S J SCANNELL & CO

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INSIDE THIS EDITION

Neighbour law part 2: Nuisance and trespass, issues with animals, noises & smells 1

The disciplinary meeting as part of a sound process 2

For companies – an overview of voluntary administration, receivership and liquidation 3

Greenpeace NZ – Supreme Court decision 3

What is a General Security Agreement? 4

Snippets 5

Fixture or chattel - why should I care?..... 5

Attorneys under enduring powers of attorney – what is your role?..... 5

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If you have any questions about the newsletter items, please contact me, I am here to help.

Neighbour law part 2: Nuisance and trespass, issues with animals, noises & smells

In a perfect world, you and your neighbour should be able to resolve any problem by discussing it together. The law is careful to balance one person's right to enjoy their land with a neighbour's right to be protected from interference.

If your neighbour's domestic animal comes onto your property without your consent, this is trespass and you have certain rights to remove the animal or have it removed. Interference with a neighbour's right to enjoy their land can amount to legal nuisance, if it is unreasonable and substantial. In most circumstances, the owner of the animal is liable for the damage it caused while trespassing. Most local councils have bylaws that place rules and requirements on owners for keeping domestic animals in towns and cities.

Dogs - the Dog Control Act 1996 sets out the legal obligations on dog ownership, including their care, control and the owner's responsibilities for damage caused by their dog. Dogs must be under the direct control of their owners at all times. For example, if a dog digs up a neighbour's plant, the neighbour can make a claim in the Disputes Tribunal if the dog's owner does not agree to pay for the damage.

If a dog is causing a nuisance by persistently barking or howling, a complaint can be made to the Dog Control section of your local council. A dog control officer can give the dog owner a written notice requiring them to stop the nuisance, and if necessary, remove the dog from the property.

If you see a dog attacking a person or any stock, poultry, domestic animal or protected wildlife, you have a right to seize or destroy the dog in order to stop the attack. If the dog is seized, it must be handed to a dog control officer

or the police who will either impound the dog or have it destroyed.

Cats - unlike dogs, cats are not closely regulated, and are allowed to trespass. The cat's owner is not usually liable for any damage made by their cat.

Stock - stock owners are liable for any damage caused by their stock wandering onto the road if the owners have not taken sufficient care to prevent this from occurring. If stock trespass onto someone else's land, the occupier of the land may impound the stock and seek damages under the Impounding Act 1955.

Noise & smell - if your neighbours, or their animals, are making excessive or unreasonable noise, a complaint can be made to the local council. An enforcement officer will usually investigate the complaint and decide what action should be taken under the Resource Management Act 1991. This will usually be either an excessive noise direction for a short-term problem (e.g. noise from a stereo) or an indefinite Abatement Notice for an ongoing problem (e.g. noise from a factory).

An application can also be made to the Environment Court for an Enforcement Order to stop an activity that is causing excessive or unreasonable noise.

The gathering of rubbish or unpleasant smells may amount to nuisance under the Health Act 1956 and be dealt with by way of enforcement orders or abatement orders as well.

Neighbourhood disputes are ideally suited to mediation and your lawyer can suggest a suitable mediator, if required.

The disciplinary meeting as part of a sound process

From time to time, issues arise with employees in workplaces that cause employers concern. These issues are many and varied but can include concerns about possible employee misconduct. These events can trigger an employment process, involving an investigation and the need to meet with the employee. After an employment investigation is concluded, the employer may decide that further action is necessary. The employer needs to ensure that they act fairly and reasonably in dealing with the employee at the centre of the allegations or issues.

It is imperative that as part of a fair process the employee is fully informed of the allegations or concerns that have prompted the investigation, and that the employer has assessed that the situation requires further action. The employee should have a real opportunity to consider and respond to the allegations or complaints. The employer should invite the employee to attend a meeting to enable the employee to provide their explanation or response.

The invitation to the disciplinary meeting should be in writing, clearly stating the purpose of the meeting, and setting out in detail the nature of the allegations or complaints that form the basis of the disciplinary meeting. The employer should specify how those allegations and concerns may justify disciplinary action, for example the allegation or issue may constitute serious misconduct or may be in breach of a specific term of the employment agreement. The letter should make the employee aware that the matter is serious, and the possible implications for the employee's continued employment. The letter should specify if there is a risk that the matter could result in termination of employment. The employer should advise the employee that they are entitled to have representation or a support person present at the meeting.

During the meeting the employer should work through the details of the allegations or issues with the employee, carefully obtaining the employees responses or explanations. The employer should keep detailed notes of the meeting, to enable the employer to demonstrate a fair and reasonable approach if the employer's process comes under scrutiny at a later date. The employee may refuse to attend the meeting, or attend the meeting and not respond. If this is the case, the employer should make the employee aware that if the employee chooses not to participate in the process the employer will have to make a decision based on information gathered during the investigation. A reasonable amount of time should be set aside for the disciplinary meeting.

