NEWSLETTER

cornwallstodart
ENHANCING SUCCESS

MARCH 2013

Commercial Litigation Newsletter

Cornwalls' Litigation News

Welcome to the first issue for 2013 of the Commercial Litigation newsletter.

This quarter we have included news on:

- *Wayne Edward John Streat v Fantastic Holdings Limited* [2011] NSWSC 1097
- legal professional privilege for in-house counsel
- estate litigation
- when to notify your professional indemnity insurer of a potential claim
- our PPSA team and a profile on Katherine Payne.

Please don't 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.

Paul Buitendag
Partner and
Head of Commercial Litigation
Phone (direct) **+61 3 9608 2110**
Mobile **+61 424 331 122**
Email **p.buitendag@cornwalls.com.au**

*Click on image to view Paul's profile

Case note: *Wayne Edward John Streat v Fantastic Holdings Limited* [2011] NSWSC 1097

Background

The Supreme Court of NSW recently held that a landlord was bound by a lease agreement that it had not formally executed.

Summary

Wayne Edward John Streat (**Landlord**) and Fantastic Holdings Limited (**Tenant**) began engaging in negotiations for a new lease in September 2010.

The Landlord sent a lease document to the Tenant on 20 January 2011. This document was executed by the Tenant and returned to the Landlord on or about 1 March 2011.

The commencement of the new lease was 3 April 2011. Both parties conducted themselves in accordance with the new lease regarding payment of rent and other obligations.

The Landlord later sought to withdraw from the lease on the basis that it had not executed the new lease and was therefore not bound by it.

Justice Pembroke held that the Landlord and Tenant were of one mind as to the terms of the new lease and 'nothing remained outstanding other than execution'. Accordingly, the Landlord was bound by the lease.

Facts

On 20 September 2010 the Landlord informed the Tenant that it was encountering financial difficulties with its lender. Following this revelation and on the same day, the Tenant sent an email proposing a new lease as a means of assisting the Landlord with early planning that could ultimately be presented to the lender.

A series of negotiations followed and concluded with the Landlord sending to the Tenant a lease document on 20 January 2011. Upon receipt, the lease document was reviewed by the Tenant and executed. The executed document was returned to the Landlord on or about 1 March 2011 but was not executed by the Landlord.

Importantly, from 3 April 2011, the Tenant and Landlord acted in accordance with the terms of the new lease. One of the terms was a rent free period, which was acknowledged in invoices by the Landlord.

Decision

In finding in favour of the Tenant, Justice Pembroke held that:

> 'there is no doubt that by 1 March 2011, if not also by 20 January 2011, there was agreement by the parties as to all of the terms of the lease…no terms remained for further negotiation and nothing remained outstanding other than execution'.

The court also held that, when the Landlord provided the Tenant with the lease document, it was:

> 'making a final offer in a form capable of acceptance, leaving nothing for further negotiation. The tenant's subsequent execution of the lease document and the return of it to the lessor signified its unqualified acceptance of that offer. In those circumstances a reasonable bystander would regard the due execution of the document by the lessor as a formality; whose inevitable likelihood went without saying'.

Justice Pembroke held that the Landlord was not entitled to withdraw from the lease and ordered the Landlord to duly execute the lease document and cause it to be registered.

Lessons learned

If a party does not wish to be bound by a lease (or any other contract) until it has been executed, the party should:

1 make this clear from the outset of negotiations;
2 clearly communicate this to the other party; and
3 not perform obligations under the agreement until it has been executed by both parties.

Authored by: Lauren Bartlett & **Leneen Forde**, Cornwall Stodart

Legal professional privilege for in-house counsel

Background

The law protects a client's right to engage in honest and open communication with their legal practitioners.

In the words of Graham J in the 2007 Federal Court case of Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2) [2007] FCA 1445 (Telstra):

> *Legal professional privilege is more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests (per Lord Taylor of Gosforth CJ in his speech in Regina v Derby Magistrates' Court, Ex parte B [1996] 1 AC 487 at 507).*

Legal professional privilege is confined to communications (including documents) between a client and their legal practitioner for the dominant purpose of giving and obtaining legal advice, and communications engaged in or documents created for the purposes of existing or anticipated litigation.

If legal professional privilege applies to a communication, the protection afforded is absolute. However, the privilege can be

waived, either intentionally or unintentionally by the person claiming the privilege.

It is the unintentional waiver of privilege that can be of concern to in-house counsel when communicating with their employer.

Necessity of independence and impartiality

Telstra serves as a useful reminder of the importance of in-house counsel maintaining their independence when providing legal advice to their employer.

For the privilege to apply, documents to be subject to privilege must have been created for the dominant purpose of giving legal advice. The term 'dominant purpose' means the predominant, but not necessarily the sole purpose. The relevant time in determining the dominant purpose is the time at which the document came into existence.

If a party can establish that a document was created for the dominant purpose of giving legal advice, the document will be privileged from production.

