QSLAW

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Q&S QUINN & SCATTINI Lawyers

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Ending An Opponent's Claim Early

Commercial Litigation Team

When assisting clients who are being sued, we consider and advise on a range of options and strategies and we work with our clients to achieve the best possible result for them in the most cost-effective manner.

In the case of an opponent's poorly considered claim, there may be an opportunity to force an early end to the proceeding by applying to the court for summary judgment or to have the claim struck out.

Recently, one of our corporate clients and its director were being sued in relation to a solar power system installed by our clients at the plaintiff's property.

The plaintiff had claimed that our clients' sales representative told him back in early 2012 that if he connected a particular solar power system prior to 30 June 2013, he would be entitled to a $0.44 rebate on his power bill. It was not disputed that, at the time, this information was correct.

But it was not until April 2013 (more than a year later) that the plaintiff finally decided to ask our clients to install a solar power system. This they did on 24 May 2013. Following completion of the installation, the plaintiff paid our clients and was satisfied with the product and the installation.

However, the plaintiff claimed that about a year later in April 2014, his electrical supplier informed him that he was not entitled to receive the $0.44 rebate because documentation was not submitted by a cut-off date.

The plaintiff engaged solicitors and proceeded to sue our clients primarily on two grounds: firstly, that back in early 2012, our client's representative had misrepresented the plaintiff's entitlement to the $0.44 rebate; and secondly, that our client had been negligent in not submitting documentation on behalf of the plaintiff by the 30 June 2013 cut-off date.

In preparing our client's defence, we reviewed the relevant legislation. We identified an amendment that commenced on 6 July 2012, which stipulated that only customers who lodged a completed application to connect a qualifying generator prior to 10 July 2012 would be entitled to the $0.44 rebate.

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Now, by the plaintiff's own pleading, he acknowledged that he had not engaged our clients to carry out any work until April 2013! We argued that, because the plaintiff had failed to lodge a completed application prior to 10 July 2012, he became legally disentitled to the $0.44 rebate long before he asked our clients to install the solar power system. Effectively, he was claiming damages against our clients for the loss of an entitlement that, by his own conduct, he had no legal entitlement to receive.

The defence we prepared for our clients denied liability primarily on this ground. On instructions from our client, we wrote to the plaintiff's solicitors offering to settle the case on the basis that it be discontinued in order to minimise further legal costs to our respective clients. The plaintiff rejected this offer and aggressively sought to continue the proceeding and to have it set down for trial.

So What Happened?

We advised our clients of their options and the associated risks, and we recommended applying to the court to have the matter dismissed or struck out. We were instructed to bring the application.

The result was that the court awarded our client judgment against the plaintiff in respect of the misrepresentation claim, and having found that the plaintiff's negligence claim was completely deficient, the plaintiff was ordered to re-plead it. The court's reasons for decision stated:

"*The plaintiff needs to re-plead his negligence claim identifying the nature and scope of the defendants' alleged duty of care by reference to the law governing recovery for pure economic loss in negligence and exactly how the defendants breached that duty. The basis for claiming loss at the rate of 44 cents per kilowatt up to 2028 also needs to be justified given that, as has been seen already, the government can, and has in the past changed the rate for policy reasons at will.*"

In our view, the opposition's claim is as good as dead. The result was a win for our clients and a significant and expensive blow to the plaintiff, who currently does not have any viable cause of action filed against our clients, and we would expect that to remain the case.

How We Can Help

Litigation can be tricky as our opponent just found out. Failure to properly prepare a claim can lead to an expensive and brutal end to a party's claim. If you find yourself or your business being sued, please call Quinn & Scattini Lawyers to book a consultation to discuss how we may be able to assist you.

Exercising A Trustee's Discretion In A SMSF

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In the recent court case of *Re Marsella; Marsella v Wareham (No 2)* [2019] VSC 65, the court was called upon to make a determination as to whether the trustee of a Self-Managed Superannuation Fund ("**SMSF**") exercised its discretion appropriately and, if not, whether it should then be removed as trustee.

The decision highlights the importance of SMSF trustees exercising their discretion to pay death benefits in good faith, with genuine consideration, and in accordance with the purpose for which the power was conferred. It is an important decision in the context of superannuation law as the court ultimately removed the trustee on the basis that the discretion was not exercised properly.

In this case, the deceased was survived by her second husband and her two children from her first marriage. The deceased was a widow when she met her second husband, and they were married for 32 years before her death in 2016.

