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LAWYERS

NEWSLETTER

Issue 2
May 2017 – Jul 2017

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Enduring Powers of Attorney – Recent Changes

Amendments to the Protection of Personal and Property Rights Act 1988 introduced plain language forms of Enduring Powers of Attorney (EPA) and standard explanation documents outlining the effects of appointing an attorney. These changes came into effect on 16 March 2017.

EPAs defined

An EPA is a legal document that allows an individual (called the Donor) to appoint another person or persons (called the Attorney(s)) to take care of their personal care and welfare and/or property if the Donor loses the ability to do so themselves. This appointment does not prevent the Donor from managing their own affairs. In contrast, a General Power of Attorney is valid only when the Donor has the legal capacity to instruct the Attorney(s).

Property

An EPA for property allows the Attorney(s) to deal with the Donor's property: for example, shares, land and money. The Donor may wish the EPA to take effect once signed and continue to apply if he/she is mentally incapable; or only to take effect if he/she becomes mentally incapable.

Personal care and welfare

This EPA allows an Attorney (only one Attorney may be appointed at any one time in respect of personal care and welfare) to make decisions about the Donor's personal care and welfare if he/she becomes mentally incapable. This power is subject to various safeguards and extends to decisions on any medical treatment required and whether the Donor attends hospital or becomes a resident in a residential care facility.

Under this EPA, the Attorney's powers can be general or specific depending on the Donor's wishes and ends when the Donor dies.

Changes made

The key change to the law is that instead of instructing a lawyer to create the EPA document itself, there are now forms available for both types of EPAs. The EPA forms can be downloaded, completed and witnessed by a lawyer, qualified legal executive or representative of a trustee corporation. However, it is still essential to obtain legal advice before certifying the form.

Further changes under the new rules are summarised below:

- With regards to witnessing, if two people appoint each other as Attorney, the same person can witness the respective Donor's signature where there is no more than a negligible risk of a conflict of interest. Witnesses must ensure that the Donor understands the nature of the EPA, the potential risks and consequences and the Donor does not act under undue pressure or duress.

- Attorneys must consult other appointed Attorneys (not including successor Attorneys) when exercising their powers; and

- A medical certificate is required to determine whether the Donor is mentally incapable. Under the old requirements, medical certificates were to be prepared in a prescribed form under particular regulations. However, some medical practitioners used their own form of medical certificates resulting in non-compliance. From 16 March 2017, medical practitioners can use their own form of medical certificates provided information from the relevant regulations is included. Previously issued certificates are still valid and do not need to be replaced – but can be if desired.

Transition provisions

Any EPAs executed by the Donor and Attorney under the old provisions still remain valid; however, EPAs signed by the Donor on or prior to 16 March 2017 and not by the Attorney will need to be re-executed under the new provisions.

If an EPA signed after March 2017 revokes an earlier EPA where the powers of the Attorney are the same but the Attorneys appointed are different under each EPA, notice must be given to the previously appointed Attorney before the new EPA can have effect. Notice may be given by the Donor's lawyer or an Attorney under the new EPA if the Donor is mentally incapable.

Summary

These changes are driven to simplify the process and reduce time and money invested in obtaining an EPA. The forms, standard explanations and frequently asked questions are available on the Government's SuperSeniors website: http://superseniors.msd.govt.nz

Health and Safety at Work Act 2015 – Happy First Birthday

Based on the 2011 Australian Model Work Health and Safety Act, New Zealand's Health and Safety at Work Act 2015 (HSWA) passed into law on 4 April 2016. New Zealand's historically high rate of workplace deaths and near misses (notably the 2010 Pike River Mine tragedy where 29 miners died due to substantial health and safety failures) was a key motivator for the overhaul of our health and safety laws.

During Parliament's readings and consultation over the HSWA, business people and the general public voiced concerns that the HSWA was a step too far and would unreasonably and fundamentally affect the way New Zealand businesses operated. However, the lawmakers cited our poor health and safety record in pushing the HSWA through.

Prior to the enactment of the HSWA, between 40 and 60 people were killed in workplace accidents each year. According to Worksafe New Zealand, this number is more than three times the annual workplace deaths in the UK and double those in Australia. The HSWA seems to be having an effect; with the deaths in the agriculture and construction industries dropping during 2016.

