NEWSLETTER

cornwallstodart
ENHANCING SUCCESS

November 2017

Commercial Litigation Newsletter

Welcome to Cornwall Stodart's November Commercial Litigation Newsletter

This edition includes articles on:

- Shareholder oppression: disputes between shareholders can often be a costly and time-consuming exercise, resulting in disruption to a business.
- Statutory Wills: the ability of the Supreme Court of Victoria to authorise a will for a person who lacks testamentary capacity.
- Credit hire car arrangements: why should you pay when the collision wasn't your fault.
- Case Study and Success Story: succesful settlement between our landlord client and their lessee regarding billboard display and potential breach of lease.

Please do not hesitate to contact us if you would like more information on any topic, whether covered in this newsletter or not. We hope you find the newsletter informative and useful.

*Click on any of the above titles to view the particular article of interest

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FOR BETTER, OR FOR WORSE - SHAREHOLDER OPPRESSION

Like a marriage, many people enter into business with the best of intentions – confident that their relationship will prevail – only for it to break down when something goes wrong. Disputes between shareholders can often be a costly and time-consuming exercise, resulting in disruption to the business itself. Where a shareholder dispute arises, it is important for the parties to resolve the dispute as quickly and efficiently as possible, in order to preserve the value of the business.

The starting point in any shareholder dispute ought to be the contractual relationship between the parties. That is, the shareholders' agreement (if it exists) and the company constitution. The shareholders' agreement may help determine what conduct is considered to be oppressive. In many cases, however, the parties have not executed a shareholders' agreement or the agreement does not expressly prohibit the conduct that the aggrieved party is alleging is oppressive.

Scope of section 232 of the *Corporations Act 2001* (Act)

Shareholders can seek relief from the courts under section 232 of the Act. Where a member of a company shows that there has been oppressive, unfairly prejudicial or unfairly discriminatory conduct, the court may order relief under section 233; namely an order:

1. that the company be wound up;
2. that the company's constitution be modified, repealed or replaced;
3. regulating the company's conduct in the future;
4. for the purchase of shares with an appropriate reduction of the company's share capital;
5. for the company to institute, prosecute or defend specified proceedings;
6. requiring a person to do a specified act; and
7. any other order that the court deems appropriate.

What is oppressive conduct?

1. improperly condoning a wrong done to the company;
2. improper issue of shares;
3. entering into loan agreements that unfairly benefit a particular shareholder;
4. distributing the assets, or dividends, to members in an uneven way;
5. excessive remuneration paid to an individual, to the exclusion of particular shareholders;
6. failing to call shareholder meetings; and
7. unreasonably withholding company information from its shareholders.

Why bother?

The vast majority of shareholder oppression claims are brought in relation to small businesses (often family run). This is usually because shareholders in smaller companies have more risk than just the capital that has been invested: they are frequently involved in the management of the company, and the shares often cannot be easily sold.

Despite this, it is notoriously expensive to resolve shareholder oppression disputes, and in most circumstances the costs are disproportionate to the claim. Frequently, the value of the business is not substantial. The time and cost associated with defending oppression claims can also place considerable strain on shareholders, and the resulting uncertainty can have an adverse effect on any business conducted by the company.

Oppression proceedings in the Supreme Court of Victoria

As a result, in October 2014 the Supreme Court of Victoria introduced a six-month pilot program in respect of an oppression application made pursuant to section 233 of the Act. After the initial success of the pilot program, the current program will remain in effect as an option for oppressed shareholders until April 2018 (**Program**).

The Program aims to facilitate the just, timely and efficient resolution of shareholder disputes. It has done so by setting strict limits as to what can be filed with the court. Specifically, the program requires that the initial affidavit must:

1. be no more than three pages in length;
2. set out a clear summary of the facts alleged to constitute the acts of oppression;
3. set out a preliminary estimate of the value of the shares (where practicable); and
4. exhibit only a current ASIC search of the company.

Following commencement, proceedings will be listed for an initial case conference before an Associate Justice or Judicial Registrar. During this stage, the parties (and their representatives) can explore the real issues in dispute and determine whether the

matter is ready for referral to mediation, or whether preliminary steps are required. For example, whether:

1. the defendant(s) should be afforded an opportunity to file a responding affidavit of no more than three pages;
2. a valuation of the company should be arranged; or
3. an order for access of the company books should be made.

Benefits of the Program

The Program provides members of a company with an option to resolve disputes quickly and efficiently. One of the major benefits of the Program is that it allows shareholders to reserve the value of the business, and then focus on the management of the business itself. The limited amount of material that is allowed to be filed with the court, together with an early mediation, results in the parties focusing on a resolution – rather than becoming entrenched in their positions and litigating the dispute. This is a big contrast to traditional proceedings that would involve months – if not years – of litigation and a significant amount of costs.