During her lifetime, the deceased had established a sole member SMSF of which she and her daughter were co-trustees. The deceased had left an earlier binding death benefit nomination. However, at the date of her death, the nomination had lapsed, so no binding nomination was in place at the deceased's date of death.

Pursuant to the terms of the deed that created the SMSF, the daughter as surviving trustee appointed her husband as a co-trustee, and on the same day they elected to exercise their discretion, as trustees, to pay the death benefits of approximately $450,416 to herself as the dependant of the deceased, with nothing to the deceased's surviving husband of 32 years.

The deceased's surviving husband brought a claim against the daughter and her husband as co-trustees of the SMSF, on the basis that the daughter and her husband did not exercise their discretion as the trustees of the SMSF in "good faith, upon real and genuine consideration and for a proper purpose" and that they had acted in conflict with their duties as trustees.

The key questions for the court were:

- Whether the trustees properly exercised their discretion when paying the deceased's death benefit. Specifically, the court considered whether the trustees acted in good faith, with real and genuine consideration and in accordance with the purposes for which the power was conferred, and
- Whether the trustees should be removed as trustees, and the appointment of a new trustee.

Outcome:

Justice McMillan held that the trustees failed to exercise their discretion with a

real and genuine consideration of the interests of the fund's beneficiaries. In view of the improper exercise of discretion and significant personal acrimony between the daughter and the deceased's husband, the trustees were removed as trustees of the fund.

The court highlighted the following points in determining that there was no proper exercise of discretion:

- The daughter did not seek specialist advice in relation to some uncertainties surrounding the trust deed of the SMSF.
- The "inference to be drawn from the evidence [was] that the [daughter] acted arbitrarily in distributing the fund, with ignorance of, or insolence toward, her duties."
- The daughter "acted in the context of uncertainty, misapprehensions as to the identity of a beneficiary, her duties as trustee, and her position of conflict."
- "The ill-informed arbitrariness with which the [daughter] approached her duties also amounts to bad faith."
- "The dismissive tenor of the correspondence from [the daughter's lawyers]" to the second husband's lawyers.
- The court ultimately found that the daughter's husband had also acted in a position of conflict as the husband of the dependant who received the benefits from the fund.

This case is an important consideration for anyone who may be a trustee of a discretionary trust (including an SMSF). While the powers of a trustee are discretionary in such trusts, the trustee's decisions must be carefully considered.

This case highlights that a disingenuous approach to the exercise of discretion may result in an aggrieved potential beneficiary bringing court action against a trustee of a SMSF.

How We Can Help

Our lawyers are experts in all estate matters. Our expert lawyers will work closely with you to ensure you meet the legalities of deceased estate administration and provide high quality, professional trustee/executor services.

Traffic Laws – Getting You Up To Speed

Criminal & Traffic Law

"*The law is the public conscience*." Thomas Hobb

As society changes, so do the laws. When the law changes, the relevant authorities publish announcements, usually with the assistance of media outlets, but not everyone views these announcements and many may be out-of-date with current laws.

This article serves to provide you with clarity regarding some common myths that are out there in the public sphere.

Rumour No. 1 – I know I can't talk to anyone on the phone while driving but I can read a text message

Incorrect. You cannot have your mobile phone in your hand at any time while driving a vehicle. This includes reading, writing or sending a text message. You are also prohibited from turning on or turning off your phone.

New laws are being introduced in 2020 which will see drivers facing $1,000 fines if they are caught using a mobile phone.

Err on the side of caution – invest in a hands-free device. Please note, if you are learner or p-plater under 25-years-old you are not allowed to use a hands-free device. This includes putting the phone on loudspeaker!

Rumour No. 2 – I know I cannot eat a full course meal behind the wheel but a sandwich or burger is okay

It really depends on your driving. You can eat or drink behind the wheel but if you are found to not be concentrating on your surroundings and the road and are pulled over by police you could be charged with careless driving. If you do not have proper control of your car, then police may issue an infringement notice.

Remember – distracted driving is one of the Fatal Five and is responsible for many deaths in Queensland. Stay safe and plan ahead – eat at the restaurant, wait until you are home or stop at a local park and take a quick break.

Rumour No. 3 – I am only going to be five minutes so I can leave my pets in the car with the windows down

False. In Queensland it is illegal to leave your vehicle with your windows down. Pets inside or not.

