QSLAW

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Q&S QUINN & SCATTINI Lawyers

Issue 12

Overdue Changes to Youth Justice System Ahead

Criminal Law Team

There has been a long standing problem with the Queensland criminal justice system, and that is our inclusion of 17-years-olds in the adult justice system. It has been a problem unique to Queensland, being the only state in Australia to treat 17-years-olds as adults and send them to adult prisons. This is despite the fact that in all other areas of law, 17-year-olds are treated as children. They are not able to vote, consume alcohol (legally) or marry. Yet if they commit offences, they are liable to be sent to a jail with other adults instead of other children.

Many of our client's and their families are shocked to learn that at the age of 17, they will be dealt with as an adult by police and the courts, instead of being dealt with by the youth justice system. Whilst it has been a contentious issue amongst the legal profession, many persons not involved with the legal or criminal justice system have been unaware of the issue and simply assume that as a 17-year-old, they will be dealt with as a child.

Thankfully, after decades of lobbying and calling for change, Queensland Parliament on 3 November 2016 passed the *Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2016* (**Act**). The purpose of this act is to ensure 17-year-olds are dealt with as children by the police and courts, as they are in all other states of Australia, as opposed to being brought before the adult court system. The aim of this reform is to in fact reduce offending and reoffending by young persons. This amendment is a welcomed change towards protecting the rights of children in Queensland. Two of the paramount considerations of the *Youth Justice Act 1992* (Qld) are to rehabilitate children and reintegrate them with the community.

The court in dealing with children, also must have regard to the following:

- keeping children safe and promoting their wellbeing;
- the child's development;
- strengthening ties between children and their families, as well as the community; and
- that imprisonment should be imposed as a last resort.

These are not matters which a court in sentencing an adult must have regard to. The police also have broader powers in dealing with children, with the act allowing them to formally caution children or use other methods to divert them away from the court system altogether.

Whilst the Act has been passed, it is currently awaiting proclamation. It is expected to come into force prior to 2 November 2017, to allow for the courts and other stakeholders to prepare for the transition. However, it is certainly an encouraging step in the right direction.

Recently Separated? Are You Entitled To Spousal Maintenance?

Family Law Team

If you have recently separated from your partner, you may be entitled to spousal maintenance.

What is Spousal Maintenance?

Spousal maintenance is the right for one party to a relationship to maintain the other party upon the parties' separation. The court has power to make an order in relation to spousal maintenance by virtue of section 74 of the *Family Law Act 1975* (**the Act**) in relation to married couples and section 90SE of the Act in relation to de facto couples.

What are the Types of Spousal Maintenance Orders?

There are three types of spousal maintenance orders:

1. urgent maintenance;
2. interim order for maintenance; and
3. final order for maintenance.

Who Can Apply For Spousal Maintenance?

In the case of Bevan[1] (the definitive case on this area of the law), the court determined the process in determining maintenance orders. Firstly, the courts will decide whether a party is to receive spousal maintenance based on two interdependent tests. The payee must have a need for spousal maintenance and the payer must have the capacity to provide financial assistance to the payee. If one of these conditions fails to be proved, then the court will not entertain an application in relation to spousal maintenance.

The payee must be in need of spousal maintenance to 'adequately' support themselves[2]. A party must satisfy the court that they have a need based on their inability to adequately support themselves for one of the following reasons as outlined within section 72(1) and section 90SF(2) of the Act. The term 'adequately' is determined by what is reasonable in the circumstances of the particular case[3]. This means, the party seeking spousal maintenance must be provided with more than the bare necessities[4]. This does not mean that the paying party is to provide the other party with the same standard of living which the parties had prior to separation[5].

A payer must have the financial capacity to be 'reasonably able' to provide financial support to the other spouse. The court will determine whether a person is 'reasonably able' by applying a forensic accounting of the income and expenses of that person in determining whether the person has the capacity to pay. This means, the payer must have the ability to pay monies to the payee to assist with the adequate support of the other party.

Interestingly, the court considers any income-tested pension, allowance or entitlements as to the income for the spouse to pay spousal maintenance.

However, there is no consideration by the courts given to any income-tested pension, allowance or entitlements in relation to the financial position of the spouse who is required to establish that they are unable to 'adequately' support oneself[6].

Essentially, the courts recognise that it is a liability for the more financially able spouse not the government to maintain the spouse who is unable to support themselves financially post-separation.

There are additional considerations that the court must consider such as the parties:

- age and state of health;
- physical and mental capacity to gain employment;
- whether a party has the care or control of a child/ren who have not attained the age of 18 years;
- the commitments of a child/ren which impact upon their ability to support oneself;
- responsibilities to support other persons;
- the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration,
- the need to protect a party who wishes to continue that party's role as a parent; and
- various other considerations.

In light of these considerations, the court must acknowledge that the standard of living prior to separation is not automatically granted to a party post-separation. More importantly, the court has discretion to make an order by taking into consideration the individual circumstances of each of the parties to determine what is reasonable in the particular circumstances of each case.