The employer must not predetermine the outcome of the disciplinary process before meeting with the employee. The employer must genuinely consider the employee's responses with an open mind. If the employee points to other information by way of explanation or response, the employer may need to undertake further enquiries or investigation before making a decision.

Any decision made by the employer following the disciplinary meeting must be what a fair and reasonable employer could have done in all the circumstances. The obligation is on the employer to justify any action or decision they make that affects the employee's employment.

Taking a fair, open and reasonable approach to the disciplinary meeting will enhance the employer's disciplinary process, and will assist in ensuring the disciplinary process is sound and any resultant decision is reasonable.

For companies – an overview of voluntary administration, receivership and liquidation

When a company is in financial difficulty, it might enter voluntary administration, receivership or liquidation. There are important differences between these processes, as outlined below.

Voluntary administration
Under Part 15A of the Companies Act 1993 ('the Act'), an administrator may be appointed to a company by:

- its board,
- a liquidator or interim liquidator where the company is in liquidation,
- a chargeholder with an enforceable charge over all, or substantially all of a company's property, or
- in certain circumstances the court.

This administrator takes control of the company from the directors and reviews the operation of the company during a 20 working day period.

After this period, a "watershed meeting" is held to decide the future of the company. By this time, the administrator will have considered the interests of the creditors of the company moving forward.

At the watershed meeting, the creditors may decide:

a) that the company execute a 'deed of company arrangement' governing how the company's affairs are to be dealt with and dealing with creditors' claims,
b) that administration should end, or
c) a liquidator be appointed where one has not already been appointed.

Depending on the outcome of voluntary administration and the watershed meeting, this process may allow the company to resume all or some of its business once it has ended, and provide real benefit to the company in terms of compromise with creditors, and future direction.

Receivership
Where a company has provided security over company assets to a creditor, and the company is in default of its obligations under the terms of the security agreement, the secured creditor (e.g. a bank with a General Security Agreement over the assets of the company) may appoint a receiver.

A receiver acts for the benefit of the secured creditor in respect of the secured property, and other creditors should be mindful that a receiver does not act for their benefit.

A receiver's powers are governed by the Receiverships Act 1993 and the specific terms of the creditor's security arrangement with the company. For example, a receiver may demand and recover the income of any secured property from a company.

Importantly, even where an administrator has been appointed for a company, in some circumstances, a receiver may still be appointed by a secured creditor.

Liquidation
Where a company is unable to pay back its debts it may go into liquidation; this is the point of no return for a company.

A liquidator can be appointed by the shareholders, board of directors or creditors of a company, or by court order.

A liquidator takes control of a company's assets primarily for the benefit of unsecured creditors, but appointment of a liquidator does not affect the rights of a secured creditor in respect of secured assets.

A liquidator's primary role is to bring in all the assets of the company and distribute them to the creditors of the company in accordance with the Act. The liquidator also has further duties, such as duties in respect of providing reports to the creditors and shareholders of the company throughout the process.

During the liquidation process, the directors of the company have very limited powers. The net effect of liquidation is that the company is ultimately struck off the Register of Companies, and can no longer trade.

Greenpeace NZ – Supreme Court decision

Charities Law in New Zealand begins, as with other common law jurisdictions, in England with the Elizabethan Statute of Charitable Uses in 1601 ('the Statute'). Although the law in New Zealand is now governed by the Charities Act 2005 ('the Act'), a recent decision of the Supreme Court concerning the charitable status of Greenpeace shows that the more than 400 years of development of the common law in this area continues in earnest.

Charitable status in New Zealand, and the resulting tax benefit, is determined by the Department of Internal Affairs and the Charities Board who assess, by analogy with existing cases, whether the particular objectives of the entity concerned are indeed charitable. Establishing 'charitable purpose' is usually the critical issue for those wishing to apply.

While a number of specific charitable purposes were originally set out in the preamble to the Statute, the courts have considered that this is not an exclusive list and preferred an approach said to be within the "spirit and intendment of the preamble".

In time charitable purposes came to be classified under four separately recognised headings, namely: relief of poverty, advancement of education, religion, and other matters beneficial to the community. It is this fourth heading, relating to public benefit, which has led to difficulties within the law. Some cases have argued a public benefit alone creates a presumption in favour of being charitable, whereas others have favoured the more traditional approach of determining charitable purpose by analogy.

Despite these divergent views, what was reasonably well accepted in New Zealand was that if the objectives of the organisation concerned were advocacy or political (as in the promotion of law reform) then, unless these could be considered ancillary to an overriding charitable purpose, the organisation could not be a charity. The Courts considered they were not competent to assess where the public benefit lies in what are essentially political matters.

Greenpeace's objectives include the promotion of nuclear disarmament. In 2008, when Greenpeace first applied for registration as a charity, it was denied on the basis that although the bulk of its purposes (such as the preservation of the environment) were charitable, the promotion of disarmament was not. Greenpeace challenged this decision by appealing to the High Court, and failing there appealed to the Court of Appeal and eventually the Supreme Court. Greenpeace argued that just having political objectives did not necessarily mean it was non-charitable.