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STATUTORY WILLS

Section 21 of the *Wills Act 1997*

Under section 21 of the the *Wills Act 1997*(Vic) (**Act**), the Supreme Court of Victoria has the power to authorise a will for a person who lacks testamentary capacity. The need for such a will may arise where:

- no will has been made by the person and a distribution under the laws of intestacy would not accord with their likely intentions, or what his or her intentions might reasonably be expected to be;
- the current will provides for a spouse or domestic partner but that relationship has ended;
- the current will does not make provision for someone who has cared for the person over a substantial period of time;
- the current will makes provision for a person who has abused their position as attorney or administrator, or abused the person physically, mentally or financially; and
- the validity of the current will is questionable – whether by informality or lack of capacity of the person when the will was made.

Who can bring the application?

Under the Act, 'any person' can bring an application for an order authorising a statutory will. In most cases, applicants are family members, carers, guardians or administrators.

Evidentiary requirements

Under section 21B of the Act, the court must be satisfied that:

a. the person on whose behalf the will is to be made does not have testamentary capacity;
b. the proposed will reflects what the intentions of the person would be likely to be, or what the intentions of the person might reasonably be expected to be, if the person had testamentary capacity; and
c. it is reasonable in all the circumstances for the court to authorise the making of the will for the person.

To satisfy the court that the person does not have testamentary capacity, it is prudent to obtain a medical report from the person's treating medical practitioner that directly addresses this question.

The court will need to carefully consider the evidence presented, before it decides what the intentions of the person would have likely been, or what they might have reasonably been, had the person testamentary capacity to make a will. The court may consider:

- Evidence of the person's wishes. Our firm acted for an administrator of an elderly person who had made handwritten notes on her last will that showed what her intentions were, shortly before she lost capacity. In that case, those notations did not form part of a validly made will but were accepted by

the court as evidence of her wishes.

- The terms of any previous will of the person.
- Evidence of the relationship between the person and the persons who are to benefit under the proposed will, which can include the applicant, family members and charitable organisations.
- The person's estate, particularly if the properties referred to in previous wills are no longer owned by the person.

Overcoming potential conflicts

In these applications, an applicant may stand to benefit under the proposed will. In these circumstances, independent evidence is important to minimise the effect of the conflict.

Our firm acted for an applicant who was to gain substantially under the proposed will, in line with the person's wishes. In that case, our client obtained an affidavit from a representative appointed to the person in question. That representative visited and interviewed the person in the aged care facility where she was residing and confirmed in his affidavit that, based on answers given by the person, it was very likely that she intended to provide for our client – if she had capacity to make a will.

Timing is important

The court cannot make an order under section 21 of the Act on behalf of a person who is deceased at the time the order is made.

This can be particularly important where an application is made on behalf of a person who is elderly. Our firm acted on behalf of an administrator of the represented person who had not made a will during her lifetime and had lost capacity to make such a will.

The person was 96 years of age when an application was made for a statutory will, and despite having generally good health, her health suddenly declined before the court had listed the matter for a hearing. An urgent application was made to the court, the matter was heard on that day and orders were made authorising a will on her behalf. The person died that night.

How we may assist

Applications under section 21 of the Act are not commonly made but can be of particular assistance where:

- a person who has lost capacity has not made a will during his or her lifetime, and an intestate distribution is unlikely to accord with his or her intentions; or
- sufficient evidence exists indicating that the current will made by that person may not reflect his or her intentions.

We have acted for clients who have been successful in these time-sensitive applications, to ensure they have done everything possible to make certain that the person whom they care about has a will made to reflect what their intentions are likely to be, or what they might have reasonably been, had they testamentary capacity.

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CREDIT HIRE CAR ARRANGEMENTS: WHY SHOULD I PAY WHEN THE COLLISION WASN'T MY FAULT?

Background

Repairers commonly refer customers who are owners of high-end value vehicles that have been damaged in a collision, to hire car companies who offer luxury replacement vehicles – and, in certain circumstances, at no upfront cost. If the customer is able to demonstrate that the collision was the fault of another party, the customer is offered a credit hire agreement, permitting the hire car company to defer upfront payment and instead seek payment of the hire car charges directly from the party at fault. This may include commencing court proceedings in the name of the customer.

Insurers are frustrated that such arrangements involve hire car fees that are, in some instances, substantially more than the market rate for a similar vehicle that could be hired from a mainstream hire company. However, it is a popular arrangement that provides people whose car is damaged in a collision at no fault of their own, a replacement vehicle while their vehicle is being repaired – without having to outlay payment of hire charges. This is particularly pertinent for a person who needs the use of a vehicle but may not have the financial means to hire a replacement vehicle while the damaged one is being repaired.

Beamis v Kanakis

The case of *Beamish v Kanakis* was an appeal against a judgment of the Magistrates' Court of Western Australia, awarding Mr Kanakis damages in the sum of $16,813.03 plus interest. The court's consideration of the law relating to the assessment of damages for the temporary loss of use of a non-income producing vehicle has provided much-needed guidance to insurers who receive claims made against their insureds from credit hire car companies.

