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focused on client satisfaction.*

NEWSLETTER

Issue 2
Winter 2009

Welcome to Issue 2 of the PMC newsletter for 2009.

August already! A tough winter is almost over. We look forward to Spring and a significant rise in temperatures – hopefully also in the standard of rugby displayed by some international teams!

Happy reading!

Inside this edition

- **Redundancy**
- **Mortgagee Sales – put your ducks in a row before you put pen to paper**
- **Domestic Violence Reforms**

Contact us by:

Telephone: 03 687-9480

Facsimile: 03 688-9749

153 Stafford Street, TIMARU

Email: admin@pmc-law.co.nz

Website: www.pmc-law.co.nz

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Our People

Partners

Mark Clark
Wayne van Vuuren

Associates

Nina Mackay
Teresa Lawrence

Consultant

Michael Mayman

Staff Solicitors

Christie O'Driscoll
Maria Green

Legal Executives

Michael Maynard
Joy Miller
Val Robinson

Administration Manager

Ally Crane

Trust Account Administrator

Dawn Ussher

Legal Secretaries

Margaret Mayston
Angela McGrath
Maureen Fitzgerald
Kate Hayman
Kay McKirdy

Reception-Administration Assistants

Tegan Brady
Renee Bloxham

Redundancy

With the world in the grip of a recession, New Zealand is facing challenging economic times. Employers are experiencing the economic squeeze and one of the solutions they are likely to turn to is restructuring and/or redundancy. Unless employers deal with these situations carefully and comply with the legal requirements, they may end up facing additional costs in the form of personal grievances raised. Legal advice at the outset may save time, stress and money.



Employers are entitled to run their business as they see fit. However, they must have genuine commercial reasons for making employees redundant and they must follow a fair process. It is in the process that employers often come unstuck.

As a guideline, employers must be able to show:

- the redundancy was based on genuine commercial reasons
- the provisions of the employment agreement have been followed
- the employer has been fair and reasonable in the way they have carried out the redundancy, and
- the action the employer has taken is fair and reasonable in all the circumstances.

Genuine commercial reasons for redundancy

Genuine commercial reasons for redundancy may arise from restructuring and/or contracting out work, a decline in demand, or a sale or transfer of the employer's business. Employers must not use redundancy as a way of dismissing an employee who is not performing.

Where redundancy occurs as a result of restructuring, the employer must make sure that any new positions formed are not substantially similar to the position being made redundant. A position that has a different title, but the same duties, will most likely be substantially similar. The following are just some of the factors that will be relevant:

- substantial changes to duties
- change in level of seniority
- changes to salary or benefits
- change to the number of hours worked
- increased or reduced responsibility for other staff

Process

Having passed the 'genuine reason for redundancy' hurdle, employers must follow a fair process, as required by the duty to act in good faith. This will generally involve:

- consultation about any proposal that may impact on the employee's employment
- a consideration of any alternatives to dismissal e.g. redeployment, reduction in hours, job sharing
- providing affected staff with information about proposed redundancies and the selection criteria for appointment to any new positions
- following the terms of the employment agreement with respect to notice periods, payment and redundancy compensation
- advising the employee of their right to representation and offering support, and
- where possible, providing counselling, career, financial and retraining advice.

Whether the process has been fair will depend on all the circumstances of the case.

Employers should note that the National Government has introduced the "ReStart" package to assist redundant workers. "ReStart" provides short term relief for low to moderate income families with children and also those already receiving the maximum accommodation supplement, along with help with securing new employment.

A redundancy tax credit is also available that makes taxing redundancy payments fairer when the redundancy payment has pushed the employee into a higher tax bracket as a result of receiving a lump sum redundancy payment.

Mortgagee Sales – put your ducks in a row before you put pen to paper

If you buy a property at a mortgagee sale, be aware that you are entering a contract that is quite different in its nature to an agreement entered into in other circumstances. The agreement is likely to be weighed heavily in the mortgagee's favour as mortgagee sales involve factors outside of the mortgagee's control, which it will want to protect itself from.

This may include a very unwilling and impecunious owner occupier who is being forced to leave their home by the mortgagee which assisted them to get there in the first place. In such circumstances, the mortgagee is usually unwilling to negotiate terms with the purchaser and adopts a take-it-or-leave-it stance.