The Supreme Court heard the case in August and by a majority decision upheld Greenpeace's argument – stating that the political purpose exclusion should no longer be applied in New Zealand. However, it did not follow that Greenpeace would automatically become a charity. Instead the Court found, that despite being political, it could not say that the promotion of nuclear disarmament was necessarily a public benefit and for that reason it chose to remit the issue for reconsideration by Charities Services.

While a watershed case for charities in New Zealand, the case demonstrates that political organisations will not automatically gain charitable status and nor will they be automatically excluded. Instead, the Court found, what is required is a consideration of the political end being advocated, and the means of its promotion, in order to assess whether that purpose can be said to be of public benefit within the spirit and intendment of the Statute.

What is a General Security Agreement?

You may have been asked to enter into a General Security Agreement ('GSA') to provide security over your assets to a third party, before that party will advance you money, goods or services. What does this mean?

What is a General Security Agreement?

A GSA is a common form of security often used to secure commercial loans or credit arrangements. It can be an effective way to obtain security over the assets owned by a person or company.

When entering into a GSA with your bank, you or your company will often be asked to provide security over all of your present and after-acquired property, meaning the bank will have security over everything you own now and everything you will own in the future. A bank could, for example, require a GSA from you or your company to secure loan monies advanced by the bank.

When entering into a GSA with one of your suppliers, you will typically provide security over just some of your assets, often the assets that they supply to you together with the sale proceeds of such assets.

A GSA will usually secure all moneys owed to the secured party now and in the future (called 'secured moneys'). This will include collateral liability and the costs of enforcement.

What if I default?

The primary remedy of a GSA is that if you are in default of your obligations, the secured party can take possession of and sell the secured property. If a Company defaults on a GSA, the secured party can appoint a receiver (in accordance with the Receiverships Act 1993) to manage the company's affairs. The receiver is then able to sell off Company assets in order to repay debts to the secured party.

Your obligations

To avoid defaulting under the GSA you will need to ensure you do not breach the specific obligations imposed under your agreement. Key obligations of the commonly used Auckland District Law Society GSA include:

- The obvious (but sometimes overlooked) obligation to pay to the secured party the secured moneys

owed to them under any agreement, in accordance with the terms of that agreement.

- You must not allow anyone else to take security over any property a secured party already has security in, without first obtaining the secured party's consent. As a practical example this will mean you may need your bank's consent before you open a line of credit with a supplier.
- If the GSA covers farm land, you must farm and manage the land in accordance with established practice, including keeping the land clear of all weeds and noxious plants, animals and insect pests and taking reasonable steps to control disease, crops, pastures, plants and stock.
- You must not sell any secured property, nor alter or remove any improvements, nor deal with any resource consent that affects secured property without the secured party's consent.
- If a Company enters into a GSA they must not materially change the control of the Company without first obtaining the secured party's consent.
- You must pay all rates, taxes, charges and other outgoings in relation to all secured property, must repair and maintain all improvements and must adequately insure all secured property.

A GSA is a complex legal document that imposes onerous obligations. It can provide powerful wide-ranging powers to the secured party to take control of your assets to recover moneys owed if a GSA is breached. With this in mind, a GSA should not be entered into lightly. Where in doubt you should always take legal advice.

Snippets

Fixture or chattel - why should I care?

When buying or selling property, fixtures are generally included automatically, chattels are not. This can cause difficulty as it is not always clear whether something is a fixture or a chattel. Fixtures are usually fixed to, and form part of the land, whereas chattels are usually movable. To further refine the test, you will need to examine on a case-by-case basis why and to what extent the item is fixed to the land. It's not always easy – these matters often end in dispute.

A dishwasher is arguably a fixture where it is plumbed and wired directly to the house and part of the cabinetry. It's arguably a chattel if it rests on its own weight, has easily detached plumbing and a regular power plug.

To avoid confusion, write it down. If something should be included (or specifically excluded) record it in the agreement. If in doubt, seek advice!

Attorneys under enduring powers of attorney – what is your role?

As an attorney appointed under an enduring power of attorney (EPA), you have important obligations to the person who appointed you ('the donor'). Some obligations are imposed at law, and some are imposed only if they are included in the EPA itself. These obligations include (but are not limited to) a duty to act to the benefit of the donor, a duty to consult and a duty to provide information on the exercise of your powers as attorney. Sometimes you will only be able to act as attorney in certain situations or will have conditions and restrictions placed on your authority to act.

Property attorneys must keep records of financial transactions entered into while the donor is mentally incapable, failing which, you may be liable for a fine of up to $1,000.

Each EPA is different, so it is important to carefully review each document to ensure you are able to comply with your obligations as attorney.

S J Scannell & Co
Would like to wish you and your family a Merry Christmas and prosperous New Year

We advise our offices will be closing on Wednesday, 23rd December 2014 and re-opening on Monday, 12th January 2015 at 8.30 am