

# LAW 2 DAY

GALBRAITHS  
LAWYERS

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## WELCOME TO ANOTHER EDITION OF LAW2DAY

Welcome to our latest edition of Law2Day. We are sure that you will find something of interest in at least one of our articles.

Looking back it has been quite a year, with some very uncertain and challenging economic conditions. Whilst many have suffered with the falling markets and finance company collapses, there seems to be a bit more optimism in the air now with lower interest rates seemingly here to stay for a while, and some realism being forced upon the property market.

We wish all of our clients the very best for Christmas and a prosperous New Year.

We will be closing on 23 December 2008 and reopening the office on 5 January 2009. We look forward to assisting all of our clients in 2009.

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## ENDURING POWERS OF ATTORNEY – SIGNIFICANT CHANGES

Enduring Powers of Attorney involve an individual, 'the donor', placing trust in a person, 'the attorney', to act competently in the donor's best interests. The donor of such a power who becomes mentally incapable is dependent on some other trusted person to make decisions for him or her. Sadly, this trust is sometimes abused, particularly by family members.

The Government realised the current legislation is inadequate and has enacted the Protection of Personal and Property Rights Amendment Act 2007 ('the Act'). The Act arises out of the Law Commission Paper 'Misuse of Enduring Powers of Attorney', received Royal Assent last year and came into force on 26 September 2008.

The Act makes the interests of the donor paramount. Where the donor has lost capacity, and decision making is taken over by an attorney, the donor still has the right to be consulted about their views. The Act places an obligation on the attorney to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.

### NEW WITNESSING REQUIREMENTS

The Act introduces new witnessing requirements for all new Enduring Powers of Attorney. A lawyer, legal executive, or an officer of a Trustee Corporation must act as the witness. Legal executives are able to witness if they have at least 12 months experience, hold a current annual registration certificate issued by the New Zealand Institute of Legal Executives, and are employed by and under the direction and supervision of a lawyer.

The witness must explain to the donor the

effects and implications of the Enduring Power of Attorney and his or her rights, and certify in the prescribed form that this has been done. At the time of signing, the witness must certify that he or she has no reason to believe that the donor lacks mental capacity and that the witness is independent of the attorney.

### NEW DEFINITION OF MENTAL CAPACITY

A donor is deemed mentally incapable if he or she lacks the capacity to:

- make a decision about a matter relating to personal care and welfare
- to understand the nature of decisions about matters relating to his or her personal care and welfare
- to foresee the consequences of decisions about matters relating to his or her personal care and welfare, or
- communicate decisions about matters relating to his or her personal care and welfare.

A prescribed form has been issued for Health Practitioners to certify as to incapacity. The form must be used on all occasions when the donor's capacity is in question.

### PROPER RECORDS TO BE KEPT

The attorney must keep proper records of each financial transaction entered into by the attorney while the donor is mentally incapable.

### SUSPENSION

The Act allows the donor who has been, but is no longer, mentally incapable to suspend the attorney's authority to act by giving written notice to the attorney. The suspension does not

revoke the Enduring Power of Attorney and can be reviewed by a Court. However, an attorney whose authority is suspended cannot act unless a Health Practitioner has certified, or the Court has determined, that the donor is mentally incapable.

### EASIER ACCESS TO COURTS

A wider range of people can now apply to the Court regarding an attorney's actions. Any of the following people may apply to the Court to review a decision:

- the donor
- a relative or attorney of the donor
- a social worker
- a medical practitioner
- a trustee corporation
- the principal manager of any place that provides hospital care, rest home care or residential disability care
- any welfare guardian who has been appointed for the donor
- a person authorised by a body or organisation contracted by the Government to provide Elder Abuse and Neglect Prevention Services
- any other person, with leave of the Court

### IN CONCLUSION

It is hoped the Act goes some way to limiting situations in which it might be possible for Enduring Powers of Attorney to be misused or abused. Although compliance costs will inevitably be increased, this is considered a small price to pay to increase protection for a vulnerable donor.