Rumour No. 4 – I take my pet with me everywhere and it is okay to let the pet sit on my lap

This is illegal. Pets are prohibited from sitting on your lap or causing you to lose proper control of the vehicle you are driving. It should also be noted, there is no specific law that requires you to restrain your pet but most pet owners love their pets and invest in restraints to protect them in the event of an accident.

Rumour No. 5 – I can leave my child in the car while I pay for petrol but not to go food shopping

Technically no. Queensland laws state that you must not leave a child under 12-years-old unattended for an unreasonable time without making reasonable provision for the supervision and care of the child. As you have learnt, you cannot leave a vehicle with the windows down so you therefore cannot leave your child in the vehicle with the windows down while you pay for fuel.

Think you can leave your keys in the car, with the air-conditioning on and children in the car, while you pay for fuel? The answer is no. If you are going to be more than 3 metres away from your vehicle you must secure the vehicle under Queensland laws.

Rumour No. 6 – There is no law stopping me from sleeping in my car after a big night out

This all depends on whether you can prove you are not in charge of the vehicle. It is illegal to sleep in the front seats of the vehicle after you have been drinking but if you are sleeping in the back seat you need to prove to police that you are not in charge of the vehicle. If you think you can prove this to the police then take the risk. Otherwise, find somewhere else to sleep off the big night.

Rumour No. 7 – I am only going to be five minutes so I can leave my keys in the car to pay for fuel

Not quite. If the petrol station's cashier is more than three metres away from your vehicle you must lock your vehicle. If you are making payment at the pump with your card then you are fine.

How We Can Help

If you find yourself charged with a traffic offence we recommend you seek legal advice as soon as possible to ensure you have the best chance of keeping your licence and avoiding heavy penalties. Our traffic lawyers have assisted many individuals defend traffic charges, including drink driving, careless driving, dangerous driving and driving while distracted.

We provide $99 traffic law initial consultations where you can meet with an expert traffic lawyer from our Criminal & Traffic Law Team to discuss your situation and plan the best course of action.

Boundaries & Surveys

Duncan Murdoch
Director
Property & Business

When buyers inspect properties at open days or prior to auction, they will generally focus on the house itself. Rarely will they inspect the boundaries of the property.

Buyers will generally assume that the boundary features (fences etc.) are correctly located on the boundaries of the property. However, this is not always the case, particularly with older properties.

The only way of determining whether the boundary features are correctly located on the boundaries of the property is to have a survey carried out. The survey will confirm the correct location of the boundaries and reveal whether there are any encroachments by adjoining properties onto the property concerned or encroachments from the property concerned onto adjoining properties.

The standard REIQ contract permits a buyer to carry out a survey. If a survey establishes that there is an error in the boundaries of the property or there is an encroachment by structures onto or from the land concerned and such error or encroachment is material then the buyer may terminate the contract before settlement. If such error or encroachment is immaterial then the buyer's only remedy is to claim compensation from the seller but such claim for compensation must be made by the buyer in writing before settlement.

Obtaining a survey can be a double-edged sword. If a buyer obtains a survey which shows an error or encroachment then the buyer will have actual knowledge of the problem. When that buyer comes to sell the property, failure to disclose that problem to a subsequent buyer can be a form of misrepresentation which could lead to a claim for damages.

The Property Law Act 1974 allows either of the property owners in an encroachment situation to apply to the court for an order in respect of the encroachment. The court can grant such order that it deems just with respect to:

a) The payment of compensation.
b) The transfer of land or the grant of an easement, right or privilege.
c) The removal of the encroachment

It is worthwhile for a buyer to consider the issue of boundaries and surveys because issues can arise which later end up as boundary disputes.

How We Can Help

Years of experience in acting for developers ensure that client concerns regarding survey plans, easements and covenants are handled with due attention to detail and professionalism by our expert Property & Business Team.

Our Commercial Litigation Team regularly handles property disputes from questions concerning boundaries right up to ownership disputes where millions of dollars of property is involved.

New Years Resolution … Or Is That Dissolution

Tim Ryan
Director
Family & De Facto Law Team

Tradition has it that the New Year is an opportunity to begin again and to reinvigorate. It is also a time for family get-togethers and a new school year for the children.

The Dilemma

It is common knowledge amongst family lawyers that life changing decisions are made at this time. A partner to a relationship will cry "*never again*" as they return home from dinner with the "In-laws."

