

*Our aim is to provide access to excellent and affordable legal services  
focused on client satisfaction.*

# NEWSLETTER

Issue 4  
Summer 2008

Welcome to the last edition of the PMC newsletter for 2008. From all of us at Petrie Mayman Clark, Merry Christmas and Happy New Year!

Our office will be closed from 5.00pm Tuesday 23 December 2008, reopening at 8.30am Monday 12 January 2009.

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While we are happy to continue mailing our quarterly newsletters to you, we do offer the following options:

- ***Email: please contact us if you would like to receive them by email, or***
- ***You can download each quarterly newsletter from our website [www.pmc-law.co.nz](http://www.pmc-law.co.nz)***

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# Family Trusts — Some Common Pitfalls

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## 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 resettlement 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 resettlement, and the trustees are asked to resettlement, 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 resettlement 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.

## Time Limits in Civil Claims

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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.

## Update on Enduring Powers of Attorney

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On 26 September 2008, new laws governing Powers of Attorney came into force. 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.

Amongst other things, the signature of the donor must be witnessed by a lawyer, qualified 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, if we consider a typical situation where a law firm acts for both husband and wife who wish to appoint each other as their Attorney, then:

(a) the law firm can draw up the documents; but

(b) the signatures of the husband and wife as donors must be witnessed by separate independent witnesses. This will involve the husband and wife meeting with separate qualifying witnesses at different law firms or Trustee offices.

For most clients, the main impact will be seen in the cost in establishing an attorneyship. For a husband and wife combination, we estimate the cost as being between \$600.00 and \$900.00. This in effect will prevent people on low incomes, pensioners and beneficiaries completing Powers of Attorney.

It may see some people opting for a General Power of Attorney instead of an Enduring Power of Attorney, the main difference being that a general power ceases to operate in the event that the donor loses the capacity to make decisions, whereas an enduring power continues through ("endures") any period of incapacity.

# Children's Participation Increased by Changes to Family Courts

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## Counselling and Mediation

Children now have the opportunity to participate in counselling when decisions are being made about parenting matters, due to the passing of the Family Matters Bill on 2 September 2008.

Provided the parents agree, children will be able to attend part of the counselling, or speak with the counsellor directly. Up until now, children's involvement in counselling was not specifically provided for by legislation.

In many cases, the benefits to both the children involved and their parents will be significant, as from an early stage in the process the child's view on what is important can be expressed and considered.

As well as counselling, parties involved in parenting matters (and other matters such as relationship issues) will be able to request family mediation to help them identify issues and to resolve matters by agreement. The mediation will not be overseen by a Family Court Judge but by a specialist mediator. The purpose of the mediation is to divert less complex family disputes away from formal court proceedings and to resolve them quickly and inexpensively. Children can also be involved in the mediation and will be able to attend the counselling, as mentioned above, to help them formulate their views.

Following the mediation, the mediator will be required to provide a report to the Court detailing the resolution reached between the parties, the issues still to be resolved and non-binding recommendations as to the next steps to be taken by the parties.

If parties (now including grandparents and other family members) are considering entering into a parenting agreement, they can request mediation or counselling. These can also both be accessed to help resolve a dispute arising from an existing agreement.

Other changes resulting from the passing of the Family Matters Bill include:

- Extending the duties of the Family Court Registrars.
- New positions of Senior Family Court Registrars, with the intention that they will be able to relieve the pressure on Judges and reduce delays by dealing with, for example, routine procedural matters.



- New provisions for openness in Family Court proceedings have also been included with support persons and accredited media allowed to attend proceedings. Reports on the proceedings can be published by the media, but it is an offence to publish a report without leave of the Court where the report includes identifying information and a child or vulnerable person is involved. Support people will also be able to attend proceedings provided the judge agrees, and
- The restriction preventing Family Court Judges wearing gowns in court has been removed.

## Implementation

The above changes are intended to increase the openness of Family Court proceedings and to improve the efficiency and effectiveness of the Family Court. The Bill was divided into 12 amendment Acts and will be implemented in stages. It is intended that most provisions will be in place by early 2009, although new services like the counselling for children, and family mediation, will take longer and the exact commencement dates are yet to be announced.

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