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newsletter

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BREXIT, POLITICAL POWER AND THE ROLE OF THE COURTS

On Thursday 23 June 2016 the Brexit polls closed and marked the beginning of the UK's withdrawal from the European Union (EU).

Brexit has triggered a series of financial, cultural and political waves which will affect the UK and Europe for a long time to come. However, from a legal perspective, it has also given rise to a silent standoff between two branches of the UK government.

Summary

Although Brexit was a political movement, after the referendum closed the movement became reliant on law changes to ratify the decision by UK's citizens to leave the EU. This law change had to take place before the withdrawal process could begin.

When changing laws, UK's Parliament must follow set democratic processes in order to avoid an abuse of Parliamentary power. If an abuse of Parliamentary power does arise, the Courts may intervene. In effect, the Courts can stop Parliament from enacting laws which the Courts deem unsafe for constitutional reasons. The same is true in New Zealand.

For Brexit, following the closing of the referendum, Parliament attempted to begin the withdrawal from the EU with immediate effect using prerogative power vested in the Prime Minister, Theresa May. The Courts intervened, forcing Parliament to follow due process in enacting the necessary laws.

The ultimate result was no more than a pause in Parliamentary processes; the proposed bills passed into law by way of significant majority very shortly after the Court's decision. However, the Court's intervention provides us with an example of the importance of the Court's role as a guard against abuses of Parliamentary power.

Interestingly, we had a similar stand off in New Zealand during the 1980s. In that instance steps by a Muldoon-led Parliament to pass laws were criticised by the Courts, but ultimately Parliament pushed the relevant laws through giving rise to a similar result to that in Brexit, but without Muldoon's Parliament showing the same respect for the Court's decisions.

The stand off

To initiate the UK's exit from the EU, the UK needed to invoke Article 50 of the Treaty of Lisbon. The formal process for the UK to invoke Article 50 is passing a piece of legislation in Parliament. Doing so ordinarily requires a set of P arliamentary steps, consultation, debates and votes.

Throughout the months following the Brexit referendum, Theresa May stated she would trigger Article 50 by using her prerogative power (a power allowing a Prime Minister to bypass Parliamentary processes in national interest). However, prerogative power has not traditionally extended to decisions requiring a change in domestic law and the suggestion that such a power be wielded in respect of Brexit upset the Scottish and Welsh Governments and leaders in Northern Ireland (Challengers).

The Challengers, whose constituents overwhelmingly voted "stay," served the English government (the Crown) with High Court proceedings claiming that triggering Article 50 without a vote from Parliament was unconstitutional. The Challengers also believed that Parliament should let the Scottish, Welsh and Irish Governments vote when determining whether the Brexit Bill should pass.

The High Court heard the case and on 7 November 2016 issued a judgement that ruled in the favour of the Challengers. It stated that the use of prerogative power to trigger Article 50 was unconstitutional as such a decision required a substantial and fundamental change in domestic law. The Crown appealed this decision to the Supreme Court which heard the case in December 2016. On 24 January 2017, the Supreme Court issued their judgement which supported the High Court's decision. Although this was a success for the Challengers, the Supreme Court also found that the Challengers would not be entitled to a vote.

On 1 February 2017, in conjunction with the Supreme Court ruling and without opposition by the Challengers, the Brexit Bill (all two lines of it) received overwhelming support in a landslide vote 498 MPs to 114 MPs. Theresa May was then free to invoke Article 50.

In Brexit, the Courts played an important role in upholding Parliamentary process. In New Zealand during the 1980s, our Courts likewise took action in the face of (in the Court's view) an abuse of Parliamentary process.

In our own stand off between two branches of Government, the Muldoon government commissioned the Clyde Dam and granted it water rights and the High Court overturned that decision. The High Court was particularly concerned about the impact on the landowners of the area.

However, where UK's Parliament followed the orders of its Courts in the case of Brexit, a Muldoon-led Parliament went ahead with the dam in the face of the High Court's decision. Muldoon appeared to then make a habit of ignoring the decisions of New Zealand's Courts, but the involvement of the Court in the affairs of Parliament demonstrates that the Courts in New Zealand (as they do in the UK) play an essential role safeguarding us from abuses of Parliamentary power.

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.

The forms provide options available to the Donor and outline the responsibilities of the Attorney(s).

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. Further, witnesses can use the standard explanation to discuss the implications and effects to the Donor of the EPA;
- 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/finance-planning/enduring-power-of-attorney/

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:

1. Imprisonment for up to two years; or
2. 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.

CARMEN CAMPOS REGISTERED LEGAL EXECUTIVE

Carmen is a Registered Legal Executive. She has worked in the legal field since 2006 primarily on the West Coast of the South Island, but more recently in Las Vegas, USA.

Carmen was born in California and raised in Las Vegas, USA and moved to the West Coast of NZ as a teenager with her family, before locating to Christchurch in 2015.

Carmen has completed the Legal Executive Diploma and graduated in 2015.

Carmen is excited to get back into work after recently having a baby. She likes to spend time with her family and enjoys staying active with friends and going for walks and to the gym.

Carmen's particular areas of interest and knowledge are: Property Transactions, Commercial and Corporate Matters, Estate Administration, Wills and Trusts.

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.

If New Zealand Courts adopt an Australian approach, we can expect fines and penalties such as these:

1. In a case in which a gap was not adequately covered by an unsecured plank of wood causing a death, the company involved was fined $425,000; and
2. In the same case, the director of the company was held personally liable and fined $85,500.

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.

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