The dominant purpose test can be a grey area in the context of communications between in-house counsel and their employer. The difficulty for in-house counsel is in ensuring that documents containing legal advice do not also contain significant commercial or business advice, or are not created predominantly for the purposes of giving non-legal advice. This is particularly the case where in-house counsel is involved in the management of the company, with the result that questions may be raised about their ability to give independent, impartial legal advice. The independence of the legal advice given is crucial in determining whether the privilege applies.

In *Telstra*, Graham J stated at [35]:

> *In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.*

The party claiming the privilege will be required to give sufficient evidence to prove the independence of their in-house counsel when giving legal advice.

To ensure the integrity of the privilege is maintained, in-house counsel should be aware of the nature of their employment when providing legal and business advice. In this regard, we recommend that in-house counsel:

- holds a current practising certificate;
- avoids wearing two hats – ensures that legal advice and business/commercial advice is communicated separately;
- is not supervised by a non-lawyer when formulating legal advice – this can call into question the impartiality of the advice given; and
- is provided protection in their employment contract insofar as their role is concerned – for example, a statement may be inserted into the position description acknowledging the practitioner's role as a provider of professional independent advice.

Authored by: Matt Foley, Alexandra Doig & **Leneen Forde**, Cornwall Stodart

When a will becomes litigious

If you thought that your will was set in stone, think again. While estate law allows a person to choose who will inherit their property by making a will, there are a number of ways that a will may be disputed. In the past twelve months, we have acted for clients in a variety of estate litigation. Some of the issues litigated are set out below.

Is the will valid?

A will can be challenged by anyone with a possible claim on the estate, if it is proven that the will was made when the deceased lacked the understanding of the property he or she was to give

TAX Consolidation Products

Cornwall Stodart has developed precedent **Tax Sharing Agreements** and **Tax Funding Agreements** for **Multiple Entry Consolidated Groups** and **Consolidated Groups**, as well as an **Indirect Tax Sharing Agreement**. These documents come with easy to follow instructions for use by corporate groups or practitioners consulting to corporate groups. They are available through a single-use, multiple-use or annual licence.

See our website for further information on our tax products.

away after his or her death. This is known as a claim for lack of testamentary capacity. A challenge can also be brought if it can be shown that the deceased was pressured to make a will that was not an accurate reflection of his or her wishes. This is known as a claim for undue influence.

Does the will make adequate provision?

People close to the deceased such as family members, friends, same sex partners, de facto partners, as well as other people who can show dependency on the deceased, may challenge a will if they believe that they have been left out of the will or feel that they have not been fairly provided for. This is a testator family maintenance claim.

Executors

Executors should also be aware that claims may be brought against them in relation to an estate they are administering. A claim can be brought to remove an executor who fails to properly administer an estate. In addition, claims can be made if beneficiaries under the will suffer financial loss as a result of the way that the estate was administered.

Administration orders

Applications can also be made regarding a person's estate while they are alive. If a person has concerns that a family member or friend is unable to manage their finances due to a disability that affects decision-making, they may apply to the Victorian Civil and Administrative Tribunal (**VCAT**), or equivalent courts or tribunals in other states and territories, for an administration order that their finances be managed by the applicant or another nominated person. This person is known as an administrator and he or she will have the ability to make decisions about that person's financial welfare.

Powers of attorney

If a person has concerns that a family member's or friend's power of attorney is being misused, they may apply to VCAT, or equivalent courts or tribunals in other states and territories, to revoke that power of attorney.

Caution

Court time limits vary depending on in which state proceedings are issued. Many claims must be brought within relatively short periods of time. There are also ways when preparing wills and other estate planning documents to minimise the risk of external claims challenging a will.

Authored by: Rena Solomonidis & **Leneen Forde**, Cornwall Stodart

When to notify your professional indemnity insurer of a potential claim

Background

Professional indemnity insurance provides that an insurer will pay on behalf of its insured, compensation which it may be legally liable to pay for a claim that is made against it during the policy period. However, where a claim is made against the insured after the policy period has expired, section 40(3) of the *Insurance Contracts Act 1984* (**Act**) prevents an insurer from refusing to indemnify the insured, if the insured notified its insurer in writing of a potential claim or loss suffered by a third party before the expiration of the period of the policy.

Livesay v Hawkins

Background

The decision in *Livesay v Hawkins* [2012] QSC 122 highlights the importance of every employee and officer in a business turning their minds to what circumstance, event, fact, omission or activity may result in forming the basis of a claim – and that such things must be reported to the insurer.

Section 40(3) of the Act requires 'a policy holder to give notice in writing to the insurer of facts that may give rise to a claim against the insured as soon as was reasonably practicable after the insured became aware of those facts but before the insurance cover provided by the contract expired'. Where the insured satisfies this provision, the insurer cannot deny indemnity if a claim was made after the policy expired.

Facts

In *Livesay v Hawkins*, a husband and wife were living in a rental house when a pelmet above a door in the house fell on the wife. The incident occurred on 25 April 2005 and they notified their rental agent of the incident in writing by letter dated 26 April 2005 and stated that the wife was exploring her rights to sue the agent in respect of the injury caused by the incident.

Despite the tone, intentions and risk to the agent outlined in the letter, the agent did not notify his insurer.

