now have “Terms of Engagement” governing our relationship with you. If you would like to view a copy please telephone the office.

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More Trouble in Paradise

A recent decision of the Court of Appeal, *Salt v Governor of Pitcairn and Associated Islands (2008)*, serves as a reminder to employers to thoroughly investigate the actions of an employee who has raised a personal grievance based on unfair dismissal, because the employee's actions will be highly relevant to the quantum of remedies. This may even extend to actions the employer wasn't aware of at the time of the dismissal.

Mr Salt was employed as Commissioner for Pitcairn Island and was responsible for the day to day administration of the affairs of Pitcairn Island. He was based in Auckland and had held the position since 1995. In 2001 Mr Salt indicated he no longer wished to remain in the role without a salary increase. From 2001 to 2003 there followed a period where Mr Salt was unwilling to sign a new contract. He believed the then Deputy Governor had complaints about his performance and he was distinctly unhappy with the situation.

By March 2003 Mr Fell, the Governor, was concerned that Mr Salt was deliberately undermining the office and authority of the Governor. In September 2003, following an unsuccessful mediation, Mr Fell dismissed Mr Salt by email giving him one month's notice. Mr Salt raised a personal grievance claiming unjustified dismissal.

The Employment Relations Authority found the dismissal was unjustified on procedural grounds and awarded Mr Salt reimbursement of wages and superannuation as well as compensation, but found his conduct had contributed to his dismissal, and adjusted the damages accordingly by 50%. This adjustment was based on a series of emails that were not discovered until after Mr Salt was dismissed.

The emails contained highly disparaging comments about the Governor and other Government officials.

Mr Salt challenged the reduction of remedies in the Employment Court and then the Court of Appeal. The Employment Court found that the Authority was correct in taking the subsequently found emails into consideration when assessing Mr Salt's contributing behaviour and reducing the remedies by 50%. The

Court of Appeal agreed with the outcome, although it reached its conclusion by a slightly different legal path.

The Court of Appeal decided that “subsequently discovered misconduct of a significant nature could be taken into account in determining remedies under Section 123 of the Act”. The Court therefore could and should take the emails into account when

determining wages, reimbursement and compensation. Furthermore, Mr Salt’s behaviour was so bad that if the employer had known of it then, the dismissal would have been justified. As a matter of “equity and good conscience” the wages reimbursement should be modest, and the 50% reduction was appropriate.

These Boots are Made for Walking - The Walking Access Act 2008

If you are a farm owner this Act won’t walk all over you!

On 25 September 2008 the Walking Access Bill was passed in Parliament. The origins of the Bill hail back to 2004 when the Government floated the idea of creating marginal public strips across privately owned land to allow all New Zealanders access to important recreational waterways. Property owners were concerned law may be passed to compulsorily acquire privately owned land for public walkways and farmers raised various concerns related to disruption of stock, damage to private property near the walkways and public safety. One major concern was their own potential liability for accidents on their property.

In answer to these concerns a Walking Access Consultation Panel was established that received almost 1400 submissions in response to its consultation document. The Panel made various recommendations that have now been enshrined in the new Act.

The Walking Access Act 2008 (“the Act”) establishes a New Zealand Walking Access Commission (“the Commission”) to enhance and extend walking access to our great outdoors. The Commission will form national strategy and provide national leadership to co-ordinate access among key stakeholders. The Commission will also provide advice and information on walking access routes, determine the nature of the access (i.e. walking, bicycles, access with motor vehicles, dogs and use by hunters) negotiate new walking access across private land and facilitate the handling of any disputes.

The Commission will develop, promote and maintain a code of responsible conduct for users of walkways that will include such matters as

- Standards of behaviour to be observed.
- Information about Maori customs, values and practices.
- Maori relationships with the land and waterways.
- A summary of benefits conferred and obligations imposed by the Act, and

- Any such other matters that the Commission feels would be beneficial to users of walkways and relevant landowners. A draft code is to be prepared as soon as practicable.