## MORE TROUBLE IN PARADISE

A recent decision of the Court of Appeal, *Salt v Governor of Pitcairn and Associated Islands* (2008), serves as a reminder to employers to thoroughly investigate the actions of an employee who has raised a personal grievance based on unfair dismissal, because the employee's actions will be highly relevant to the quantum of remedies. This may even extend to actions the employer wasn't aware of at the time of the dismissal.



Mr Salt was employed as Commissioner for Pitcairn Island and was responsible for the day to day administration of the affairs of Pitcairn Island. He was based in Auckland and had held the position since 1995. In 2001 Mr Salt indicated he no longer wished to remain in the role without a salary increase. From 2001 to 2003 there followed a period where Mr Salt was unwilling to sign a new contract. He believed the then Deputy Governor had complaints about his performance and he was distinctly unhappy with the situation.

By March 2003 Mr Fell, the Governor, was concerned that Mr Salt was deliberately undermining the office and authority of the Governor. In September 2003, following an unsuccessful mediation, Mr Fell dismissed Mr Salt by email giving him one month's notice. Mr Salt raised a personal grievance claiming unjustified dismissal.

The Employment Relations Authority found the dismissal was unjustified on procedural grounds and awarded Mr Salt reimbursement of wages and superannuation as well as compensation, but found his conduct had contributed to his dismissal, and adjusted the damages accordingly by 50%. This adjustment was based on a series of emails that were not discovered until after Mr Salt was dismissed.

The emails contained highly disparaging comments about the Governor and other Government officials.

Mr Salt challenged the reduction of remedies in the Employment Court and then the Court of Appeal. The Employment Court found that the Authority was correct in taking the subsequently found emails into consideration when assessing Mr Salt's contributing behaviour and reducing the remedies by 50%. The Court of Appeal agreed with the outcome, although it reached its conclusion by a slightly different legal path.

The Court of Appeal decided that "subsequently discovered misconduct of a significant nature could be taken into account in determining remedies under Section 123 of the Act". The Court therefore could and should take the emails into account when determining wages, reimbursement and compensation. Furthermore, Mr Salt's behaviour was so bad that if the employer had known of it then, the dismissal would have been justified. As a matter of "equity and good conscience" the wages reimbursement should be modest, and the 50% reduction was appropriate.

## THE EARLY BIRD CATCHES THE WORM – TIME LIMITS IN CIVIL CLAIMS

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.

## CHILDREN'S PARTICIPATION INCREASED BY CHANGES TO FAMILY COURTS

### 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.

## PROTECT YOUR BUSINESS FROM BAD DEBTORS

Owners or managers of small to medium sized businesses will be increasingly aware of how the global credit squeeze is affecting New Zealand. As finance companies collapse. The pressure grows for everyone to cut costs and make savings. One common response from debtors to these pressures is to delay paying creditors – including you. Effectively they are using you as a low cost source of extended funding.



Planning how best to protect your business from bad debtors involves both practical and legal issues, as set out in the following paragraphs.

Take time at the outset to ensure the customer can and will pay. Sometimes the promise of a new order for work overrides common sense enquiries at the time about the customer's circumstances and their ability and willingness to pay the price you require.

Ensure that you have full details of your customers before you commit to the work. This includes all of their contact details but also the legal name and type of entity. All too often creditors go to take enforcement action only to find they are missing details that compromise debt recovery. For example, you might assume your customer is John Brown trading as John's Timber Supplies only to find out that he was representing John Brown Limited trading as John's Timber Supplies. This can result in you having no action against John Brown personally, only his limited liability company, which might be insolvent.

If your customer is a small company, obtain a guarantee from the directors. It is often more effective to pursue a director personally, rather than a company.

Have written terms of trade that the customer signs before you supply the product or service. This makes it very difficult for the customer to dispute your terms at a later stage, which often happens if the terms are posted with an invoice, after supply, or not recorded in writing at all. Include terms that:

- state when payment is due
- set a default interest rate for late payment, and
- provide for recovery of full legal costs, should you have to take enforcement action.

