

NEWSLETTER

March 2004

THE CYCLE RACE THAT WENT WRONG

For many people who are members of sports clubs or who organise sporting events, the Christchurch Cycle Race case was cause for serious concern. Astrid Andersen's conviction on a charge of criminal nuisance in August 2003 sent shockwaves through the sporting community.

Now that the dust has settled and emotions have subsided, it is a prudent time to consider the remarks on sentence by Judge Abbott.

The facts of the case are fairly well known. Ms Andersen organised Le Race 2001. While taking part in that event, Mrs Caldwell collided with a car travelling in the opposite direction on the Summit Road. At the time, Mrs Caldwell was cycling on the wrong side of the road.

The charge against Ms Andersen succeeded because in essence, the information that Ms Andersen provided to competitors was ambiguous regarding the status of the Summit Road and a number of competitors were mistakenly under the impression that the Summit

Road would be closed to other traffic during the event. The information provided to competitors was in an information sheet (which referred to a road closure on the Summit Road) and an oral briefing given by Ms Andersen prior to the start of the race.

Ms Andersen had identified that one of the potential hazards of the event was with cyclists receiving incorrect information. It was intended that by providing the information pack and pre-race briefing, Ms Andersen would avoid that hazard.

Judge Abbott commented on news coverage of the trial. He noted that there had been "a number of wild pronouncements in the media and by sporting organisations and event organisers that the verdict on the criminal nuisance charge against [Ms Andersen] is the death knell to the sporting culture of this country as we know it. That is utter nonsense. Nothing could be further from the truth". Judge Abbott's point was that a degree of negligence is required for a criminal nuisance charge to be proved.

The tragedy which befell Mrs Caldwell resulted from a series of flawed decisions by Ms Andersen and in particular, her failure to consult her safety manager (who was highly qualified) regarding the contents of the pre-race documentation. In Judge Abbott's view the verdict which the jury reached was not only justified but virtually inevitable.

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In summary, the Judge held that Ms Andersen's conduct was neither reckless nor intentional, but was merely careless. He did however note her continued attitude of denial since the tragedy occurred. He imposed a fine of \$10,000. We understand that the case is under appeal.

Event organisers would do well to remember that a charge of criminal nuisance actually requires an element of negligence. Furthermore, there must be a causative link between the act or omission and the endangering of life. While participants in inherently risky activities must assume responsibility for their own safety, that assumption of risk will be determined by the participants' understanding of the likely risks involved, based on the information provided to them. If you are organising an event, ensure that your written and oral instructions are clear, unambiguous and consistent.

DOG CONTROL

In late 2003 the Dog Control Act ("Act") was significantly changed by the Dog Control Amendment Act 2003, in response to a number of publicised attacks on children.



Purpose

The Act aims to:

- Provide councils with greater powers and additional obligations in relation to their dog control policies and practices;
- Place greater responsibility on dog owners, and
- Bring in measures such as micro-chipping of dogs and the classification of certain breeds of dogs as 'dangerous and menacing' to help meet the above purposes.

Some changes took effect on 1 December 2003. The remaining changes take effect on 1 June 2004 and 1 June 2006.

Key Changes

A council now has the ability to class a dog as a 'menacing dog', on the basis of either:

- Observed or reported behaviour of the dog, or
- Any characteristic typically associated with that dog's breed or type. Dogs listed in this category cannot be bred or imported into New Zealand and include American Pit Bull Terriers, Dogo Argentino, Japanese Tosa, and the Brazilian Fila.

Where a dog is deemed to be a menacing dog, it must be muzzled in public and, if the local council so requires, it must be neutered.

Dangerous Dogs

The actions of a dog can in some circumstances result in the dog being classified as a 'dangerous dog' under the Act. Dangerous dogs must also be muzzled in public and neutered and are subject to increased registration fees. Failure to muzzle or neuter will likely result in an order for destruction of the dog, if the owner is successfully prosecuted!

All dog owners must now carry or use a leash at all times (on the dog – not the owner!)

Powers of Councils

Dog control officers and rangers are now able to seize a dog from private land where the dog is not constrained (i.e. loose and unsupervised on an unfenced section), where the dog has been off the property and not under control, or where the dog has been left without access to proper and sufficient food, water or shelter.