It is not uncommon for purchasers to face difficulties after settlement, such as having to evict a previous owner occupier, or having to deal with damage caused to the house by the disgruntled owner. In one instance, the occupier took all the chattels from the property and sold them to pay other sundry debts, leaving the purchaser out of pocket.

Other common issues for purchasers at mortgagee sales can include:

- There is less protection for purchasers as the agreement usually does not include standard provisions. For example, the mortgagee will have removed the section in the agreement relating to the vendor's warranties and will have removed the right for the purchaser to approve title. Often purchasers will not be able to view the property beforehand as the owner does not allow an inspection, so it will not be clear whether work has been carried out that should have required a permit.
- Purchasers may not be able to claim against the mortgagee for late settlement/possession as there may be situations where the mortgagee is unable to evict the owner. The mortgagee does not guarantee that it will give vacant possession on the day of settlement.

- Once the contract is signed, it is unconditional and so requires thorough due diligence prior to signing. Even though a contract is unconditional, the terms may allow the bank to cancel the agreement prior to settlement if the owner pays the debt. This means the purchaser is unable to know whether settlement will actually occur until the day of settlement.
- The mortgagee may require the purchaser to insure the property from the moment the agreement is signed, because the mortgagee ceases to accept responsibility for loss from the moment the hammer falls.

Buying a vacant property at a mortgagee sale reduces the chance of the house and chattels being interfered with prior to, or after, settlement.



Mortgagee sales offer an opportunity to buy a property at a reduced cost. To lessen the chances of problems occurring, you must understand the agreement well and undertake a thorough due diligence investigation prior to entering into the agreement.

You should seek legal advice before the auction, as well as checking the title, council records and the property in advance, if possible. However, there may still be some issues that arise that are out of your control as purchaser.

The above is by no means an extensive list of the issues that a purchaser could face, but it is a reminder to put your ducks in a row before putting pen to paper.

Domestic Violence Reforms



New Zealand continues to have relatively high rates of domestic violence compared with other OECD countries despite having comprehensive

legislation aimed at protecting women, men and children from violence in the home. For instance, in 2007/2008 family violence accounted for approximately 39% of homicides, 42% of kidnappings and abductions, 44% of grievous assaults and 64% of serious assaults.

These shocking results may reflect an increase in violence from previous years, but could also reflect more public reporting of violence as a result of the domestic violence awareness campaign, "It's Not O.K.". Regardless, the figures are alarming and prompted an investigation into the effectiveness of current domestic violence legislation.

Although the current legislation was not actually found to be defective, it required strengthening in order to better protect victims of domestic violence.

The result is the Domestic Violence Reform Bill 2008, which was introduced to Parliament on 30 September 2008.

To summarise, the key areas of reform include:

- *enhancing the ability of police to take more immediate action to protect victims of domestic violence.* This is particularly the case during callouts to incidents in the home. The introduction of the 'safety order' will allow police to remove the alleged violent party from the home for a period up to 72 hours, allowing time for the victim to take any steps necessary to ensure their safety, such as applying for a protection order. Furthermore, where police suspect that someone has committed a breach of a protection order, they will have the ability to arrest them without having to obtain a warrant.
- *amending the manner in which applications for temporary protection orders are dealt with.* Specifically, the Court will be required to give prompt written reasons if it decides

to decline a without-notice application for a temporary protection order. This will allow an applicant who perhaps fears repercussions, to discontinue the application before it is served on, and therefore comes to the notice of, the other party.

- *the provision of better information and programmes for both victims and perpetrators of domestic violence.* It is proposed that every person under a protection order, including children, receive an offer from the Court to attend an information session about how to make use of the protection order and what other programmes and assistance are available to them. It is also proposed that the range of programmes be extended. There appears to be no provision in the Bill for the availability of programmes for victims or perpetrators before matters escalate to the point where the making of a protection order is necessary.
- *amending the Sentencing Act 2002,* by requiring the Court sentencing a person convicted of domestic violence, to consider making a protection order on behalf of the victim. The Court must be satisfied that an order is 'necessary' – as is currently the case under the Domestic Violence Act 1995. The victim must also consent to the making of a protection order.
- *amending the Care of Children Act 2004* to better protect children from all forms of violence, by ensuring the definition of violence is the same in both the Domestic Violence Act and the Care of Children Act.

The Bill is currently awaiting its first reading.