Facts

On 6 August 2014, Ms Beamish drove her vehicle into the rear of a 2006 Porsche Boxster convertible (**2006 Porsche**) owned by Mr Kanakis. Ms Beamish admitted that she was responsible for the collision. Mr Kanakis entered into a rental hire car agreement with Compass Corporation (**Compass**), whereby Compass hired to Mr Kanakis a 2014 Porsche Boxster (**2014 Porsche**), at the daily rate of $540.91 for a period of 32 days while the 2006 Porsche was being repaired.

Mr Kanakis also entered into a 'Mandate and Authority to Act' agreement with Compass, which meant that Mr Kanakis would not have to make any upfront payment to Compass, and Compass could seek payment of the hire car charges directly from the party at fault, or alternatively her motor vehicle liability insurer.

Mr Kanakis claimed that he needed a replacement vehicle while the repairs were being undertaken to get to and from work, visit his girlfriend, attend the gym, attend dancing lessons, run errands for his parents and visit his father in hospital.

The decision

On appeal, the court found that Mr Kanakis was not entitled to an exact 'like for like' replacement car where 'a late model BMW, Mercedes Benz, Holden Hyundai, Toyota Camry or Nissan Pulsar were each a reasonable "like for like" replacement for the 2006 Porsche' because they were each:

a. worth more than the 2006 Porsche;
b. suitable for the purposes for which Mr Kanakis used the Porsche prior to the accident;
c. readily available for hire from a mainstream hire car company in Perth at the relevant time; and
c. able to be hired for considerably less than the cost of the replacement Porsche, from a mainstream hire car company.

Comment

If credit hire car companies wish to continue to claim full payment of the hire car charges from the party at fault, they will need to ensure that the vehicle offered is of similar value to the damaged vehicle, rather than an exact 'like for like' replacement.

In determining what an appropriate replacement vehicle will be, the precise nature of the need for the replacement vehicle must be taken into account, as well as the nature and value of:

- the damaged vehicle;
- the replacement vehicle; and
- any vehicles readily available for hire from a mainstream hire car company that are capable of meeting the precise nature of the need for a replacement vehicle.

No doubt making these enquiries will require substantially more effort than has been required in the past.

Conclusion

Where a party wishes to take advantage of a credit hire car arrangement, that party has to be prepared for the possibility that they may be required to disclose personal and financial details to the party at fault or their insurer (and/or the court), to demonstrate the need for a replacement vehicle. They may also be required to demonstrate that they did not have the financial means to instead use the services of a mainstream (and usually cheaper) hire car company.

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CASE NOTE AND SUCCESS STORY

All signs point to a settlement

We were recently instructed to defend proceedings brought against our landlord client regarding the erection and display of a billboard, which was alleged to have been in breach of a lease between our client and the lessee plaintiff.

We successfully negotiated a settlement that allowed both parties to avoid the time and expense of litigation, and also preserved the ongoing commercial relationship between them.

Background

Our client (**Landlord**) owned a two storey building located in an inner Melbourne suburb that occupied a prominent position with significant exposure to traffic.

Our client leased the roof of the building to an outdoor advertising company (**Lessee**), who erected two large advertisements – including one north-facing digital advertisement on the roof.

In early 2016 our client secured a planning permit to erect and display a north-facing floodlit promotion sign on the first floor of the building.

In late 2016 the Lessee commenced proceedings in the Supreme Court, seeking to prevent our client from erecting and using the sign on the basis that it would diminish the value of the advertisements displayed by the Lessee.

The Lessee argued that our client was in breach of a clause in the lease, which provided that our client must not place any object which wholly or partially obstructs the view or which in any way diminishes the value of the Lessee's advertisements displayed or to be displayed from the signs.

The Lessee did not contend that the sign would physically interfere with the view but that its erection and use would have deleterious effects on the value of its advertisements.

To succeed in its claim, the Lessee had to prove that:

- the value of its advertisements would be diminished by the erection and use of the sign – this is a question of fact; and
- the diminution in value caused by the erection and use constituted a breach of the lease – this is a question of law.

Conversely, on behalf of our client, we argued that the clause in the lease did not restrain the Lessee from using the first storey for advertising and denied any allegation that the sign would diminish the value of the advertisements.

We further claimed that during lease negotiations the Lessee had agreed to delete a clause that prevented our client from allowing:

> *any other advertisements... to be erected or placed elsewhere on the building unless the same are erected or placed on the building by the Lessee or with the prior written consent of the Lessee....*

We argued that in light of the above, the Lessee had agreed to allow advertising signs to be placed on the building, provided that the signs did not obstruct the Lessee's sign.

We also argued that the Landlord would suffer a monetary loss in rental income from the sign if it was restrained from using it for advertising.

Outcome

The parties reached a successful settlement, whereby our client was paid a sum of money and additional rent per year in exchange for a variation of the lease that allowed for other advertising to be placed on the building with the written consent of the Lessee.

Take-away note

While litigation is appropriate in some circumstances, it is always important to consider the uncertainties of outcome and whether there is an ongoing relationship between the parties in order to obtain the best commercial outcome for the client.

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