The Act preserves private property rights and provides that public access to private land should be achieved through negotiation and agreement with landholders rather than compulsory acquisition. It sets out the process that must be followed to declare a walkway over public land and to negotiate a walkway over private land and Maori freehold land.

Section 54 of the Act sets out a number of strict liability offences that may be incurred while using walkways. Strict liability offences include:

- Discharging a firearm
- Setting a net, trap or snare
- Placing poison or explosives
- Lighting a fire
- Taking plants
- Using a vehicle
- Taking a horse or dog on a walkway without authority

Section 56 sets out offences that require knowledge, intent or recklessness, such as interfering or disturbing livestock or wildlife, damaging or destroying structures and attempting to intimidate persons using a walkway.

The Act provides for the appointment of enforcement officers, for a term not exceeding 3 years, who have powers to prevent or stop offenders. A fine not exceeding \$5,000 may be imposed for offences under section 54 of the Act and a fine not exceeding \$10,000 for offences under section 56 of the Act.

Within 11 years from the commencement of the Act the Minister must report on a review into the Act and any recommendations for changes to the Act.

You can find out more about the commission at its website, www.walkingaccess.org.nz.

Family Trusts – Some Common Pitfalls

Introduction

In the course of trusteeship, trustees make decisions that will impact on the assets of the trust. If made incorrectly, trustees' decisions can lead to personal liability if the trust suffers a loss.

Potential problems could arise, especially in the current economic climate, due to such issues as:

- A drop in asset values
- Excessive trust borrowings
- Loss of income from trust assets, or from a beneficiary's company
- Trust assets used as security for company/personal borrowings of a beneficiary/person who established the trust

Trustees are obliged by law to have the best interests of the beneficiaries at the core of decision making, not the best interests of the settlors (the people who established the trust).

Trust secures family company borrowings

It is common for trustees to agree to provide mortgages over trust property and provide corresponding unlimited liability guarantees in favour of another entity/borrower, such as the family company, which might run the family business or operate the family farm.

The problem arises when the company is then unable to meet its loan repayment commitments and the bank is required to sell trust property to pay for non-trust borrowing. The decision to provide guarantees and mortgages to the bank for company borrowing can be the trust's undoing.

Before they provide guarantees and mortgages the trustees must consider whether this is actually in the beneficiaries' best interests. For example, was the trustees' decision prudent in light of the financial situation of the company, and was the guarantee and loan structure reviewed on an ongoing basis?

Also, before guarantees and mortgages are given, the trustees are required to check the trust deed to ensure there is power in the deed to provide such guarantees and mortgages.

Resettlement of trust assets

Trust deeds should contain a provision to allow the trust to resettle its assets on another trust provided the resettlement is for the benefit or advancement of one of the beneficiaries of the trust. If the trust deed has a power to resettle, and the trustees are asked to resettle, they are required to conclude that it would be in the best interests of the beneficiaries to do so and that it is a proper exercise of the power of advancement to resettle trust assets on one, or a group of, beneficiaries.

This is a decision not to be made lightly as the remaining beneficiaries may be interested in the details of the resettlement, not to mention the Inland Revenue Department. The trustees are less likely to be personally liable if they turn their mind to the best interests of the beneficiaries before making the decision.

Minimising the chances of an incorrect decision

Trustees minimise the likelihood of making incorrect decisions if they consult and meet regularly with their independent trustee, accountant, and lawyer to review the current position. Communication is vital and provides an extra level of security. Trustees who proceed to administer the trust without seeking external assistance do so at their own peril.

Trustee decisions would be made easier by the existence of a regularly updated settlor memorandum of wishes that sets out the settlor's intentions regarding the trust fund. It should be easily accessed by the trustees and kept up to date.

Conclusion

In short, trustee obligations are not simple and require careful thought. It is always best to consult with professionals if unsure and to ensure there is a clear set of trust documentation to avoid problems in situations such as the above.

