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

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Mediation

For anyone who has ever been embroiled in any form of dispute, whether commercial or otherwise, it can seem that the cost of justice is prohibitively high. Lawyers cost money, filing documents in court is expensive and time consuming, and our courts are overloaded so the wait to appear in court is often long, and the outcome is uncertain. It is little wonder then that many people turn to mediation as a means of resolving disputes, small or large, in a cost effective and timely manner.

The justice system has recognised the effectiveness of mediation. The High Court, District Court and Family Court are all utilising mediation as a way to promote early resolution of matters rather than proceeding through the court process.

Mediation is used to resolve such issues as tenancy disputes, employment disputes, civil disputes, claims to the Health and Disability Commissioner, claims under the Human Rights Act, community issues, environmental issues, and property disputes to name just a few. As you can see the application is endless.

For those of you who wish to resolve matters through mediation, below is a brief outline of what you can expect.

1. Depending on the type of dispute, mediation may be ordered by the court following the initial filing of an application. Alternatively, parties may agree that they will endeavour to resolve their differences through mediation and the parties themselves will choose a mediator.
2. There are many capable mediators in New Zealand (LEADR NZ and AMINZ, amongst others, may be contacted for a list of accredited mediators in your area).

3. You may retain your lawyer to assist with the mediation process if you choose, or you may attend mediation by yourself. Whether you wish to retain your lawyer will often depend on the legal complexity of the issue.
4. Mediation will generally cost somewhere between \$3,000 to \$5,000 plus GST per day, however you should check this fee out with your mediator. The fee will usually be split between the parties and is therefore much less expensive than litigation.
5. The mediator will sometimes meet separately with each party prior to mediation to gain an overview of the issues, discuss the mediation process with you and have an 'agreement to mediate' document signed.
6. Everything that occurs and is said at mediation is confidential to the parties except in circumstances where the parties agree otherwise.
7. On the day of the mediation, the parties will meet together with the mediator. The mediator will make a brief opening statement and then each party will have an opportunity to make an opening statement setting out how they see the problem. The mediator will then identify the issues and the parties will agree on an agenda.
8. The parties will then be invited to address each agenda item and the mediator will assist the parties in this process. This is an opportunity to air grievances and express feelings as well as discuss the facts and the merits of each party's case.
9. At any time during the process, the mediator may wish to meet with a party individually to discuss issues in more depth and generate options for resolution. Anything that is said at that time is confidential and will not be repeated or referred to by the mediator when the parties meet together again.
10. There may be several independent sessions or none at all depending on the needs of the parties.
11. The mediator's role is to assist the parties to explore the issues and develop options for resolution, not to make a decision for the parties. If the parties reach agreement, this will be recorded in writing.

Mediation generally has a high settlement rate with reports of 75 – 80% of cases settling at mediation. Please contact us if you wish to know more about the mediation process.

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.

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

Director's Duties

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.

Animal Welfare Bill

Incidents of animal cruelty are increasingly reported by the media yet despite the abundance of offending there have been very few prosecutions in relation to animal cruelty, and only a 3% imprisonment rate.

The Animal Welfare Amendment Bill has been introduced to send a clear message to the public that offending of this nature will not be tolerated. It is believed that in the absence of government

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.

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.

intervention, incidents are only likely to increase. There is also a growing body of evidence linking animal cruelty to aggression towards humans. The Hon. Simon Bridges, who advanced this Bill, believes that if we treat animal cruelty seriously we may also help prevent further serious offending.

Some of the changes proposed by the Bill follow:

An increase in the maximum sentences for various ill-treatment offences. The penalty for wilful ill-treatment will increase from three years to five years imprisonment, together with a maximum fine of \$100,000 for individuals and \$500,000 for a body corporate.

A new offence of reckless ill-treatment will be introduced to fill the gap between the offence of wilful ill-treatment and simple ill-treatment. This provision will apply when the offender knew or appreciated that serious harm could occur and unreasonably still took the risk. The penalty will be a maximum of three years imprisonment, or a fine not exceeding \$75,000 for an individual and \$350,000 for a body corporate. Federated Farmers have expressed concern that this new offence may place farmers at risk of prosecution in the course of their normal farming duties and that it does not take into account the complexities and financial realities of animal ownership for production. Parliament's view is that the new section is essential to ensure prosecution and harsher penalties for those serious offences that do not meet the threshold for wilful ill-treatment.

It will also be more difficult to remove an order that disqualifies an individual from owning an animal for a period of time. Individuals will not be able to apply to have an order removed within two years of it being made, or for the period specified in the order. The penalty for contravening a disqualification order will increase to a maximum of three years imprisonment or a fine not exceeding \$75,000 for an individual or \$350,000 for a body corporate.

The rules around forfeiture of animals will be broadened to enable all animals owned by the offender to be removed, and not just the animal that is the subject of the offence. Unfairness around forfeiture is to be avoided by ensuring that an owner does not have to forfeit their animal if the offending behaviour was committed by someone else.

Overall it is believed that these new provisions will strengthen the Act and enable serious offending against animals to be dealt with more effectively.

Snippets

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. 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.

Big Brother may be watching you!

The internet is an indispensable 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. Watch this space for a full report in the next issue.