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NEWSLETTER

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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.

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.

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:

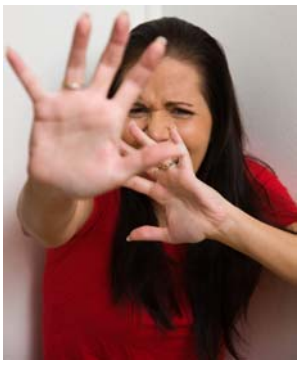
- The duty to act in good faith and in the best interests of the company.
- The duty to use their powers for the purpose for which they were conferred and not for any ulterior motive.
- The duty to act in accordance with the obligations under the Companies Act 1993 and the company's constitution.
- That 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 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.

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 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.

Outlined below are some of the changes proposed by the Bill.

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 realties 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 indispensible 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.

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