The Early Bird Catches the Worm – Time Limits in Civil Claims

Imagine that 2008 was just not your year. It began with the discovery that your home, bought four years ago, is a leaky home and needs major repairs that will cost over \$200,000.

A short time later your widowed mother died, leaving her entire estate, worth several million dollars, to your siblings because of a recent falling out with you – and that after years of living with you and your family. Then, two months ago, you lost your job

because you stood up to your manager, who is a workplace bully. The final straw came when your plasma TV died last night during a test match, after having intermittent problems since you bought it 18 months ago.

You decide it is time to right some wrongs and go to see your lawyer. One of the issues that will be raised with you is limitation periods, which are time limits within which certain claims must be brought.

Some of the limitation periods that might apply in the present scenario include the following.

You believe that the real estate agent who sold you the house misled you and you would like to bring a claim under the Fair Trading Act 1986. However, your claim under that Act might be barred because applications under the Fair Trading Act must ordinarily be made within three years of the date of the event.

You then consider bringing a claim through the Weathertight Homes Resolution Service against the architect, the developer, the builder, the roofing company and the council that issued the code compliance certificate. Unfortunately, the house is 11 years old and section 393 of the Building Act 2004 prevents claims being brought 10 years or more after the date the work was carried out.

You may have better luck bringing a claim against your mother's estate pursuant to the Family Protection Act 1955 (or on the basis of a testamentary promise, if you had been led to believe that you would inherit some of the estate). The general rule for bringing such claims is that they must be filed within 12 months of the date that administration or probate is granted. However, in

certain circumstances you need to be even quicker, because the estate may be distributed after six months.

What about your case for unfair job dismissal? If you wish to bring a personal grievance pursuant to the Employment Relations Act 2000 against your employer, it must be submitted to the employer within 90 days from the date you were dismissed.

Surely the Consumer Guarantees Act 1993 won't let you down. However the Act provides that you must reject goods "within a reasonable time" and what is reasonable will depend upon the type of goods and how they were used. You might not be entitled to compensation if it turns out that the minor problems you have been having for 18 months should have been fixed and would have prevented the TV from stopping altogether.

These are only a handful of examples of the limitation periods that apply to a vast array of legal situations. While some of the limitation periods can be extended by a court, the examples highlight that it may be crucial to seek legal advice as soon as possible. Most claims must be brought within a certain time, or the opportunity to obtain a remedy will be lost.

Snippets

Building Act Update - Kiwi DIY Tradition Improved

Hon. Shane Jones, the Building and Construction Minister, has taken steps to cut back on DIY building regulations enacted as a result of the leaky building crisis.

The Government has realised that the response to the crisis was too extreme and has reduced the scope of work that requires building consent. Schedule 1 (Exempt Building Work) of the Building Act 2004 was amended by Order in Council on 16 October 2008. The work that does not require consent now includes such things as:

- Changing existing household plumbing
- Removing or changing non-load bearing walls
- Installing or replacing windows or exterior doors
- Making a home more accessible by widening doorways and building access ramps
- Construction of retaining walls that retain not more than 1.5 metres depth of ground
- The construction, alteration or removal of a pergola

These changes will allow Kiwis to once again take up their tools and go about what they have always done in that long standing tradition of DIY.

Enduring Powers of Attorney

On 26 September 2008, the Act governing powers of attorney was amended. In brief, the Act has made powers of attorney documents more secure meaning they are less able to be abused by attorneys to whom power to act on a donor's behalf is given.

Among other things, the signature of the donor must be witnessed by a lawyer, qualifying legal executive, or an officer of a trustee corporation. The witness to the donor's signature must certify that he/she is independent of the Attorney.

Therefore, in the common situation where a husband and wife wish to appoint each other as attorneys, advice from two qualifying witnesses such as a lawyer/qualifying legal executive/officer of a trustee corporation is a necessity. Both parties should see their witness independently of the other.

The independent advice requirement will be the major effect of this amendment and is one of the measures that aim to ensure powers of attorney achieve what they set out to achieve.

If you have any questions about the newsletter items, please contact us, we are here to help.