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Issue 11

Typographical Errors in a Will

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The issue sometimes arises that a clerical error made in a will has a significant impact on the interpretation of the will and on whether the will is valid.

Quinn & Scattini Lawyers acted in a case where the deceased had prepared a homemade will and had typed "*I, [John Doe], hereby decline this to be my last Will and Testament.*"

The problem was with the word '*decline*'.

When an application was made for a grant of probate, the Registrar of the Supreme Court (**Registrar**) would not issue a grant of probate because the word 'decline' had been typed in the will instead of the word 'declare'. The registrar issued a requisition on the basis that the registrar did not have the power to decide whether the deceased person intended the document to be their final will, with the effect that the matter needed to be heard by a judge.

Section 33(1)(a) of the *Succession Act 1981* (Qld) allows the court to rectify clerical errors made in a will. An application must be made within 6 months after the date of death, otherwise leave of the court has to be sought to extend the time to make the application.

As with most applications to the court, it is necessary to provide evidence by way of affidavits as to the relevant facts and to make submissions to the court setting out arguments in support of the application. The success of an application cannot be 100% guaranteed and there is always the risk that the judge may not make the orders you are seeking.

While it may seem obvious that the word 'decline' was a simple typing error that should have been typed as the word 'declare', it was necessary to provide affidavits to the court from the witnesses to the will setting out their recollection of the facts surrounding the deceased person making the will and signing the will in their presence.

Witnesses do not always provide their addresses when witnessing a will and they can be difficult to locate many years after the will has been signed. Considerable cost can be incurred in locating witnesses, preparing and finalising their affidavits and making submissions to the court in support of the application.

While the court has the power to correct such simple errors in a will, it is far less stressful and less expensive if a person intending to make a will provides their will instructions to a solicitor who is experienced in making wills.

In the case mentioned above, the mis-typing of two simple letters in the homemade will cost the estate thousands of dollars for the court application.

Another Lesson to protect your Interest in Leased Equipment – *Personal Property Securities Act 2009* (Cth)

Commercial Litigation Team

The recent decision of the New South Wales Supreme Court in Forge Group Power Pty Limited (in liquidation) (receivers and managers appointed) v General Electric International Inc. [2016] NSWSC 52 is a reminder of the importance of registering (or perfecting in another way) your interest in personal property.

The case is a harsh reminder for businesses to comply with the registration requirements of the *Personal Property Securities Act 2009* (Cth) (**PPSA**), in order to protect their business's interests.

Setting the scene

Horizon Power and Forge Group Pty Ltd (**Forge Group**) entered into a head contract in 2013 (**Head Contract**).

Subsequent to the Head Contract, Forge Group entered into another contract with General Electric International (**GE**) pursuant to which GE agreed to lease four mobile gas turbine generators (**Turbines**) to Forge Group for a fixed term (**Lease**). GE also agreed to provide Forge Group with additional services, such as installation, commissioning and demobilisation of the Turbines for the duration of the Lease.

On 11 February 2014, not long after the Turbines had been installed, Forge Group appointed voluntary administrators. Forge Group went into liquidation on 18 March 2014.

The Issues at Hand

At the time of Forge Group's liquidation, GE had not registered its interest in the Turbines on the Personal Property Security Register (**PPSR**).

Forge Group sought declarations from the court that the interests of GE (and other parties who were assigned rights in the Turbines by GE) vested in Forge Group immediately before the appointment of the administrators.

With GE facing the prospect of having no rights to the $60 million Turbines, GE argued that the PPSA did not apply to the Lease on the basis that:

- GE was not regularly engaged in the business of leasing goods, and
- in the alternative, the Turbines were fixtures.

Was GE Regularly Engaged in the Business of Leasing Goods?

The PPSA provides that, if the lessor of the goods is not 'regularly engaged in the business', then the PPSA does not apply (section 13(2)(a) of PPSA).

GE argued that it had not regularly engaged in the business of leasing, and

that only its Australian operations should be taken into consideration. This was due to the fact that GE had sold all leasing components of its power generation rental business on 22 October 2013 (after the parties entered into the Lease), and was no longer engaged in the business of leasing goods in Australia.

Forge Group argued that GE's international operations should be taken into account.

