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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 OK". 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.

LOOK BEFORE YOU LEAP - FAMILY TRUSTS AND THE FAMILY PROTECTION ACT

Family trusts are an ideal way to protect assets from various threats, including for example, claims under the Property (Relationships) Act 1976 and being eroded by rest home subsidies. However, in the recent case of *X v X*, the Court of Appeal has highlighted the risk of losing control over assets placed into trust and the difficulty in getting that control back once it is gone.

Section 182 of the Family Proceedings Act 1980 has been described as being a trust busting mechanism whereby the Court can go behind the provisions of a Trust Deed in situations where there has been a significant change of circumstances since the Trust Deed was entered into.

In *X v X*, the husband and wife settled a trust that, by the time of their separation, owned assets worth between \$7-9 million. During the course of the relationship the couple had moved to Australia and, in order to make their trust more efficient under Australian tax law, Mr and Mrs X had resigned as both appointers and trustees of the family trust.

The trustees of a family trust have the authority to deal with the assets of a family trust. This includes the ability to sell or purchase additional trust assets, allow charges and mortgages to be registered over trust assets, as well as distributing trust assets or trust income to beneficiaries. The appointers of a trust have the authority to appoint or retire trustees.

By retiring as both trustees and appointers of their own family trust, Mr and Mrs X effectively gave control of their assets to independent third party trustees.

Following the breakdown of the relationship, Mr X applied to the Court under section 182 of the Act to have the trust assets of the family trust resettled onto three new trusts. Mr and Mrs X would each control a trust containing 25% of the assets of the former family trust. A third trust would be created with the remaining 50% of the former trust assets for the benefit of the couple's children. Despite the fact that the Trust Deed contained express provisions to allow for the former family trust to be resettled, the Court of Appeal dismissed the application by the husband.

One effect of this decision is to limit the applicability of section 182 of the Family Proceedings Act and make it more difficult for the Court to intervene in trusts that have been set up for a legitimate purpose.

The case highlights that when considering placing assets in a family trust, or dealing with family trust assets, it is crucial to take great care to consider the legal and practical implications of the decisions that you are making. Mr and Mrs X would have had fewer problems if they had retained the ability to control the trust, either by acting as trustees or, at the very least, by retaining the power of appointment.

FARM SALE TIME AGAIN

Introduction

This is the time of year when farmers, together with their advisors, start to prepare for the beginning of June when farms typically change hands. In many instances agreements for sale and purchase are already in place and both parties are waiting. Deposits have been paid, GST issues have been ironed out, and some elections would have been made if the farm supplies Fonterra. In other cases sharemilkers and farm employees have their

contracts in place. It is against this backdrop that lawyers move to centre stage.

Other issues along the way

Establishing the structure by which the farm is purchased will often require the collective wisdom of the farmers, lawyers and accountants. Structural options include a farming company, a trust for land with shares linked to a partnership for the farming operation, or a variation of this. Different structures

suit different farming operations and different family circumstances.

In many instances the herd has spent time off the main farm on runoffs and separate grazing blocks. Grazing agreements should be perused now so there are no issues as they terminate. Regular checking of the herd to ensure they are in good condition is imperative.

The agreements for sale and purchase usually include requirements concerning the fertilizing of the farm being sold, which paddocks are to be shut off and protected, what amounts of hay and silage must be left and so on. These details should be worked through early on so any omissions can be rectified, thereby preventing issues at settlement time. Rural real estate agents and farm advisors can be of assistance here. Many agents and farm advisors maintain a real interest and are very helpful on an ongoing basis, long after the deal has been struck. They do a great job in ensuring the finalizing of a myriad of practical farming matters and arrangements that need to happen at 1 June. The farmers themselves often get together with a round table approach to discuss issues and proceedings. If issues are left too late and become part of the legal settlement requirements, they are often harder to rectify and quantify. That is a position to be avoided if possible.

Plant and equipment should be in good working order. This can be reviewed early with the plant list checked through for accuracy. Another brief look will be necessary at settlement time.

SNIPPETS

Early release of deposit

If you are a purchaser of a property, have paid the deposit on the unconditional date, and are subsequently asked to agree to an early release of the deposit to the vendor (quite a common request), then think again! When a deposit is paid, the stakeholder (usually a real estate agent) is required to hold it for 10 days. Vendors often ask the agent to release the deposit early to use it as a deposit on another house. The agent can do so, provided the purchaser agrees. Be wary of agreeing to the release, because the transaction might not settle. If the transaction does not settle and the vendor has already spent the deposit, you as the purchaser have no security and your deposit is gone.

