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Summer Issue

Civil claims in the District Court: A much needed overhaul ... Dean Russ

Relationship Property: What you need to know if you separate....Catherine Munro

Failed Investment! Can you get your money back?... Callum McLean

Drugs & Driving: Know your obligations .. Dean Russ

Major Changes to the rules of the District Court

Dean discusses the impact of new District Court Rules



*Dean Russ
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From 1 November 2009 all civil cases filed in the District Court are governed by new rules and processes.

The new rules reflect a radical change in the philosophy of how litigation should be managed. The rules, and the processes that follow from the rules, have no New Zealand

precedent and no other similar system exists anywhere in the world.

Why change?

We are all familiar with the old adage, "if it's not broken, don't fix it".

For anyone who has been involved with civil litigation in the District Court, their perception is likely to have been that of a system that was outdated, ill-equipped for dealing with modern dispute resolution and, for all practical purposes, broken.

Quite apart from public experience, a range of case statistics supported change. One of the most compelling statistical facts revealed that of the thousands of cases

filed each year in District Courts around New Zealand, on average only a staggering 3% of those cases actually ever reached a traditional trial presided over by a Judge.

For users of the court system, and in particular the general public, it has become increasingly difficult to justify a set of rules and processes which assume that cases must be managed in a way to get them to a trial. This is particularly so when experience shows that nearly 97% of cases filed do not ever reach a trial.

The glaring reality is that the way in which the court rules have been structured has denied access to real justice for the majority of Court users.

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To become involved in formal court action is daunting for the majority of people, faced with complex and unnecessary procedural steps, constant delays and spiralling costs, most people have found dispute resolution through court action increasingly out of their reach.

With the majority of civil disputes being dealt with in the District Court (its jurisdiction covering cases up to \$200,000), change has been long overdue.

The changes

From 1 November 2009 fundamental changes have taken place in the District Court. These changes, some eight years in the making, sweep away the bulk of the existing District Court Rules and put in place a new set of streamlined and simplified procedures.

The philosophy behind the change is the creation of a modern litigation process that reflects modern business practices and the technological and judicial resources which the court is now able to deliver.

The core philosophy of the new District Court Rules is to put access to justice ahead of competing considerations. No longer is the traditional trial the expected means of resolving a dispute; in most cases it will be a last resort.

The new Rules promote settlement between the parties as the basic objective.

The processes behind the new Rules are specifically designed to enhance the prospect of settlement at an early stage through simplified problem statements to early disclosure of documents and defences. The majority of cases are expected to be quickly moved to a settlement conference with a Judge assisting the parties to reach resolution.

Recognising that not all cases can be settled, the new Rules still provide for a




range of judicially directed outcomes including short trials, simplified trials and the full trial (although these are expected to be rare). In the case of the short and simplified trials, traditional procedural requirements are largely dispensed with or otherwise simplified, the drive being to reduce costs and free up judicial resources so that cases can be dealt with more quickly, more efficiently and more cost effectively.

The New Era

All cases commencing from 1 November 2009 must operate under the new rules. There are new forms and new processes applying to these cases. While a significant object of the new Rules has been to make the process user friendly and more accessible to the general public, professional legal assistance will always be beneficial in resolving any form of dispute, particularly ones where court is involved.

The litigation team at Fletcher Vautier Moore are familiar with the new Rules and the writer was a presenter in a series of national seminars on the new rules conducted by the New Zealand Law Society for lawyers, judges and justice department staff. Our team is happy to discuss any questions you might have about how these rules affect you, either in respect of current claims that you might have before the Court, or a pending dispute.

Please note that the rules coincide with an increase in the Disputes Tribunal jurisdiction to \$15,000 as a matter of right, and \$20,000 should the parties agree to the increased amount. The expectation is that cases within the Disputes Tribunal jurisdiction should be dealt with by the Tribunal. Again, we are happy to advise and assist with these claims.

If you would like to discuss this article please feel free to contact: Dean Russ at our Nelson office. 

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Relationship Property – Contracting out agreements

Catherine discusses important issues to be aware of when couples separate.



*Catherine Munro
Solicitor
Family, Nelson
Tel: (03) 548 1469*

When parties separate, the Property (Relationships) Act

1976 provides for an equal division of the family home, family chattels and other relationship property. In some circumstances this can be quite unjust. For example one person may have acquired a greater amount of property prior to the commencement of the relationship. This

can be particularly relevant for second marriages where one party has had an opportunity to acquire greater assets than the other party.