Time Limitation

For married couples, there is a 12 month time limitation for those who intend to make an application to court seeking spousal maintenance from their ex-spouse. For de facto couples there is a two year time limitation. A failure to do so may mean that any proceedings relating to maintenance (or property) may become statute barred and you may lose your rights to your claim for spousal maintenance (or property settlement) being determined by the Family Court or Federal Circuit Court.

It is important that you speak with a family lawyer in order to determine whether you are entitled to claim spousal maintenance.

[1] Bevan (1995) FLC 92-600

[2] Section 75(2) of the Act provides that "a party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately"

[3] In the Marriage of Nutting [1978] FLC 90-140

[4] In the Marriage of Evans [1978] FLC 90-435

[5] In the Marriage of Mitchell (1995) 19 Fam Lr 44

[6] Section 75(2)(f) of the Act.

Challenging a Bank Guarantee

Commercial Litigation Team

This is both a cautionary tale for anyone who is contemplating acting as guarantor of someone else's liability, and a David-and-Goliath story of a battle with a major bank.

The Short Version

Quinn & Scattini Lawyers act for a client who is seeking relief from a guarantee and associated mortgages that were provided to a bank to secure repayment of monies lent to a company of which our client's son was sole director and shareholder. The purpose of the loan was to purchase a motel.

The Facts

Our client provided the guarantee in reliance on a number of representations made by the bank. These representations included assurances from the bank that:

- the borrower did not have financial problems, and the income from the motel meant that the borrower would not default under the loan;
- the location and estimated value of the motel meant that the guarantee would never be called upon; and
- the son had enough management expertise to operate the motel in order to meet the obligations of the borrower under the loan.

As a result of the representations, and due to pressure by the bank to sign the relevant documents urgently, our client signed the guarantee. When the son defaulted under the loan, the bank pursued our client under the guarantee.

Our client alleges that the representations by the bank were misleading and deceptive, based on the facts that our client's son was unemployed and had no assets, the annual loan repayments exceeded the motel's current net annual income, and the motel required reasonable experience in motel management to maintain good occupancy.

The Remedy Sought

Our client has applied for an order under section 86 of the *Trade Practices Act 1974* (**the TPA**) to discharge our client from all liability under the guarantee, and damages under section 82 of the TPA. In the alternative, our client has applied for an injunction pursuant to section 12GD of the *Australian Securities and Investments Commission Act 2001* (**the ASIC Act**) preventing the bank from enforcing the guarantee. We also argue that it is unconscionable to enforce the guarantee and that the bank's conduct contravened section 51AC of the TPA or section 12CC of the ASIC Act. This case is still before the court, so watch this space.

An Important Reminder

It is important to remember before you sign any documents, especially guarantees, that:

- you should take your time and seek independent legal advice;
- you should not give in to pressure by the borrower's finance company to sign any documents on the spot; and
- if you feel pressured, do not sign any documents.

If you are being chased by a creditor under a guarantee, you should immediately seek legal advice.

Issues in Giving a Buyer Early Occupation

Duncan Murdoch
Director
Business & Property

There may be a number of reasons why a seller is asked by a buyer for permission for the buyer to take occupation of a property before settlement has taken place. Whatever the reason, the seller must give careful consideration before agreeing to give the buyer early occupation.

There are a number of potential problems with giving a buyer obtaining early occupation.

These may include:

- the buyer damages the property;
- appliances break and there are questions as to who is responsible for their repair;
- the property is damaged or destroyed e.g. by fire and questions arise as to whose liability it is and whether insurance is in place to cover it;
- the buyer fails to settle; and
- the buyer fails to vacate the property when requested.

The process for evicting the buyer of a residential property can be time consuming and expensive. A seller must think long and hard whether the risk is worth taking.

If a seller does accept the risk then the standard conditions in an REIQ contract for house and residential land provide (amongst other things):

- the buyer must maintain the property in substantially its condition at the date of possession, fair wear and tear excepted.
- entry into possession is under a licence personal to the buyer revocable at any time and does not:
    - create a relationship of landlord and tenant; or
    - waive the buyer's rights under the contract.
- the buyer must insure the property to the seller's satisfaction.
- the buyer indemnifies the seller against any expense or damages incurred by the seller as a result of the buyer's possession of the property.

These standard conditions only go so far.

Consideration should be given to expanding these conditions to include specifically stating such things as:

- the buyer accepts the property in its condition at the date of possession;
- the buyer is responsible for all repairs and maintenance to the property;

- the buyer must pay for all services from the date of possession (electricity, gas, water consumption etc);
- adjustments for rates, body corporate fees etc. should be made from the date of possession not the settlement date; and
- no pets are permitted.

This is not an exhaustive list and there may be other issues that a seller wants to include.

As shown above, the giving of early occupation is not a straightforward issue and many complications can and do arise. Sellers need to be aware of the potential risks and proceed accordingly.