If appropriate, include specific reference to creating a security interest pursuant to the Personal Properties Securities Act 1999. This will enable you to become a secured creditor. If you do this, you will also need to be aware of the process for registering a financing statement on the Personal Properties Securities Register at [www.ppsr.govt.nz/cms](http://www.ppsr.govt.nz/cms), without which your security won't be complete and is likely to be ineffective.

Take steps as soon as a customer is late. Speak with them if possible. If not, write to them. Too often debtors are not contacted early enough and a problem that could have been a minor one becomes a major one.

The overall key is to take care with your procedures and documentation at the outset of the transactions. It may require time and money to put everything in place but it will more than pay for itself over time.

Lawyers often deal with creditors who fail to recover some or all of their debt, despite having provided an excellent product or service, because they haven't taken enough care or obtained adequate advice when setting up their paperwork and procedures.

## EMPLOYMENT RELATIONS (FLEXIBLE WORKING ARRANGEMENTS) AMENDMENT ACT 2007

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 was given Royal Assent on 26 November 2007 and came into force on 1 July 2008.

The Bill was introduced by Green Party MP Sue Kedgley and was designed to address the perceived need of employees with young families who were simply dropping out of the work force rather than obtaining more flexible working arrangements to meet the needs of their family.

A Department of Labour survey found that most employees felt unable to broach the need for more flexible working arrangements with their employers because they felt they would be penalised for doing so. By providing a statutory framework this Act seeks to protect those employees who wish to choose how to balance work and family life.

### WHO MAY APPLY?

Any employee who is responsible for the care of any person and who has been working for their employer for not less than 6 months may make an application under the Act. There are no requirements that the employee be related to the person they are caring for and there is no definition of what the 'care' may involve.

### WHAT ARE FLEXIBLE WORKING ARRANGEMENTS?

The employee may apply to vary their conditions of employment related to their hours of work, days of work, and/or place of work and this request must be in writing. The request made will entirely depend on the needs of the employee in caring for another person.

### WHAT INFORMATION MUST BE SUPPLIED?

The employee must specify:

- how they wish to vary their conditions of employment
- whether the request is to permanently vary their conditions of employment or for a specified period of time
- how the variation will allow them to provide better care for the person they are caring for,
- what changes the employer may need to make if the employee request is approved.

### CAN MORE THAN 1 REQUEST BE MADE?

If a request is made the employee is not entitled to make another request under this part of the Act for another 12 months.

### WHAT THE EMPLOYER MUST DO

The employer does not have to accept the request. The employer must notify the employee within 3 months whether their request has been

approved or refused and, if refused, notify the grounds for refusal and provide an explanation of the reasons for their decision. If the employee is dissatisfied, he or she may refer the matter to mediation. If that does not resolve matters, the problem can be referred to the Employment Relations Authority for a determination.

## WHAT ARE THE GROUNDS FOR REFUSAL?

The Act sets out the following broad grounds for refusal:

- a detrimental impact on the quality or performance of work
- additional cost
- inability to reorganise work
- inability to recruit additional staff
- insufficiency of work
- planned structural changes
- detrimental effect on ability to meet customer demand
- the potential to undermine the terms of a collective agreement where the request relates to working arrangements to which the collective agreement applies

## WHAT IF THE EMPLOYER DOES NOT RESPOND?

If the employer has not complied with their obligations under the Act the employee may refer the matter to a Labour Inspector for assistance in resolving the matter. The employer may be fined up to \$2000 by the Employment Relations Authority.

A review of the operation of these amendments must be carried out by the Minister of Labour as soon as is practicable after 1 July 2010.

## CONFIDENTIALITY OF EMPLOYMENT MEDIATION

Confidentiality in employment mediation is crucial to the integrity of the mediation process. While the Employment Court decision in *Jesudhass v Just Hotel Ltd* cast some doubt over the extent of the requirement of confidentiality, the Court of Appeal has now clarified the position. The Employment Relations Act 2000 ("the Act") seeks to "...build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship..."