Section 21 of the Act provides for a husband and wife, civil union partners, de facto partners or two persons in contemplation of entering into a marriage, civil union or de facto relationship to contract out of the provisions of the Act.

There are a number of reasons as to why it may be wise to contract out of the Act, but usually it is to avoid the presumption of equal sharing of property that arises when the relationship ends. An Agreement to contract out of the Act may also deal with property acquired by the parties before the relationship began. This is called separate property and should not be divided between your partner and yourself.



It is difficult to have a Property Agreement set aside. A Court can only do this if, after having regard to all the circumstances, it is satisfied that giving effect to the Agreement would cause serious injustice.

There are strict requirements regarding Property Agreements and what is required to bind parties to a Property Agreement and it is important to ensure that these requirements are met.

It is increasingly common for parties to a relationship (marriage, civil union, de facto relationship) to enter into such Agreements. It is important to remember that time and money spent at the beginning of a relationship to have a binding Agreement drawn up, will often save you a lot more money, time and

stress later on, in the event that the relationship comes to an end.

If you have any queries in relation to a Property Agreement, or would like us to draft an Agreement for you, please contact Catherine.

If you would like to discuss this article please feel free to contact: Catherine Munro at our Nelson office. ⚠

A Property Agreement can:

- declare property to be separate or relationship property;
- define the share each party to the Agreement has;
- define shares on death;
- provide for the calculation of the shares and
- prescribe the method by which the relationship property is to be divided.

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Some good news for burnt Investors

Failed Investment! Callum discusses options for retrieving your investment.



*Callum McLean
Solicitor
Litigation, Nelson
Tel: (03) 548 1469*

Numerous companies such as Blue Chip, Bridgecorp, Capital + Merchant and others have failed in the recent recession, leaving investors significantly out of pocket. However, there has been some good news for burnt investors. The intermediate companies who recommended such investments may be left at risk if such advice was incorrect or omitted crucial factors.

A recent decision of the High Court, *Breeze v VPFS Financial Planners Limited*, will have repercussions for all intermediate financial advisory firms which advised investors to invest in high risk schemes.

The facts involved Mrs Breeze who was a 75 year old widow, her investment profile was conservative and aimed at low risk modest income returns. She was advised to invest in a Blue Chip related scheme by her financial advisor.

Expert evidence was that the Blue Chip related scheme recommended was wholly unsuited to Mrs Breeze, as the risks were manifest with the

scheme wholly dependent on the ongoing viability of closely related companies, and the maximisation of gains would have taken years to occur. As such, the Court found that the advice received was deficient, bearing in mind Mrs Breeze's age, her immediate needs and it was not an appropriate investment as it put her home at risk. The financial advisory company had failed to meet the standards of a reasonable financial advisor.

Mrs Breeze was successful in her claims that VPFS had been



negligent and for breach of an implied term of contract.

The result is promising; in particular for elderly investors who invested through intermediate financial advisory firms in schemes such as those provided by Blue Chip related companies.

In another recent decision of the High Court, *Bartle v GE Custodians*, Mr and Mrs Bartle invested in a Blue Chip related scheme that involved them signing an Agreement for Sale and Purchase for an investment property in Auckland. Their Whangarei property was used as security for this purchase. The court found that the


Bartles' solicitor knew that they had few resources apart from their home, that they were pensioners, and that they could not meet their obligations if Blue Chip collapsed. Legal advice about the legal implications of the joint venture structure they were considering should have been given. In other words, it should have been explained to the Bartles that if Blue Chip collapsed, they would be left to settle the purchase on the investment property and to meet the full obligations of all the mortgages and other associated loans.

This duty of care was owed to the Bartles despite the court finding that they had not entered into a retainer with the solicitor at the time that they met with the solicitor prior to signing the Sale & Purchase Agreement.

This is when the relevant advice should have been provided.

The Bartles were successful in their claim that their solicitor had been negligent.

If you have invested in one of the many failed finance or investment companies such as Bridgecorp and/or Blue Chip through an intermediate entity or on the basis of professional advice, then all may not be lost. We would be happy to discuss the implications of these decisions and any means of recovery you may have.

If you would like to discuss this article please feel free to contact: Callum McLean at our Nelson office. 

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Drugs and Driving - New Police testing powers

Know your obligations



*Dean Russ
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Next time you are driving and are stopped by police, it might not be for a test to see if you have been drinking.