Others make decisions based simply on a new beginning. Quite often it's the case where one half of a relationship has deeply considered the ramifications of separation. The other half? It's like a tonne of bricks have fallen upon them. They are devastated and it's a fine line as to how they respond.

Family lawyers are left to tread a knife edge when their respective clients' line up against each other.

The Dynamics

The logical and objective approach of the law often struggles with this competing dynamic borne of domestic circumstances. What goes on behind closed doors and the domestic arguments that may have been honed over years, sometimes decades, are reignited in the public arena.

The Family Court and its enabling legislation, the *Family Law Act 1975* ("**the Act**") has struggled with this dilemma since its inception. The Act has undergone constant revision in an attempt to address the seeming impossible…taking emotion out of Family Law proceedings.

Of course this is impossible and it is recommended that resolving a property dispute or arguments relating to proper arrangements for children within the judicial arena should only be regarded as a last resort. It would seem logical that couples who have bought and sold properties together, trusted each other, sworn allegiances and raised children should be able to resolve issues that might arise at separation.

However these are the ties that bind and sometimes when broken, depending on the reason, no amount of logical recourse can assist. The couple who call time on a mutually agreeable basis are rarely seen within the court process.

Behind Closed Doors

Often the disputes and arguments that are heard in the courtroom should more appropriately be left behind closed doors. This dynamic is often the reason for separation and newly separated couples will not agree that white is white or black is black. Grey will not be tolerated

because it is a compromise. He/she always gets their own way and enough is enough seems to be the modus operandi of separated partners who have reached the stage of litigation.

The Stakes

The stakes can be high and incredibly poignant in Family Law. This is particularly so where there are children involved. Most parties to Family Law disputes have children. The good parents resolve their issues regarding the children's needs with a view to their best interests. Some parents treat their kids like chattels and use them either as a bargaining tool or, a different tool; more like a hammer to bash the other parent over the head. Judges cannot emulate King Solomon of biblical times and "divide" the child in equal shares for each parent.

Perhaps this scenario plays out in the minds of the judge when hearing evidence and argument concerning the "best interest" of the child. One judge has been heard to mutter "...these children would be better raised by monkeys. Unfortunately there are no monkeys before me today and I must decide between the competing interests of their parents..." (not a direct quote).

The Last Resort

Mediation, conciliation or arbitration are now a prerequisite of all jurisdictions and none more so than the Family Court. Mediation is sanctioned by the Family Court and it is necessary to establish before the court that this facility has, at least, been tried. Clearly it takes two to tango and if one party is not interested in a civilised discussion, is uncomfortable or in fear of the other then the court is the only means of determining what is a fit and proper regime for the ongoing care, and welfare, of the children.

This is not a preferred option and quite frankly, no one with any experience in these matters believes it is appropriate. Solomon no longer presides and monkeys do not get a look in.

Mediation, conciliation or arbitration are now a prerequisite of all jurisdictions and none more so than the Family Court. Mediation is sanctioned by the Family Court.

The Bottom Line

Avoid the court process. If there is no alternative and all other avenues have been tried then the Family Court is structured to at least keep in touch with the most basic of principles; the best interests of the child.

If it is a property dispute then there is an emphasis on what is fair and equitable in

the particular circumstances. Get yourself a good lawyer, one that is focussed on the best way through the quagmire given the unique (always) factual situation. Instructing an "attack dog" lawyer driven by ego and aggression may initially seem appealing. Be careful however as this could result in more stress and higher costs.

Conclusion

The best family lawyer is one who has the ability to play nice in the beginning but can still bring their "A game" if the situation calls for it. The most important goal is resolution and closure. A family lawyer's role is sometimes to be a mediator, sometimes a litigator and other times a social worker.

For the most part all these skills are needed in equal measure. If the ex-partner does not want to negotiate and simply wants to "win" the final argument, it is difficult to progress and resolve the dispute without resorting to litigation. A good family lawyer must be prepared and be capable of advancing their client's entitlement in whatever role is appropriate in the circumstances.

How We Can Help

Quinn & Scattini Lawyers are highly experienced with all types of family law matters. We use compassion and understanding for all matters which are emotional, particularly if a matter involves sensitive issues such as divorce. With over 40 years' experience, Q&S's Family Law Team are experts in the family law field. The team also boasts two Accredited Family Law Specialists.

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