Retention of the deposit until settlement by the stakeholder has merit, especially where there is a mortgage on the title. If there is a mortgage, be aware that the deposit might be needed to settle the vendor's mortgage debt, and if released early and spent in other ways by the vendor, then the vendor might not be able to discharge the mortgage.

The key is to consider the issues carefully before agreeing to the early release of the deposit, particularly where the title is encumbered.

Financiers like all borrowing arrangements and documentation to be in place early. Often there is a sale and a purchase by the same farmer on the same day. All interlinking details, loan repayments, seasonal finance and structural changes need to be in place as early as reasonably possible, giving lawyers a chance to check matters over with the banks and to plan draw-downs.

Farmers now supply milk to various companies, and each company has its own arrangements with its farmer suppliers. The largest, of course, is Fonterra. There are many issues revolving around the Fonterra Share Register, including who is on the Register at 31st May 2009, what are the end of season movements and elections, at what price will the shareholding adjustments be made per share, what happens if milk supply has increased or decreased, what to do about additional shares if they are needed, and what forms require signature. And so the list continues.

Conclusion

As a final note it should be emphasised that lawyers, along with other advisors, must work closely with their clients, and vice versa, to ensure that between them all relevant matters are covered. Not all issues are strictly legal ones, but lawyers play a vital part in the process of buying or selling a farm. Seeking professional advice from the outset is an important step in ensuring a harmonious and successful settlement at the end of the process.

The Sale and Supply of Liquor & Liquor Enforcement Bill – Update

Introduced to Parliament in August 2008, the Sale and Supply of Liquor and Liquor Enforcement Bill is a response to public demand for Government action regarding youth drinking and alcohol related offending. The Bill proposes to amend the sale of Liquor Act 1989, Summary Offences Act 1981, and the Land Transport Act 1998.

The Bill takes a multifaceted approach towards encouraging a moderate drinking environment and reducing the normalisation of youth drinking. In summary, it proposes to:

- Improve community input into liquor licensing decisions. Local councils will be able to restrict the number of liquor outlets in an area, as well as their location and proximity to other community buildings such as schools.
- Require grocery-selling stores seeking a liquor licence to be at least 150 square metres or more in size. Existing outlets of less than 150 square metres will be ineligible to renew their liquor licence.

- Make it an offence for anyone, other than a parent or guardian, to supply a minor with alcohol.
- Reduce the blood alcohol limit to zero for drivers under 20 who do not hold a full drivers licence.

CONTINUING EDUCATION

It is a requirement that all solicitors attend seminars to keep up with legal developments in their field of expertise. The following seminars have been attended/will be attended by members of our Firm. If you would like information on any of the following seminars please contact us.

New Zealand Immigration – March 2009 – Sonja Hucker
Enduring Powers of Attorney – April 2009 – Kaye McKenzie
Local Government Legal Forum – May 2009 – Paul Anderson
Introduction to Company Law – May 2009 – Stu Barraclough
Drafting for Success in the Family Court – June 2009 – Nina Elliott
New Trial Committal Process and Disclosure – June 2009 – Andrew Laurenson
New Trial Committal Process and Disclosure – June 2009 – Lucin Fraser
Residential Property Transactions – July 2009 – Stu Barraclough
Maori Land Update – July 2009 – Sonja Hucker
Health Information Privacy Code – August 2009 – Paul Franklin

GOVETT QUILLIAM NEWS

Recent Law Changes Seminar

On 28 April 2009 Govett Quilliam hosted a successful Chamber of Commerce seminar covering recent law changes which included the 90 day probation period, restructuring given the economic situation, the new breaks laws, the introduction of the four day working week and changes to the RMA.

Baby News

Congratulations to Alex and Kate Laurenson on the birth of their daughter Georgiana on 27 May 2009.

GOVETT QUILLIAM PROFILES

This week we are profiling our newest Partner Alex Laurenson and his Personal Assistants. Pat Nicholls and Mel Cameron job share the role, however Rachel Roberts is currently filling in for Mel while she is on maternity leave.

ALEX LAURENSEN - Partner



Alex was born in New Plymouth and spent his early childhood years in New Plymouth before shifting with his family to Wellington. Alex initially joined Govett Quilliam in April 2000 as a graduate of Victoria University before returning to the big smoke (Wellington) in April 2004. Alex married a Taranaki girl, Kate Gordon, and subsequently they decided that New Plymouth would be a great place to live and Alex returned to Govett Quilliam in October 2007 and became a partner in July 2008. Alex is a family lawyer and enjoys working in the family team alongside Paul Shearer.