From 1 June 2004 the owner of a dog must ensure that either the dog is under the direct control of a person, or confined within the land or premises in such a manner that it cannot freely leave the land or premises at any time.

Microchipping

One of the most controversial changes is the requirement for all dogs registered on or after 1 July 2006, and all dogs classified as either 'dangerous' or 'menacing' since 1 December 2003, to be micro-chipped.

The penalties for breaching the Act have been significantly increased. The maximum penalty for owning a dog that is involved in a serious attack has increased from three months imprisonment or a fine of up to \$5,000, to three years imprisonment or a fine of up to \$20,000. Councils have the ability to issue infringement notices imposing instant fines on dog owners.

Conclusion

If you are a dog owner, you need to be aware of your new obligations and ensure that you have an adequately fenced property to avoid breaching the act.

BUT IT'S MY MONEY!!

Have you ever supplied goods or services to a company, received some payment, but the company has gone into liquidation leaving you owed the rest?

If so, the liquidator may have asked you to file a claim form. You do so, but do not believe you will receive any further payment, take the loss, write the debt off and put it down to a bad experience.

But have you then received a letter from the liquidator asking you to refund the payments you have already received?

What Can They Claim?

Section 292 of the Companies Act 1993 ("Act") provides that payments made by a company within a certain period before it goes into liquidation are voidable, can be set aside and claimed back by the liquidator. This is the case if you received payment:

- At a time when the company was unable to pay its due debts, and
- It enabled you to receive more towards satisfaction of your debt than you would otherwise have received in the liquidation, **unless** the transaction took place in the ordinary course of business.

There are two time periods to be concerned about - within **six months** and within **two years** of the liquidation. If the transaction took place within six months the ability to resist the setting aside is considerably more difficult.

The liquidator must serve you with a notice which sets out the transactions to be set aside. If you take no action, the transactions are set aside and the liquidator is entitled to pursue you to recover the amount involved.

In order to avoid this - you **must** apply to the High Court seeking an order cancelling the notice.

There have been a number of cases concerning the right to have the notice cancelled and the related provisions of the Act, and most cases are determined on whether the transaction took place 'in the ordinary course of business'. This is a problematic test, and there are various interpretations that have been applied.

At its simplest, the test is satisfied if the payment to the affected party was made by the company in unremarkable circumstances, that is, within the terms of trade that applied, without the need for any arrangement to be made and without any pressure being applied to extract payment.

What Can You Do?

Even if the order to cancel the notice is not made by the Court, there is some further possible relief for creditors. Section 296 of the Act provides that recovery may be denied wholly or in part if the person from whom recovery is sought:

- received the property in good faith; and
- has altered their position in the reasonably held belief that the payment was validly made and would not be set aside; **and**
- in the opinion of the Court, it is inequitable to order recovery.

Unfortunately you may have to go through the time and expense of a hearing to determine if you will get relief.

Our Advice

Companies that go into liquidation can cause real and serious problems for suppliers by not only leaving debts unpaid, but also opening up the possibility that payments received may be set aside. There are possible ways to deal with these problems and you should contact your lawyer to discuss them.

PUTTING THE BRAKES ON DODGY DEALERS??

On 15 December 2003 the Motor Vehicle Sales Act (MVSA) came into effect replacing the Motor Vehicle Dealers Act 1975.



The purpose of the MVSA is promotion and protection of consumer interests in relation to motor vehicle sales. Accordingly, the MSVA has implemented significant changes in the law relating to car dealers and their trading activities.

The MVSA has deregulated the car sales industry by replacing licensing requirements of car dealers with a new system of registration that

applies to "motor vehicle traders". The MVSA defines a "motor vehicle trader" ("trader") as any person whose business is motor vehicle trading and includes car market operators, importers, wholesalers, auctioneers and consultants.

Persons who hold themselves out as carrying on the business of motor vehicle trading, and persons who sell more than six vehicles or import more than three vehicles in any twelve month period will also be treated as traders (unless they can prove that they are not doing so for the primary purpose of gain).