Purpose of the QLS Fidelity Fund

Russell Leneham
Director
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All solicitors in Queensland are required by law to:

- hold a current practising certificate which is issued annually by the Queensland Law Society (**QLS**);
- maintain insurance with a monopoly insurer owned by the QLS; and
- pay an annual levy to the QLS to maintain a fund known as the Fidelity Fund (**the Fund**).

The compulsory insurance policy with the monopoly insurer covers solicitors for most acts of negligence in their professional work, thus ensuring that clients have a source of insurance to claim against. The insurance does not cover fraudulent actions by a solicitor; that's where the Fund comes in.

The purpose of the Fund is to reimburse clients whose money is stolen by rogue solicitors. The Fund has been maintained for many decades by the financial contributions of Queensland solicitors.

It is crucial to the efficient operation of commerce, and especially for real estate transactions to be able to occur efficiently, that solicitors operate trust accounts for the purpose of holding clients' money. The funds held by solicitors in their trust account can often be hundreds of thousands of dollars, or even millions of dollars, for a single transaction.

Funds collected in deceased estates or family law property settlements, and payments in settlement of litigation, also form a significant source of funds held in solicitors' trust accounts.

It is therefore essential that the public must have confidence in entrusting their funds to solicitors to be held in their trust accounts.

Reductions of Annual Levies in 2015 and 2016

In 2015 and 2016 the QLS gave surprising good news to Queensland's solicitors by repeatedly reducing the amount of the annual Fund levy.

The reason for these reductions was that the Fund was, and is, to put it bluntly, rich. The Fund is in such good shape that it has a surplus of more than $20 million, AFTER allowing for all known claims.

Fraud by Biddle

Russell Biddle was a Queensland solicitor who ripped off a deceased estate to the tune of more than a million dollars. Shortly before his fraudulent activity was detected, he sold his legal practice and moved to NSW.

The administrator of the estate whose funds were stolen by Biddle instructed Quinn & Scattini Lawyers (**Q&S**) to represent the estate in claiming reimbursement from the Fund.

The Cap on Payments

The Legal Profession Act places a cap of $200,000 per claim on payments from the Fund. But that law also gives the QLS the discretion to pay claims in full regardless of the cap.

Despite the Fund being so wealthy that it has a surplus of millions of dollars, and despite the ability of the QLS to increase the annual levies on solicitors if the Fund needs more money, the QLS decided to impose the cap on the claims made on behalf of the estate.

Courier-Mail Article

On 6 March 2017 the Courier-Mail reported on this travesty.

The Courier-Mail article stated:

"Lawyers are receiving discount fees for a multimillion-dollar 'fidelity guarantee fund' while refusing to fully refund victims ripped off by the profession's rogues."

QLS president Christine Smyth said… '*the QLS had to ensure the fund remained healthy so 'victims of illegal acts are protected*'.

However, senior legal figures, including Q&S Director Russell Leneham, are aghast victims aren't being fully refunded.

Attorney-General Yvette D'Ath said… '*I am writing to the Queensland Law Society about this issue*'."

Clearly the community is not satisfied by the conduct of the QLS. Nor are solicitors. The QLS is not properly representing the interests of solicitors on this issue.

Response by QLS

Two days after the Courier-Mail article was published, the QLS issued the following statement to solicitors:

"A recent article in the print media has criticised the Fidelity Guarantee Fund. That criticism was unfair.

The fund has been in place for many years. It is an initiative promulgated by the goodwill and personal funds of thousands of Queensland solicitors. It is not funded by government, it is not funded by members of the public – it is your money. It is responsibly managed by Queensland Law Society to properly reflect our profession's concerns for the crimes of defrauding lawyers.

Any prudent fund must have caps, and while our sympathies go to those who are affected by criminal conduct, we simply cannot be expected to be a guarantor of every criminal defalcation that might occur.

The Society prudently manages the fund and at all times acts with complete integrity. There will be from time to time disappointed beneficiaries. The Society must operate for

the overall protection of the broader public to the extent which is appropriate and manageable. The Society takes this responsibility very seriously, and while our fund management committee has empathy for victims, it must ensure future victims are also protected." (Emphasis added.)

Rebuttal of QLS Response

That response simply does not stack up to a logical analysis, for the following reasons:

- Yes, the Fund is composed of money contributed personally by Queensland solicitors. Therefore the fund should be managed in the interests of Queensland solicitors. And what is their interest? It is in the interests of Queensland solicitors to maintain public confidence in placing funds in solicitors' trust accounts. That confidence is eroded by the current attitude of the QLS.
- Yes, the Fund must remain healthy so that claims by future victims can be redressed. But when the Fund is so healthy that it has capacity to pay all known claims AND maintain a surplus of more than $20 million AND reduce the annual levies paid by solicitors, then it is clear that all current claims can and should be paid in full.

In short, the Courier-Mail's criticism of the QLS was entirely justified. The QLS is more interested in protecting its bundle of cash, for no good reason, than it is in ensuring that the Fund is used for the purpose for which it exists, namely to pay victims of fraud.

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