

NEWSLETTER

Issue 3

August 2010 – October 2010

Inside this edition

Automobiles - What is Reasonable Access to Land?	1
Director's Duties	2
Emissions Trading Scheme in the Agriculture Sector	2
Snippets	3
<i>The Importance of a Current Will</i>	3
<i>Big Brother may be Watching you!</i>	4

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

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 judgment 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.

Emissions Trading Scheme in the Agriculture Sector

What is the Emissions Trading Scheme?

The Emissions Trading Scheme (‘ETS’) is a scheme designed to encourage the reduction in

greenhouse gas emissions such as carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride. It is

also designed to promote investment in renewable energy, efficient and clean technology, and the planting of trees that act as “carbon sinks”.

It is a scheme based on “units”. Simply put, units are bought and sold between participating organisations and individuals. If a participant sells a product that emits greenhouse gases, for example a natural gas company whose consumers emit greenhouse gases when gas is used, it is required to purchase units from another organisation that has earned units (such as a forestry company that grows trees and is able to sell those units). Units can be sold either to other participants or on the Global Emissions Markets.

When does the Agricultural Sector enter into the Scheme?

Farmers will be indirectly affected by the ETS from 1 July 2010 due to increased costs of compliance and preparatory/preventative measures prior to entry into the scheme. Farmers will not be directly affected until at least 2015, as meat and dairy processors such as Fonterra will be the initial participants in the ETS, and accordingly will have compliance obligations to meet initially.

The agricultural sector enters the ETS in full on 1 January 2015 as it pertains to the farming sector's release of greenhouse gases such as methane and nitrous oxide. The agriculture sector will have already entered into the scheme from 2012 in relation to carbon dioxide emissions produced by energy and fossil fuel use.

What Costs will there be to Farmers?

To use the dairy sector as an example, Fonterra predicts that by 2015 the total average cost per shareholder will increase by about \$10,000. Fonterra's Guide to Climate Change reports that:

- for the average Fonterra shareholder operating costs will increase by about \$2,500 every year from 2013,
- agricultural emissions produced by cattle (methane and nitrous oxide) will cost the average farmer an additional \$2,500 a year from 2015,
- Fonterra itself will face increased costs due to being a participant in this scheme. Costs are

estimated to be an additional \$25 million dollars per year from 1 July 2010 and \$50 million dollars per year from 2013 (these costs are not expected to be exponential),

- from 2015, the average cost increase per shareholder will be in the vicinity of \$10,000, or an extra cost of 7c per kilogram of milk solids.

What can Farmers do?

The scheme asks farmers to begin thinking of ways to reduce agricultural emissions. Some options available include planting forests, using fertilisers more efficiently, using nitrogen inhibitors, and improving productivity. The New Zealand Government's 'Climate Change Information' website states that for an average dairy farm, the planting of 6 hectares of *Pinus Radiata* would "offset the cost of the ETS from 1 July 2010 to 31 December 2012".

What are Fonterra's Obligations?

Fonterra is required to monitor, calculate and report emissions. Fonterra is also responsible for reporting on farm emissions. The ETS will require Fonterra to buy emissions units equal to its total reported emissions each year. To reduce costs, Fonterra has invested in research and development programmes and has implemented various business reduction policies.

Government Assistance to the Agricultural Sector

An issue for the agriculture sector is that methane and nitrous oxide are more efficient at trapping the sun's heat than carbon dioxide and therefore pastoral production contributes to the release of gases which in turn has a greater impact on global warming than other sectors. In an effort to keep the agriculture sector competitive with other countries the Government will provide processors such as Fonterra with 90% of its emissions units to keep it competitive with overseas competitors. This means that Fonterra will need to purchase 10% of its emissions units. The allocation from the Government will reduce by 1.3% per year.

Should farmers require further information on the ETS, the “Fonterra Guide to Climate Change” is an excellent starting point and can be found on the Fonterra website.

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.

Fleming Foster News!

We are now well settled in our new offices at Level 3, van den Brink House, 652 Great South Road, Manukau City.

We welcome Garry Mason, a Senior Solicitor, who joined our firm in June 2010. Garry has previously worked for a leading CBD law firm and most recently for an offshore law firm in the Cayman Islands. Garry specialises in Trusts, Estate Planning, Financial Services and products such as superannuation, Kiwisaver and unit trusts.

FLEMING FOSTER SOLICITORS

Manukau

Ph: 262-0330 Fax: 262-0331

Email: info@flemingfoster.co.nz

Website: www.flemingfoster.co.nz

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