Online Register

Those that fall within the MVSA definition of a trader must be registered on the Motor Vehicle Traders Register ("MVTR") by 31 March 2004. Consumers can check if traders are registered or have been banned from registration through the online MVTR.

The legislative change of most interest to those buying or selling vehicles is the Suppliers Information Notice ("SIN") that traders must display on all used vehicles. A SIN contains crucial information for the consumer. In particular, it must tell you whether or not a trader is registered and the registration number must be displayed. It must disclose details of any security interests registered against the vehicle and provide a summary of rights available to the consumer. Information about the actual distance traveled by the vehicle must be provided. If the motor vehicle trader believes the odometer reading is incorrect, the SIN must clearly state this. The Commerce Commission is the appropriate agency for consumers to contact for enforcement of SIN requirements.

Dealing With Disputes

Previously where problems with traders arose consumers had to file claims to the Motor Vehicles Disputes Tribunal (MVDT) through the Motor Vehicle Dealers Institute. Now consumers can approach the MVDT directly.

- The MVDT can now hear claims under a wider range of laws including the Consumer Guarantees Act, Fair Trading Act, and Sale of Goods Act.
- Claims can be made against registered traders and unregistered traders if the consumer can show the trader was in the business of selling vehicles.
- The MVDT could previously only hear claims relating to used vehicles but it is now empowered to hear claims relating to new vehicles of a value up to \$50,000.
- Consumers can claim for a wide range of grievances and the remedies available from the MVDT are also broad.

While the MVSA goes some distance to providing increased consumer protection against legitimately registered traders, there remains no incentive for rogues who illegally import and sell cars each year to legitimize their "business". If you are intending on purchasing a used vehicle, ensure you see the SIN before you buy!!

RETIREMENT VILLAGES ACT 2003

The Retirement Villages Act 2003 ("the Act") was passed on 22 October 2002. Parts of the Act will come into force in February 2004. The remainder will come in to force later in the year.



Purpose

The purpose of the Act is to provide greater protection to residents of Retirement Villages and their property rights, by providing a clear legal framework for residents, intending residents and operators.

What is a retirement village?

The definition in the Act is broad and includes any property or building that contains 2 or more residential units providing residential accommodation together with services and/or facilities for persons predominantly in their retirement (and their spouses), and for which they pay a capital sum as consideration.

Registration

The Act requires the operators of all new and existing Villages to lodge an application for registration with the Registrar of Retirement Villages.

If a Village is not registered, it is unlawful for an operator to make any offer of occupation or permit the publication of any advertisement relating to the Village.

It is important to note that the fact that a Village is registered does not mean that it has the approval of the Registrar or the Crown.

The Act provides increased protection by requiring:

1. That the industry complies with a Code of Practice that has been approved by the Senior Citizens' Minister.
2. That every Village has a Code of Resident's Rights.
3. That the Occupation Right Agreement contains a number of standard terms.
4. That an intending resident receives:
 - A copy of the Code of Practice.
 - A copy of the Code of Resident's Rights.
 - A comprehensive disclosure statement. The disclosure requirements go some way to ensuring that intending residents have the ability to make informed decisions before investing their money in a Village. The statement must

outline all essential information, including:

- All entry, occupancy and exit costs and the terms of payment (exit costs apply when a resident moves out or passes away).
 - The terms and conditions of residence.
 - Sale and disposal arrangements.
 - A suggestion that intending residents obtain independent legal advice.
5. That an intending resident be given a 15 day 'cooling off' period to cancel the agreement.
 6. That each Village has a statutory supervisor and that the effect of the Act is monitored by a Retirement Commissioner.
 7. That an operator provides and makes known a facility for dealing with complaints along with a dispute resolution procedure.
 8. That intending residents obtain independent legal advice before signing the occupation agreement.
 9. That new penalties for breaches of the legislation be provided including:
 - Suspension of registration.
 - Voiding the agreement.
 - Being charged with a summary offence.

Although the increased need for protection arises due to a number of factors, the most obvious must be that Retirement Village operators are dealing with potentially vulnerable members of society - people who are acquiring the right to occupy a property in a Village while not necessarily acquiring a corresponding saleable interest in the property.

If you have any questions about the newsletter items please contact us, we're happy to help.