General responsibilities

Under the HSWA, Persons Conducting Business or Undertakings (PCBU) have a duty to ensure that, so far as reasonably practical, the workplace is without risks to the health and safety of any person. PCBU's are usually business entities such as companies, but also includes sole traders, self-employed persons, contractors and certain volunteer organisations. The HSWA also places obligations on persons to whom responsibility for health and safety has been delegated (Officers) and persons working at a workplace (Workers).

In general terms, a PCBU's underlying obligation is a duty to ensure that all reasonable measures have been taken to protect the health and safety of Workers and other persons who are at the workplace. Officers (individuals who are in positions that allow them to exercise significant influence over the management of the business or undertaking) are responsible for exercising due diligence to ensure that the PCBU complies with its duties. Workers must take care of themselves and ensure that they do not affect the safety of others and comply with all reasonable directions, policies and procedures.

Penalties

A Worker who commits an offence of reckless conduct will be liable to pay a maximum fine of $300,000 or serve a maximum term of imprisonment of five years. For the same offence, a PCBU or an Officer may pay a maximum fine of $600,000 or serve a maximum term of imprisonment of five years.

If a Worker is convicted of failing to comply with a duty that exposes an individual to the risk of death, serious injury or illness, they will be liable to pay a maximum fine of $150,000. In the same instance, a PCBU or an Officer will be liable to pay a maximum fine of $300,000.

If a Worker fails to comply with a duty (that does not also expose an individual to a risk of death or serious injury) he or she will be liable to pay a maximum fine of $50,000. In the same instance, a PCBU or Officer will be liable to pay a maximum fine of $100,000.

Decisions by the Courts

The press followed the prosecution of Pike River Coal Limited (PRCL) closely and many considered the sentences to be lenient. In that matter, PRCL was convicted under the old Act and therefore faced lesser penalties than those set out in the HSWA. The Department of Labour brought three charges against PRCL (each carrying a maximum of a fine under the old Act of $250,000) and it pleaded guilty to all three charges. In its judgement, the Greymouth District Court fined PRCL $46,800 in total for unsafe work practices.

Although there have been no convictions under the HWSA yet (as the incidents currently before the Courts and at a stage where decisions are being made occurred prior to 4 April 2016), recent decisions by the Courts under the old Act have suggested that a harder line (than in PRCL) seems to have been taken since the introduction of the HSWA.

In November 2016, the Court was asked to determine penalties relating to an incident that involved an employee who was killed when a substance was being transferred from a transport tank to another tank under pressure. The company involved was charged under the old Act and pleaded guilty. The penalties levied on the defendant in this matter were more severe than those in the PRCL case. Here, the company was ordered to pay $140,319.80 in reparation to the victim's family. Reparation was ordered instead of fines so that the affected persons were compensated as the company was in liquidation and did not have the resources to pay both reparation and fines. However, the Court found that an appropriate fine, in this case, would have been $73,800.

Despite there being no decisions by the Courts under the HSWA, it is clear that New Zealand businesses, their owners and key staff will face higher penalties in future.

The Harmful Digital Communications Act – Cyberbullies Beware

The Department of Justice, in its 2017 report on cyberbullying and other forms of digital harassment, concluded that this modern form of bullying and intimidation has devastating effects on people and more should be done to deal with it. Despite a widely held understanding of the effects of cyberbullying, historically there have been very few avenues of redress for victims of cyberbullying in New Zealand. In response to the Department of Justice's report, the Harmful Digital Communications Act (HDCA) was enacted in 2015 to provide such avenues.

The purpose of the HDCA is to prevent and reduce harm to individuals caused by harmful digital communication (HDC) and to provide victims of HDC with a quick and efficient means of redress.

HDC is any form of public or private electronic communication, which includes text messages, online posts, photographs and video recordings that cause serious emotional distress to an individual. In *R v Partha Iyer* [2016] NZDC 23957 the Court was asked to determine if the Crown (the body that brings these matters before the Courts) had sufficient evidence to support a prosecution under the HDCA. The Court held that serious emotional distress did not have to be physical, but the victim must be more than merely annoyed or upset. The key sections of the Act considered in *Partha* were sections 22(1) (Causing harm by posting digital communication) and 19 (Orders that may be made by Court).