The New South Wales Supreme Court found that:

- the activities outside of Australia should be taken into account, wherever in the world those activities occur,
- the test applies to the time the Lease was entered into (May 2013), meaning that GE was engaged in the business of leasing goods at that time, and
- GE was regularly engaged in the business of leasing goods at all relevant times.

What Does 'Regularly' Really Mean?

The case raised interesting commentary on the interpretation of the word 'regularly' under section 13(2)(a) of the PPSA.

Across the world, there have been different interpretations of the word 'regularly' by the courts when it comes to each country's respective personal property securities legislation. The courts in Canada have found 'regularly' engaged in the business of leasing to refer to an established part of the business, regardless of frequency, yet the courts in New Zealand have decided that 'regularly' engaged in the business of leasing means a series of transactions.

The court in this case held that consideration must be given to whether a party is 'regularly' engaged in the business of leasing, not whether they are engaged in the activity of "entering into leases'.

Are Turbines Fixtures?

The PPSA provides that security interests do not apply to a 'fixture' (section 10 of PPSA).

GE argued that the Turbines were fixtures and that section 10 of the PPSA introduced a specific meaning of "affixed to the land", namely "a non-trivial attachment".

Forge argued that the common law test applied, which took into account the intention of the person affixing the goods to the land and the degree of annexation.

For example:

- the Turbines were designed to be demobilised and moved to another site easily, and in a short time-frame;
- the Turbines were only to be in position at the site for a period of two years;
- Forge Power were contractually required to return the Turbines at the end of the Lease;
- the attachment of the Turbines to the land was for the better enjoyment of the land;
- the removal of the Turbines would cause no damage to the land;

- the cost of removal of the Turbines would not exceed the value of the Turbines;
- Forge Group was not the owner of the land and it plainly did not intend to make a gift of the Turbines to Horizon Power; and
- GE prescribed the mechanism for attachment and plainly did not intend the units to become the property of the owner of the land.

The court decided that the Turbines did not become fixtures.

The Outcome

The court found that GE had lost its rights to the $60 million Turbines because the Lease was subject to the PPSA.

As the security interest was not registered, it was determined that GE's interest in the Turbines vested in Forge Group immediately prior to the appointment of voluntary administrators, and Forge Group's rights to the Turbines were superior to GE's.

In order to avoid losing rights to your own goods, it is recommended that you contact Quinn & Scattini Lawyers to discuss the process of registration and to obtain clear legal advice regarding your rights and responsibilities under the PPSA, and to ensure that all documentation is kept up-to-date.

Restraint of Trade

Business & Property Team

Protecting the goodwill and brand of the business and creating income and profit are the main objectives of all businesses. In an attempt to achieve these objectives business owners will often include restraint of trade (**ROT**) clauses in employment agreements, partnership agreements and in business sale agreements.

What are Restraint of Trade Clauses?

ROT clauses are used by employers to attempt to prevent:

- current or former employees or partners from using the trade information obtained in the course of their employment for their own benefits;
- 'snatching' existing clients; or
- competing with the business for a period of time within a specified geographic area/territory.

The effect of a valid ROT clause is that the employee is restrained from taking certain action, which may include, but not limited to:

- engaging in alternative employment with another employer during the term of the employment;
- soliciting the company's clients once employment has ended;
- disclosing confidential information post employment; and

- poaching/soliciting of other employees to work in competition with the employer.

ROT clauses are also used by business buyers to restrain the seller from starting up or trading in a competing business immediately after the business sale.

Courts Attitude on ROT

Courts will only enforce ROT clauses if they are deemed reasonable. However, previous cases show the courts are often reluctant to enforce ROT clauses.

The courts have, from time to time, pointed out that any restrictions on trade can only be justified if it is reasonable in the interests of the parties concerned and reasonable in the public interests. In other words, whilst adequate protection should be afforded to a party to protect genuine business interest, such protection must not at the same time be adverse to the public.

What to Look Out for in a ROT Clause

The mere presence of a ROT clause in any contractual document does not make it enforceable. Whether or not a clause is enforceable depends on a number of factors:

(a) Genuine and Legitimate Interests

For a restraint to be reasonable there must be a genuine and legitimate interest that needs protection and the restraint should be limited to protecting that interest. The ROT clause must not be too broad by preventing the party being restrained from working at all or having any non-employment involvement (such as shareholding) in another company which competes with the employer.