One of the ways the Act achieves its objective is to promote mediation as the primary problem solving mechanism and reduce the need for judicial intervention.

Typically a person raising a personal grievance

under the Act will request mediation as a first step to resolving their grievance. Through the mediation process the parties discuss the issues, consider options and are often able to reach agreement with the assistance of the mediator. These agreements are binding on the parties and enforceable. They allow the parties to resolve disputes relatively quickly themselves, rather than face an uncertain outcome at the Employment Relations Authority or in the Employment Court.

Section 148 of the Act provides that the parties must keep confidential: "...any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation."

The confidentiality requirement is designed to ensure that the parties can engage in free and frank discussion of the issues and get to the heart of the matter without fear that their words will later be used against them.

In 2006, the Employment Court in *Jesudhass v Just Hotel Ltd* considered the extent of confidentiality afforded at mediation. Mr *Jesudhass* was suspended

by his employer, *Just Hotel Ltd*. He raised a personal grievance and sought mediation. Mr *Jesudhass* alleged that during mediation his employer advised that they would dismiss him as soon as the mediation was finished. Mr *Jesudhass* raised a second personal grievance, that of unjustified dismissal, and sought to bring evidence of those alleged statements in support of his claim.

The Employment Court found that evidence of conduct during mediation could be used where those communications were not made in a genuine attempt to resolve an employment relationship problem.

*Just Hotel Limited* appealed this decision successfully. The Court of Appeal overturned the decision and found that the purpose of Section 148 was to allow parties to speak freely and frankly without the fear that their statements could be used against them. This could only occur if statements made at mediation remained confidential. The Court found that all documents prepared for the purposes of mediation and all statements made at mediation were confidential and that only in some limited circumstances, such as where public policy dictates (for example evidence of criminal conduct), could the statutory veil of confidentiality be lifted.

This decision is consistent with ensuring that mediation is promoted as the primary problem solving mechanism under the Employment Relations Act 2000.

## ROOM WITH A VIEW

### INTRODUCTION

Imagine this, after considering the various housing options you decide you want an apartment in the heart of Auckland City. You want to be close to the action. It's central, a perfect base, a long term investment! The city has many beautiful views so you want to be elevated to take advantage of the opportunity for that. You spy a brochure which covers the key aspects of your search. The apartments are not built yet but the glossy publication promises classy central city living, and that view. Once you have signed up and the building has been constructed, you walk in and discover that a roof is obstructing your priceless view!

### A MISREPRESENTATION

The key question for the court in the case that followed this disappointing discovery by the purchaser was whether the misrepresentation made in the brochure meant that the agreement to purchase could be cancelled. Alternatively, would the Court require the purchaser to pay over the purchase price and buy an asset that did not live up to the initial expectations? The Court in this case said settlement must proceed.

### THE AGREEMENT AND PLANS/SPECIFICATIONS

After the "tease" in the original brochure, came the actual agreement for sale and purchase with detailed plans and specifications. These, when taken as a whole, showed the existence of the roof in front, and fully disclosed the exact situation. The agreement included the standard provision that once signed, the agreement was the binding and complete legal arrangement between the vendor and purchaser.

In other words, the brochure was not to be taken into account when finally deciding what the terms of the contract were. As the purchaser had the opportunity to take any legal or other advice available prior to signing, there was no reason, in the Court's view, why the contract should not stand. The Court ruled that the settlement must proceed.

### CONCLUSION AND WARNING

In the excitement of the purchase, who would have given a thought to the roof next door, particularly as nothing was constructed at the date of signing. In hindsight, the warning is clear and the principle applies to every signed sale and purchase agreement. Before you sign, obtain all the advice you can, because prior representations will usually not be a relevant factor. In this instance, not only legal advice was required, but specific architectural advice regarding the plans and specifications was also needed.

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