Section 22(1) sets the test for determining whether a person has committed a punishable offence by posting a digital communication. The Court in *Partha* adopted a three-stage test to determine whether the Crown had shown that the conduct of the defendant amounted to an offence:

1. Whether the person who posted the digital communication had the intention to harm;
2. Whether the information was likely to harm; and
3. Whether it caused harm to the victim.

Harm

The Court found in *Partha* that intention to cause harm under section 22(1) of the HDCA could be the intention to elicit a serious response of grief, anguish, anxiety or feelings of insecurity. To prove intention, the Crown must demonstrate that the defendant inflicted feelings of serious shame, fear and insecurity on the victim enabling the defendant to achieve their aim. The onus is therefore on the defendant to prove that there was no such intention or the same result could not have been achieved without inflicting serious emotional distress. In *Partha*, the defendant openly admitted to posting revealing photos of the victim to coerce the victim into achieving his aim; meaning that inflicting serious emotional distress could not be separated from the intention to harm.

Section 22(2) sets out a non-exhaustive list of factors which the Court may consider when determining whether the post was likely to harm an ordinary person in the position of the victim. The onus is on the Crown to satisfy this test. In *Partha* the Crown produced photos showing the victim in a state of undress. The Crown submitted that, due to the victim's professional standing in the community, the pictures were likely to cause harm to the victim by damaging the victim's reputation.

The onus also rests on the Crown to prove that the information has caused harm to the victim. In *Partha* the District Court ruled that the Crown had not produced sufficient evidence to establish that the victim suffered serious emotional distress. However, on appeal Justice Downs stated that there was serious matter to be tried and therefore the Crown should pursue a prosecution in a full substantive trial. The matter remains before the Courts.

Sentences

If a defendant is convicted, the Court will consider the factors set out in section 19(5) in sentencing. These factors include:

1. Whether the defendant intended to cause harm to the victim;
2. If the content of the communication was published;
3. How far it has been disseminated; and
4. If it is likely to cause harm to the victim.

The maximum penalties under the HDCA (section 22(1)) are imprisonment for up to two years; or a fine of up to $50,000.

The Court in *Partha* quoted Parliamentary discussions about the HDCA and determined, in conjunction with these discussions, that penalties will vary depending on the seriousness of the crime.

Accordingly, while the HDCA it still young, it has real potential to hold people who engage in cyberbullying and digital harassment accountable for the harm they inflict, and the more serious the harm, the more severe the sentence.

Auction Preparation

Property is often purchased and sold in New Zealand, particularly in a seller's market, via auctions. However, buyers frequently underprepare for an auction and are caught out when the hammer falls. When purchasing at auction, a buyer is making an offer unconditionally. In essence, this means that the highest bidder over the reserve (being the lowest sum that the seller determines it will sell at) is making a binding cash offer and entering a binding agreement with the seller.

Accordingly, buyers need to have completed all of their due diligence investigations and asked all of their key questions before the auction.

Talk to the agent

Before attending and bidding at an auction, buyers should obtain as much information as possible about the property by:

- Talking to the listing agent;
- Reviewing the history of the land and the buildings via reports provided by the seller, the agent or purchased via a lawyer or the local council; and
- Asking questions about the number of parties interested in bidding at auction and at what price such parties are registering their interest.

Some of the types of reports that a buyer might need will be contained in the agent's auction pack.

Any buyers considering a bid should register their interest with the agent. If a third party makes a pre-auction offer, the auction must be brought forward. As such, interested buyers will need to be prepared to bid at the early auction, including having funds available to pay the deposit which must be paid on the auction day.

Review the auction terms and conditions

The agent should provide potential buyers with a copy of the auction terms and conditions of sale.

Buyers should review these terms carefully, to ensure that the proposed chattels list is correct and that the settlement date is practically and financially achievable.

Buyers should also be checking these terms to see whether any standard conditions have been deleted or varied, including disclaimers of warranties or information about a property. This aspect (if not the terms as a whole) should be reviewed by a lawyer for certainty.