The agent held professional indemnity cover for the period 24 July 2004 and 24 July 2005. The incident therefore occurred during the period of insurance but the wife only served a claim under the *Personal Injuries Proceedings Act 2002* (QLD) regarding injuries sustained in the April 2005 incident in September 2005. In October 2005 the agent passed the claim form to his broker who in turn made a formal claim notification with the insurer. Cover was denied because the notification fell outside the policy period.

The decision

The court found that the letter dated 26 April 2005 was defined as a 'claim' for the purposes of the contract of insurance and therefore the claim had not been made outside the policy period.

Where no claim is made during the policy period and the insured failed to notify the insurer of a potential claim, the insured risks its entitlement to protection under the policy.

Comment

An employee or officer of a business must consider whether what has occurred may be sufficient to entitle the other party to recover against the company or business. While not all complaints, disputes or demands will result in a decision that the business will be held in breach of its professional duty, it is important to consider the circumstances where an employee has made an error resulting in a loss to the client, as well as the seriousness of an incident and whether a complaint is made in writing, made verbally or received from a solicitor. You should also consider whether multiple discussions or written communications have taken place regarding the subject circumstances.

Taking into account the above factors should assist you in deciding whether or not to notify your insurer of a set of circumstances that may later lead to a claim against you.

Authored by: Jenny Gearing & **Joe Naccarata**, Cornwall Stodart

Cornwalls' PPSA expertise

'The Personal Property Securities Act 2009 (PPSA) requires a fundamental shift in the way that people regard their non-land assets. If a business does not comply with the requirements of the PPSA, it risks losing its rights in those assets.

The PPSA is complex and offers little forgiveness to those who do not comply with its provisions. We take a practical approach to assist our clients in determining how the PPSA affects their businesses and what they need to do to protect their rights.'

Katherine Payne, Senior Associate

The PPSA

The PPSA affects most businesses and all industries. Cornwall Stodart is active in ensuring clients understand the PPSA and its requirements, processes and potential traps. We run an ongoing program of seminars – including seminars focused on the application of the PPSA to specific industries – and we have written a useful *PPSA Practical Survival Guide for Insolvency Practitioners* (**PPSA Guide**).

Katherine Payne co-produced the PPSA Guide and presents seminars on the PPSA throughout Australia. She has been instrumental in our firm's ongoing work surrounding the PPSA.

Our PPSA team

Katherine is supported by our PPSA team, which has in depth experience to reflect the broad nature of the PPSA's application. Our team includes lawyers with a background in commercial, property, intellectual property, banking and finance, insolvency and disputes.

Our team can help with all aspects of the PPSA, from considering how it applies to your business and preparing terms and conditions, to obtaining the removal of incorrect PPS registrations and determining priority rankings of creditors. We also provide practical, 'hands on' training to help your team apply the PPSA in their day-to-day tasks.

We guide clients through their PPSA issues, including suppliers and lessors of goods, manufacturers and producers of goods, businesses in mining, extractive and construction, banks, financiers and insolvency practitioners.

Our PPSA expertise includes:

- advising insolvency practitioners on matters including what assets are available, characterising interests, retention of title and priority disputes

- the application of the PPSA to a business and its operations, including what needs to be registered and how
- providing hands on training, including how to register on the PPS Register
- preparing and amending terms and conditions to ensure PPSA compliance
- help with developing practical business protocols to ensure PPSA compliance
- determining the effect of the PPSA on liens, retention of title, lease and bailment interests
- determining whether assets have been purchased free of security interests, or subject to prior interests
- assistance with obtaining the removal of incorrect PPS registrations.

For a full overview of our PPSA expertise and experience, as well as the related services we offer, please see our **website** or if you would like to discuss the implications of the PPSA on your business, please contact Katherine Payne on +61 3 9608 2149 or k.payne@cornwalls.com.au.

Cornwalls' Litigation Team Member Profile

Katherine Payne, Senior Associate

Katherine has broad, practical and in depth experience in the PPSA and dispute resolution.

Her areas of expertise include the PPSA and its practical application, its pitfalls and its requirements. She has written several articles on the PPSA and has given practical presentations to accountants, insolvency practitioners and clients ranging from mining operators to suppliers of packaging, audiovisual and other goods.

In addition, Katherine has particular expertise regarding insolvency, misleading and deceptive conduct, and building and construction. She has particular interest and experience in insolvency litigation and advising operators in the building and construction industry, especially on security of payment legislation. Katherine has acted for and advised clients in various jurisdictions, including Victoria, NSW and Queensland, and in international arbitration. She is a regular presenter on topics relating to the PPSA, insolvency and building and construction.

In 2011 Cornwall Stodart became responsible for reviewing and updating the Lexis Nexis *Australian Corporation Law – Principles & Practice (External Administration)* loose-leaf volume on a quarterly basis. Katherine is one of the co-authors involved in this process.

To see Katherine's full professional profile, including her specific experience, please see our **website**.

Katherine Payne
Senior Associate
Phone (direct) **+61 3 9608 2149**
Mobile **+61 417 054 064**
Email **k.payne@cornwalls.com.au**