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## NEWSLETTER

November 2010

Dear Client

In this issue we address a number of current legal issues.

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### PATHS, TERRAIN AND AUTOMOBILES - WHAT IS REASONABLE ACCESS TO LAND?

The Court of Appeal recently considered this issue in the case of *Murray and Tuohy v BC Group (2003) Limited and Ors [2010] NZCA 163*. 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 requiring their immediate neighbours to provide

access to their property through a right of way easement, on the basis that 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.

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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 reasons of the Court, stated "we cannot accept that it is necessarily the case that under modern day community standards vehicular access on to 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

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### **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 *FXHT Fund Managers Ltd v Oberholster* held that directors who are not actively engaged in the company or '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.

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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.

## **POLICE SAFETY ORDERS**

As from 1 July 2010, amendments to the Domestic Violence Act 1995 now enable the Police to issue on-the-spot 'Police Safety Orders' ('PSO').

Under this new regime, a qualified constable may issue a PSO in a situation where the parties are in a domestic relationship, and where the Police have reasonable grounds to believe that family violence has occurred or may occur but there is insufficient evidence to make an arrest.

In issuing a PSO the constable must consider whether domestic violence is or has been taking place, the hardship the PSO may cause to any party and any other matters the constable considers relevant.

The PSO may last for up to 5 days and provides the victim with immediate protection. It is hoped that the order will provide a way of filling the gap between an incident occurring and the issuing of a Temporary Protection Order.

An important element of the PSO is that it does not require the consent of the victim. As a result victims who are too scared or intimidated to act will nevertheless be afforded the necessary interim protection to enable them to take further steps to secure their ongoing safety.

The person bound by the PSO order must:

- vacate the premises for up to 5 days,
- surrender all firearms and their firearm licence for the period of the PSO,
- not threaten, assault, intimidate or harass the protected person or encourage anyone else to do so, and
- not contact the protected person.

The PSO also protects any children that live with the protected person and suspends any parenting orders or access or care agreements that benefit the person bound by the order.

The conditions under a PSO are similar to those under a court ordered Protection Order. However, unlike a Protection Order, the protected person under a PSO cannot consent to residing with the person bound by the PSO.

In the event that the PSO is breached, the bound person can be taken into custody and must appear before the Court. The Court may then:

- direct the Police to issue a further PSO,
- release the bound person without further order, or
- issue a Temporary Protection Order if the protected person does not object.

Concerns have been raised that in some circumstances the consequences for the bound person following the making of the order may be harsh. These orders, however, have the potential to assist victims to escape domestic violence, especially as the victim's consent is not needed for an order to be made.

## **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

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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. having not made 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.

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### **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 ownership as 'tenants in common'. 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 that were originally 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 and did not form part of the estate.

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 (a half share of the two properties) 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 prior to death and as such the circumstances were confidential.

#### **Joint Tenancy or Tenancy in Common?**

If property is owned as joint tenants then it does not become part of the estate and transfers by survivorship to the surviving joint tenant regardless of the contents of the will. If property is owned as tenants in common, then it 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

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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.

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## **90 DAY TRIAL PERIODS - EMPLOYERS** **BEWARE!!**

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. The main benefit of a trial period is that it allows an employer to dismiss an employee within the 90 day trial period without fear of a claim from the employee of unjustified dismissal.

The Department of Labour has recently conducted an evaluation of trial periods and found that approximately 40% of employers stated that they would not have hired their last employee without the trial period and 74% of people hired on a trial period have retained their positions. It therefore appears to have been a win-win for both employees and employers.

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.

In this case Heather Smith was working in the Stokes Valley Pharmacy when it was sold. Heather

was offered a job with the new employer 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 can 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 it was only for a day, and therefore she 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 as it was provided to her on 29 September 2009. The Court rejected this argument and held that the Agreement required execution by signature and until it was signed the Agreement remained a draft that could potentially be amended. The result was that 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 found 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 that they must be given one.

It was also found that if an employer seeks to rely on a trial period, the employment agreement 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, in this case Heather's contract required 4 weeks notice. Therefore, the court found that the two weeks notice period that was given was deficient

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and subsequently 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.

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### DIRECTORS RIGHT TO RELY ON SPECIALIST ADVICE

The recent 'Feltex Five' decision, *Ministry of Economic Development v Feeney and Ors*, demonstrated that directors may avoid being held personally liable in certain circumstances if they have relied on expert advice.

The decision involved the prosecution of five Feltex directors ('Directors') for failing to disclose breaches of an ANZ loan agreement and for classifying this ANZ liability as a current liability in their financial reports. While the Directors did not deny that their reports breached the Financial Reporting Act 1993 ('FRA'), they argued that they had a defence under s40 FRA, in that they took all reasonable steps to ensure that the requirements under the FRA had been met. The Directors argued that they relied on expert advice which led them to believe that their reports were compliant.