From 1 November 2009, the police have expanded powers allowing them to require a driver to undergo a 'Compulsory Impairment Test' (CIT) to determine if a driver is under the influence of drugs.

So who does this affect?

The power applies to:

- Anyone driving or attempting to drive a motor vehicle; or
- Anyone whom the police have good cause to suspect has recently committed an offence against the Land Transport Act involving the driving of a motor vehicle; or
- Anyone involved in an accident; or
- Where there has been an accident and the police are unable to ascertain who has been driving; or
- Any person the police have good cause to suspect was in the motor vehicle at the time of the accident.

The trigger for the police power is a "good cause to suspect"

that the driver has consumed a drug or drugs. This is a factual assessment by the police. Previous cases with similar wording for other testing procedures suggest that there must be a good factual basis for the belief. In practice, the assessment is likely to be based on prior observations of driver behaviour (speeding, weaving or driving erratically) and the driver's appearance on being pulled over (blood shot eyes, blurred speech, dilated pupils, unusual behaviour etc). If required to undergo a CIT a driver is required to remain stopped for a period of time



reasonable to undergo the test. The driver can be required to accompany the police officer to another place to undergo the CIT if road safety, personal safety or privacy issues arise for the giving or taking of the test. In addition to those obligations a person who has undergone a CIT must remain at the place where the test was undertaken until the results of the test are ascertained.

Anyone refusing to comply with these obligations may be arrested. The CIT is able to be used in addition to any other alcohol breath screening

or evidential breath tests which the police may consider necessary.

Any of those familiar with American reality police programmes will have seen many aspects of the CIT which is similar to those used by police officers in the United States to assess alcohol intoxication. Essentially, the test involves a number of visible observations by the police officer including viewing the subject's eyes, measuring pupil size, testing reaction to torch light and tracking of objects. Drivers undergoing the test must also complete a number of balancing, walking and coordination tests. In each case the police record the results and, where the police officer is satisfied that the person's compliance is inadequate, may conclude that the person has failed the test.

Failing the Compulsory Impairment Test will lead to arrest and subsequent blood testing under the compulsory blood testing provisions of the Land Transport Act. If blood testing discloses use of a controlled drug or prescription medicine (for which there is no valid prescription), prosecution can follow. Similarly, refusal to comply with a police officer's request for a CIT to be undertaken will trigger the same compulsory blood testing requirements.

If you would like to discuss this article please feel free to contact: Dean Russ at our Nelson office. ▲▲

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Introducing... Catherine Munro



Catherine Munro
Solicitor
Nelson
Tel: (03) 548 1469

Originally from Christchurch, Catherine has lived and worked in Perth, Western Australia for many years.

She completed her law degree at Murdoch University, Perth. After qualifying as a lawyer, Catherine has worked predominantly as a family lawyer. Catherine specialises in all aspects of family law including children's issues, property matters (relationship property agreements and separation agreements), spousal maintenance, divorce applications, protection orders, Hague Convention applications, paternity applications, child support etc.

Catherine has had extensive experience in mediation of family law matters. She believes mediation is very helpful for families who are either in the process of separation or who have separated, particularly where there are children involved.

For 3-4 years Catherine worked at the National Native Title Tribunal in Perth. The Tribunal was established to deal with native title applications and to assist with the mediation of claims between Aboriginal people and other interested persons.

In 2009 Catherine and her family decided to return to New Zealand to live. They chose Nelson due to the sunny skies and beautiful beaches.



Christmas Hours

Nelson, Richmond and Motueka

Our offices at Nelson, Richmond and Motueka will close for the Christmas vacation at 5pm Wednesday 23rd December, and will reopen Monday 11th January with skeleton staff, full reception will be available from Monday 18th January 2010 at 8.30am.

Takaka

Our final weekly visit to Takaka for 2009 will be Thursday 17th December 2009, commencing again on Thursday 21st January 2010.

After Hours Contacts

Should you require legal assistance during our office closure periods, please ring our normal office numbers (Nelson 548 1469; Richmond 543 8301; Motueka 528 7030; or 0800 281 469) as our calls are being managed and your query will be directed to the appropriate lawyer available over the Christmas break.



Would you prefer to receive our newsletter via e-mail?

If so, please contact Sue Gardener, Partnership Secretary, Nelson Office

E-mail: sgardener@fvm.co.nz Telephone 03 548 1469



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LAWYERS

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Visits to **Takaka** every Thursday/Friday

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