Further, consideration should be given as to whether there are other existing competing businesses in the area. If there are, the restraint may be deemed to restrict the person's competition in the area rather than protecting any legitimate interest. Such restraint will have little justification in public interest.

(b) Nature of the Business and Clientele

It is important to have a properly drafted restraint clause which takes into account the standard practice of the relevant industry. For example, for a business that does not engage with a regular and recurring client base, a restraint which purports to prevent or limit an employee's contact with previous clients of the business is unlikely to be reasonable.

However, if the person has a high level of contact with recurring clients and the business is dependent on such contact being made, it may be reasonable for a restraint to be placed to prevent soliciting of clients after the employment has ended or after business sale.

(c) Nature of the Restrained Party's role and Exposure to Confidential Information

Protecting trade secrets and confidential information is essential to ensure the continuing success of any business. In appropriate circumstances, it may be reasonable to restrain a former employee who had knowledge of confidential information in his/her employment term from disclosing the information if the disclosure of such information to

competitors will be detrimental to the business.

(d) Scope and Duration of the Restraint

A ROT clause will only be deemed reasonable if a limit is set for the geographical area and the duration of the restraint. In general, the restraint should not cover a geographical area that is larger than necessary to protect the business interests while the period of restraint should not be for a time period that is longer than necessary to protect the business interest.

Care should be taken when incorporating 'standard' ROT clauses into any agreement. Properly drafted ROT clauses can be helpful in protecting genuine business interests. It is important for businesses to identify precisely what interests that the owners wish to protect, in what area and for what time and ensure the restriction of trade is limited to that.

It is advisable to seek legal advice to ensure any ROT clauses you have in place are likely to be enforceable.

Why Formalise Property Settlement?

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Family & De Facto
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Formal finalisation can take the format of a binding financial agreement which requires each party to obtain independent legal advice, or consent orders which are registered with the court and reviewed by a registrar. Each option requires disclosure to be undertaken and each party needs to be satisfied that all property, debts and superannuation have been disclosed with proper values attributed to each item.

Whilst it may seem tedious to get to this point, there are some very valid reasons why it may well be in your best interests to finalise your settlement by either of the just mentioned options.

If you are transferring a house or other item that attracts stamp duty, there is a stamp duty exemption available to a party under the *Family Law Act* (Cth) ("**the Act**") and the *Duties Act (*Qld)[1]. You will still have to pay conveyancing fees and registration/processing fees, however, you will not have to pay stamp duty on the portion of property being acquired.

There may be capital gains tax roll-over relief that can be addressed. As with all taxation matters, advice from your accountant is imperative. There are further obligations in this regard where the property transaction is over $2 million dollars.

Whilst you may be separated but not divorced, for married couples, no limitation date applies. So, if you happen to win the mega-draw in lotto, it is fair game for property settlement. Whilst your former spouse may not have made a contribution to the acquisition of that win, it is still a financial resource for family law purposes and you may be required to make a payment to the other party[2]. By not only undertaking property settlement but also obtaining a divorce, the avenues

to try and claim against those monies become significantly reduced – the claiming party then has a lot of explaining to do as to why they should be allowed to make an application.

If you were in a de facto relationship, there is a limitation date of two years from the date of separation to either resolve by agreement or issue proceedings. The vulnerability of your lotto win remains live during this time. Applying after a limitation date has past requires explanation as to why you should be allowed to proceed.

Undertaking formal property settlement gives you the peace of mind in knowing that your financial ties with the other party have been finalised.

Section 81 of the Act[3] tells us:

"In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them."

So, the only aspect that would not be finalised, once the order is made is the actual mechanics of putting the order into action.

Having finalisation of your property settlement means you no longer have to consult the other party about what colour to paint a room, whether there should be improvements or any other aspect which might increase or decrease the value of the property. It gains peace of mind.

Judgments and laws mentioned in this post:

[1] Sections 90 and 90WA Family Law Act 1975; section 424 Duties Act Qld
[2] Farmer & Bramley[2000] FamCA 1615
[3] Section 90ST for de facto relationships

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