At the time the financial reports were prepared, the company was transitioning to new financial reporting standards and commissioned a team of accountants to review these standards and the company's financial reports. However, it was reported that the accountants incorrectly advised the company of the requirements under the new standards and their advice led to the breach and subsequently the prosecution of the Directors. The issue was whether the Directors could rely on this expert advice or whether they should have taken further steps to meet the requirements under s40 FRA.

The Court held it was necessary to determine whether the Directors had taken all reasonable steps in light of the protections under the Companies Act 1993 (the 'Act'). Under s138 of

the Act, directors are able to rely on information and advice from a professional adviser or expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence.

This defence applies where it is evident that directors:

- acted in good faith,
- made proper inquiries where the need for inquiry is indicated by the circumstances, and
- had no knowledge that such reliance is unwarranted.

In this case it was found that a reasonable director, having read the accountants' report and having attended their meeting, would have been left with no doubt that the financial statements complied with the new standards. Therefore the Directors had no knowledge that reliance was unwarranted and were entitled to believe that the work undertaken by such a highly reputable firm was within their expertise. Furthermore, they were aware that the transition to the new standards was very complex and had put in place a comprehensive strategy to manage it.

Therefore it was held that the Directors took all reasonable and proper steps to ensure the requirements of the FRA were complied with and there was no evidence of an intention to mislead. Each of the Directors was found not guilty.

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### ALCOHOL LAW REFORM PACKAGE

There has been a reported increase in the consumption of alcohol since the liberalisation of the liquor laws in 1989, which made alcohol more affordable and more widely available. On 23 August 2010 the Minister of Justice, Hon. Simon Power, announced a new Alcohol Law Reform package. This new package is based on the Law Commission's report "Alcohol in our Lives: Curbing the Harm" (NZLC R114, Wellington 2010) a follow up on the initial report "Alcohol in our lives" (NZLC IP15, Wellington, 2009), and incorporates 126 of their recommendations.

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The Law Commission's reports revealed that 54% of people under 25 and 25% of adults consume large quantities (6 plus standard drinks for males and 4 plus standard drinks for females) of alcohol when they drink, and that the number of liquor licences has doubled in the past two decades. However, it identified the main concerns for society are those aged 14-19 who are drinking at an earlier age and consuming larger quantities of alcohol than previous surveys have shown for this age group.

The problem with this heavy drinking culture is the risk that it poses and harm that it causes both to the individual and to society. Alcohol contributes to 1,000 deaths per year and is a factor in 31% of all police-recorded offences, 34% of family violence incidents, and 49.5% of all homicides. The aim of the reform package is to change this drinking culture and reduce the harm it causes by restricting both access to alcohol and the advertisement of alcohol.

The reforms will provide the following:

- A split purchase age, 18 years for on-licenses and 20 years for off-licenses.
- Restricting RTDs to 5 per cent alcohol content and limiting RTDs to containers holding no more than 1.5 standard drinks.
- That it is an offence to supply alcohol to a person under the age of 18 years without their parent's or guardian's consent, and there is also a requirement that alcohol is supplied responsibly.
- That the Minister of Justice may ban alcohol products that are particularly appealing to minors or dangerous to health.
- It is an offence to advertise alcohol in a way that appeals to minors.
- Communities are to have a greater say on the concentration, location, and opening hours of alcohol outlets through the use of local alcohol policies.
- For a restriction of maximum opening hours for off-licenses to 7am - 11pm and for on-licenses, club licenses and special licenses to 8am - 4am.
- Clarity to the law that dairies and convenience stores are not "off-licenses" (and therefore cannot sell alcohol), together with increasing penalties for a range of licence breaches.

- An extension of liquor bans to include places that the public has legitimate access to, for example car parks and school grounds.
- Strengthening the offence of promoting excessive consumption of alcohol by having it apply to any business selling or promoting alcohol and providing examples of unacceptable promotions such as giving away free alcohol.
- Improved public education and treatment services.

It is anticipated that these reforms will provide a balance between restricting the use of alcohol and not inconveniencing those who drink responsibly. However, as has been reported in the media, by trying to satisfy everyone the changes may not go far enough to make a significant difference.

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### 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.

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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 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 acting for up to five years if it is found that they have breached companies related legislation or if they have been misleading in any way.

It is anticipated that these changes will make it easier to deal with compliance issues around company registration and to remedy issues surrounding the authenticity of directors and shareholders of companies. Individuals will be able to check the Companies Office records if they have any concerns surrounding a company with which they are doing business. Mr Power states that 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.

We would also like to welcome Aaron Nicholls, as a Solicitor, to our firm. Aaron has been practising law for the past 13 years and specialises in commercial, companies, insolvency, creditor's proposals, conveyancing and trusts.

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