Get legal advice on the title
In becoming the buyer, the successful bidder will have accepted the legal title to the property (the instrument that details the key legal interests and restrictions that apply to the land) and the auction terms and conditions of sale. It is, therefore, extremely important that prospective buyers seek advice on the title before attending an auction; prudent buyers will also have taken advice on the auction terms and conditions of sale.

If, in obtaining advice, a buyer discovers an issue with the property, agreement or the title, he or she may raise such an issue as part of pre-auction negotiations. In some instances, variations may be agreed such that they apply in respect of the successful bid as between the seller and the particular buyer that negotiated such variations.

Due diligence
A Land Information Memorandum (LIM) is a report prepared by the relevant Council which provides historical and current information relating to the property, land and any buildings. Prospective buyers are strongly advised to obtain a LIM report. A LIM report enables a buyer to ascertain whether buildings and/or structures on the land which require consent, such as a dwelling, spa pool, garage or fireplace have been approved by the local council. In addition, a LIM report may provide information on the zoning of the area and natural hazards.
Builder's report and contamination testing

Obtaining a builder's report entails engaging a qualified builder to perform a pre-purchase inspection, and provide a written report outlining any significant building defects. A comprehensive builder's report can be expected to include advice on fences, paths, retaining walls, foundations, insulation, ventilation, plumbing, drainage, structures and roofing materials.

Contamination tests are also becoming more common. Contamination tests measure toxicity within a building, and provide information on whether it is safe to work or live in. High toxicity levels may result in health risks and time consuming and costly decontamination processes.

Finance
As auctions are based on potential buyers making unconditional offers to the vendor, it is essential that any necessary finance is arranged prior to bidding at auction and that buyers are in a position to draw down the funds on the designated settlement date.

Summary
In summary, buyers should gather as much knowledge as possible on a property before bidding at an auction. Doing so will enable buyers to better set a purchase price that they may be comfortable bidding to; it will also help the bank and insurance brokers to give a keen buyer the promises and backing that he or she needs to bid.

Snippets

Default Interest
Default interest is a higher interest rate which is payable if a party to an agreement fails to fulfil an obligation to the other party. Typically, commercial arrangements, settlements and the vast majority of loan agreements contain default interest clauses.

Default interest clauses are often seen in the standard terms of a loan agreement. The ordinary interest rate in a loan agreement might be 6.24% per annum. If the borrower was to miss a repayment, the agreement might require that party to pay a higher interest rate of, say, 11.24% on the sum that was not paid.

Default interest must be set at a reasonable commercial rate, which constitutes a genuine pre-estimate of loss to the innocent party in the event of default. Factors material to ascertaining a reasonable commercial rate include the nature of the business, the industry, the economic climate and interest rates charged by major lenders such as banks.

Default interest cannot, by law, be used as a tool to penalise a defaulting party. The term "penalty" applies to punitive default interest rate clauses within a contract. Essentially, this is where a contract is designed to make the consequences of a breach so daunting that a debtor will not default. Default interest clauses which constitute a penalty are unenforceable, even where parties agree to such a clause at the outset of the agreement.

Trusts - A Brief Summary
A trust is an arrangement in which a person (Settlor) transfers assets to selected persons (Trustees) to be held for the benefit of persons named by the Settlor (Beneficiaries).
A trust is usually established by way of a trust deed but can be created via less formal means. Once the trust is created, the Settlor loses legal ownership of the transferred assets; the Trustees then become the legal owner(s) of the trust assets.

The Trustees have a duty of the utmost good faith to both the Settlor and the Beneficiaries, and to deal with the trust assets in line with the terms of the trust together with the Trustee Act 1956.

The Beneficiaries are the only people entitled to benefit from the trust's assets. Any person (including corporate persons such as companies) can be a beneficiary of a trust, whether that person is alive or unborn. A Settlor may appoint themselves as a Beneficiary.

When establishing a trust, it is vital that the Settlor considers who he or she will appoint as the Trustees and Beneficiaries. To do so, it is important to understand the roles, responsibilities and rights of each participant in the trust, and to take advice from experts.

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

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