For the past two years Alex has captained our squash team which has competed in the Kawaroa Squash Club's business house competition and has relished the captaincy role, in particular, being able to rank the other players in the team to give himself an opportunity to have some wins!! Alex enjoys watching all sports and also enjoys watching old movies and is an expert on any Hollywood trivia.

Alex is now looking forward to the challenges and pleasures that fatherhood will bring with the birth of his daughter, Georgiana, on 27 May 2009.

PAT NICHOLLS – Personal Assistant



Pat left England and arrived in New Plymouth with her family in 1975. She obtained a secretarial position with a New Plymouth law firm where she worked for 6 years. Pat then moved to Christchurch where she worked for another three and a half years as a legal secretary. On returning to New Plymouth in 1985, she was successful in obtaining a position with Govett Quilliam as a legal secretary and has continued to work with Govett Quilliam for the last 23 and a half years. Pat has worked for a multitude of terrific lawyers over this time, most recently for Alex and the Family Team. In her spare time, Pat enjoys catching up with family and friends, gardening and doing a variety of crossword puzzles daily.

MEL CAMERON – Personal Assistant



Born and bred in New Plymouth, Mel lived in Australia for several years and travelled around Europe before returning to New Plymouth to join Govett Quilliam on 17 May 1999 in the commercial team as a legal secretary. Mel left for maternity leave and returned to work in the Family Team in August 2008 in a job sharing role with Pat. Mel went on maternity leave in January 2009 and is still on maternity leave while her role is covered by Rachel. Mel and husband Graeme have two children, Isaac (2 ½) and Lucy (4 months). In her spare time Mel enjoys exercising when she can although, the most exercise she tends to get these days is when she take the kids to music weekly! Training for half marathons and triathlons are on hold at the mo!

RACHEL ROBERTS – Personal Assistant



Prior to leaving Govett Quilliam in 2004 to start a family Rachel had been working at Govett Quilliam for 14 years starting off as the office junior on 8 April 1991 and working her way through to becoming a Personal Assistant in the Family Team. Rachel is back working with Govett Quilliam covering a 12 month maternity leave position and is enjoying being back with the firm. Rachel has two young boys who are both very active and keep her busy. She enjoys spending time with her family and enjoys taking the boys to the great parks/playgrounds and beaches that New Plymouth has to offer.

GOVETT-BREWSTER ART GALLERY

PHOTO HISTORIES: MARK ADAMS, BRUCE CONNEW AND JOHN MILLER - 13 June to 30 August

Against the backdrop of the world economic crisis and the failure of mainstream media to deal with current events, the representation of the real has assumed new relevance, Photo hiStories traces the documentary approaches of three New Zealand photographers.

CHINA IN FOUR SEASONS: JIN JIANGBO - 4 July to 6 September

Jin Jiangbo is the first in a series of four major exhibitions spanning 12 months entitled China in Four Seasons. Through his vast and penetrating photographs, leading Chinese artist Jin Jiangbo investigates the massive impact of the ‘Great Economic Retreat’ in today’s China.

MIEKE GERRITZEN - BEAUTIFUL WORLD - 4 July to 6 September

Beautiful World takes apart text and language and becomes a visual machine for the manipulation of the word. It confronts globalisation, economic prowess and the insidious aesthetics of consumer society.

MONICA BREWSTER EVENINGS

The Monica Brewster evening in association with Govett Quilliam the lawyers brings an impressive array of national and international artists and cultural thinkers to New Plymouth. It offers an evening of exceptional speakers, art, food, wine and conviviality. Entry \$12, friends of the Govett-Brewster art gallery \$8, students with ID free.

JIN JIANGBO - Tuesday 30 June 6.00 – 8.00pm

Jin Jiangbo is one of China’s leading photographers and media artists. His most recent work interrogates the massive impact of the ‘Great Economic Retreat’ in today’s China.

GREGORY SHOLETTE - Tuesday 28 July 6.00 – 8.00pm

Gregory Sholette is an artist, writer, and an Assistant Professor of Sculpture at Queens College, New York.

PETER BRUNT - Tuesday 25 August 6.00 – 8.00pm

Peter Brunt teaches Pacific art history and art history methodology in the Art History Programme at Victoria University of Wellington. He holds a PhD in art history from Cornell University.

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