

**PLEASE  
READ  
THIS**

Please note: Our offices will be closing for the Christmas/New Year break on Tuesday, 23rd December 2008 and re-opening with skeleton staff on Monday, 5th January 2009. We wish you and your family a safe and happy festive season.

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**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

**Partner’s Corner**

As another year draws to a close we begin to consider what we have accomplished in 2008 and look forward to progressing in the New Year.

This year we prepared ourselves for a down turn in revenue and activity, but upon reflection we were certainly kept busy. Hopefully by the time we have settled into 2009 the economic black clouds will have cleared leaving times of more opportunity and prosperity for all of our clients and the community.

We remind our clients we will be closing for business Tuesday 23rd December 2008 and reopening with a full staff on Wednesday 14th January 2009. However please note we will have staff and solicitors available to provide all of your essential legal services from Monday 5th January 2009.

Look out for a bustling Lincoln Road office after Christmas as we welcome our Huapai staff to join us forming one central hub from which to concentrate our experienced team.

We assure our clients we will be continuing to offer our support and services to the Huapai/ Kumeu area despite our reduced facilities. We are becoming increasingly flexible in our profession and we thank you for your cooperation with this decision.

Once again Smith & Partners would like to offer our sincere thanks for all of your continued support and loyalty throughout 2008 and beyond. We wish you and your family a safe and happy festive season.

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.

## Family Trusts – Some Common Pitfalls

### Introduction

In the course of trusteeship, trustees make decisions that will impact on the assets of the trust. If made incorrectly, trustees’ decisions can lead to personal liability if the trust suffers a loss.

Potential problems could arise, especially in the current economic climate, due to such issues as:

- A drop in asset values
- Excessive trust borrowings
- Loss of income from trust assets, or from a beneficiary’s company
- Trust assets used as security for company/personal borrowings of a beneficiary/person who established the trust

Trustees are obliged by law to have the best interests of the beneficiaries at the core of decision making, not the best interests of the settlors (the people who established the trust).

### Trust secures family company borrowings

It is common for trustees to agree to provide mortgages over trust property and provide corresponding unlimited liability guarantees in favour of another entity/borrower, such as the family company, which might run the family business or operate the family farm.

The problem arises when the company is then unable to meet its loan repayment commitments and the bank is required to sell trust property to pay for non-trust borrowing. The decision to provide guarantees and mortgages to the bank for company borrowing can be the trust’s undoing.

Before they provide guarantees and mortgages the trustees must consider whether this is actually in the beneficiaries’ best interests. For example, was the trustees’ decision prudent in light of the financial situation of the company, and was the guarantee and loan structure reviewed on an ongoing basis?

Also, before guarantees and mortgages are given, the trustees are required to check the trust deed to ensure there is power in the deed to provide such guarantees and mortgages.



### Resettlement of trust assets

Trust deeds should contain a provision to allow the trust to resettle its assets on another trust provided the resettlement is for the benefit or advancement of one of the beneficiaries of the trust. If the trust deed has a power to resettle, and the trustees are asked to resettle, they are required to conclude that it would be in the best interests of the beneficiaries to do so and that it is a proper exercise of the power of advancement to resettle trust assets on one, or a group of, beneficiaries.

This is a decision not to be made lightly as the remaining beneficiaries may be interested in the details of the resettlement, not to mention the Inland Revenue Department. The trustees are less likely to be personally liable if they turn their mind to the best interests of the beneficiaries before making the decision.

### Minimising the chances of an incorrect decision

Trustees minimise the likelihood of making incorrect decisions if they consult and meet regularly with their independent trustee, accountant, and lawyer to review the current position. Communication is vital and provides an extra level of security. Trustees who proceed to administer the trust without seeking external assistance do so at their own peril.

Trustee decisions would be made easier by the existence of a regularly updated settlor memorandum of wishes that sets out the settlor’s intentions regarding the trust fund. It should be easily accessed by the trustees and kept up to date.

### Conclusion

In short, trustee obligations are not simple and require careful thought. It is always best to consult with professionals if unsure and to ensure there is a clear set of trust documentation to avoid problems in situations such as the above.

## 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.

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.

## 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.

## Solicitor Profile - Annette Page



Annette Page is a senior member of the family law team, with over 11 years experience in civil, employment and family law. Her areas of particular expertise are Parenting Disputes, Relationship Property and Estates.

Annette has also been approved by the Court to act as Lawyer for Child. This means that she is at times appointed by the Court to represent the views of children in disputed cases in Court.

## Solicitor Profile - Ruth Gregory



Ruth Gregory has been part of the team at Smith and Partners since first joining us from a City firm in 2004.

She returned to the litigation department after completing her family of boys, in January 2007, and loves to help navigate all people through challenges in their family or working lives, to achieve the best possible outcomes.

Ruth's special interests are children's wellbeing, and resolving relationship property issues.

## Snippets

### Building Act Update - Kiwi DIY Tradition Improved



Hon. Shane Jones, the Building and Construction Minister, has taken steps to cut back on DIY building regulations enacted as a result of the leaky building crisis.

The Government has realised that the response to the crisis

was too extreme and has reduced the scope of work that requires building consent. Schedule 1 (Exempt Building Work) of the Building Act 2004 was amended by Order in Council on 16 October 2008. The work that does not require consent now includes such things as:

- Changing existing household plumbing
- Removing or changing non-load bearing walls
- Installing or replacing windows or exterior doors
- Making a home more accessible by widening doorways and building access ramps
- Construction of retaining walls that retain not more than 1.5 metres depth of ground
- The construction, alteration or removal of a pergola

These changes will allow Kiwis to once again take up their tools and go about what they have always done in that long standing tradition of DIY.

### Enduring Powers of Attorney

On 26 September 2008, the Act governing powers of attorney was amended. In brief, the Act has made powers of attorney documents more secure meaning they are less able to be abused by attorneys to whom power to act on a donor's behalf is given.

Among other things, the signature of the donor must be witnessed by a lawyer, qualifying legal executive, or an officer of a trustee corporation. The witness to the donor's signature must certify that he/she is independent of the Attorney.

Therefore, in the common situation where a husband and wife wish to appoint each other as attorneys, advice from two qualifying witnesses such as a lawyer/qualifying legal executive/officer of a trustee corporation is a necessity. Both parties should see their witness independently of the other.

The independent advice requirement will be the major effect of this amendment and is one of the measures that aim to ensure powers of attorney achieve what they set out to achieve.

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If you have any questions about the newsletter items, please contact us, we're here to help. If you would like to receive this Newsletter electronically, please forward your email details to [newsletter@smithpartners.co.nz](mailto:newsletter@smithpartners.co.nz).

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