McKEAN PARK LAWYERS
(incorporating Pelham Lawyers)

MATTERS
JUNE 2012

BANKS WARNED ON GUARANTOR SAFEGUARDS

BY TONY ROGERS

In a recent case decided by the Victorian Supreme Court, BankWest was criticised for allowing the wife of a businessman to sign multiple documents in support of $18 million worth of loans when according to the Court she had "next to no business knowledge and no advice or warning about what she was signing".

BankWest had originally commenced action against Naseem Abdul and his wife Theresa claiming moneys due under the various loan facilities entered into in 2007. The action bought by the Bank was to recover the $18 million loan facilities provided to Mr and Mrs Abdul and companies controlled by the husband to enable the financing of aged care and child care facilities.

Justice Clyde Croft of the Supreme Court was very critical of the Bank's attitude in that it "ignored all of the safeguards that should have been in place" and as well its actions were "at odds" with the Code of Banking Practice which like many Banks, BankWest had undertaken to abide by.

Justice Croft said that BankWest should have insisted that Theresa Abdul obtain independent legal advice in addition to assuring itself that she was fully aware of the nature of the transaction and her own personal risk.

The Bank chose not to take these courses of action.

Justice Croft made the point that Mrs Abdul should have been afforded special attention and that one would have expected that "ordinary diligence and prudence of Bankers would mean that great care would have been taken to ensure that she was aware of the nature of the transaction and understood the potential consequences in terms of her personal liability".

The companies were placed in liquidation and the Bank was seeking to obtain redress by seeking enforcement of personal guarantees given by Naseem and Theresa Abdul. The decision of the Supreme Court was to affirm an Associate Judge's decision in the Supreme Court declining to give BankWest summary judgment against the

Abduls. The net affect though of the judgment was that the Bank was excluded from claiming against Mrs Abdul.

All Lenders should be vigilant when dealing with persons who have no direct interest in loans being made to another person and who are requested to sign guarantees and ensure that:-

1. **documents are sent to the guarantor personally; and**
2. **that the guarantor has sufficient time to read and understand the documents;**
3. **that the guarantor be requested to obtain independent legal or financial advice.**

Unless this can be proven to a Court it is likely that Lenders will lose out in attempting to recover from guarantors like Mrs Abdul.

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HOW STRONG IS YOUR BUSINESS?

BY MARK FLYNN & STEPHEN ROACHE

Testing economic conditions prove that failing to plan is planning to fail.

Any business needs to clearly define what it is aiming to achieve and develop and implement strategies to help achieve those objectives. This is equally important for the business itself. A business succession plan is critical to help maximise the value of your business and secure the transfer of that value when you leave the business.

Every business owner should have clear answers to the fundamental questions –

1. When to start planning.
2. What to consider in planning for succession.
3. What contingencies should be considered.
4. How and when should ownership and/or control of the business be transferred.

Even the most basic business succession plan should identify and have options to deal with contingencies which may affect important parts of the business. Ultimately the most important parts of any business include both ownership of the business but also the management and control of the business. We have assisted many clients in developing their own business succession plan. The benefits include –

- Increasing the value the business.
- Safeguarding the long term health of the business.
- Perpetuating the entrepreneurial energy to drive the business.
- Identify select and prepare successors for their intended roles in the business.
- Help retain the most talented potential successors in the business.
- Help protect and reward loyal employees and perpetuate employment opportunities.
- Assist the owners to learn and start to "let go" of the business.
- Help improve both the pre and post retirement financial security of the business owner.
- Anticipate and avoid potential conflicts between business owners.
- Help develop a commitment to the philosophy of stewardship of the business.

All of these benefits translate into added value and security for the business now and into the future.

If you require any advice or assistance in understanding the value of an effective business succession plan for your business or require assistance in developing a business succession plan please contact our Commercial Law Team.

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SELLING YOUR BUSINESS PLANNING AND PREPARATION

BY DIVYA SHARMA

PROTECT VALUE

Selling a business is usually a one-time chance to capitalise on the accrued value of the entrepreneur's creativity and hard work. It can become stressful and daunting due to the sheer complexity and time consuming nature of the endeavour. In addition to the high financial stakes, it often involves specialised legal, accounting and other advice. Thus, it is important that the business owner keeps abreast of all the details in the deal to maximise value. A few mistakes along the way may mean a loss of hundreds of thousands of dollars to the seller.

Mistakes in the past have lead to delays in closing the deal, caused sellers to leave money on the table or losing out on key terms and in some cases it has even caused deals to fall over altogether. These mistakes can however be avoided through careful planning, preparation and timely legal advice.

PLANNING

You should plan at least 6 months in advance before offering your business for sale. A plan means clearly knowing and setting down your goals for the sale, identifying the potential buyers you would want to sell to and mapping out the future for your business and yourself. You will need to answer some key questions and make some specific decisions well in advance, such as:

- Why are you selling? - your answer needs to convince a prospective buyer.
- What are the other options to consider? - bringing in outside management or becoming a silent partner.
- Whether your family members and close friends will support your decision?
- Who will the business be offered to? - management, staff, family members, competitors or suppliers.
- Whether you or your expertise would be critical to the commercial success of the business? – if yes, do you wish to stay on as a manager/employee after the sale or retain some equity in your business.
- What will be sold with the business - assets, property, stock, obligations, debts and liabilities etc?
- Is the timing right – have you considered the market conditions and whether the sale price may be better if you wait?
- What would be the financial benefits of a sale?
- Would you be free to earn your living after you sell your business, or would you be subject to a restraint of trade?

PREPARATION

Potential buyers would want to form an accurate view of the value of the business and its potential for future growth, so owners need to be ready to 'open the books' and talk

honestly about the performance, strengths and weaknesses of the business. This may include divulging sensitive and confidential information such as financial results, sales figures, operational details, product and customer data, details of legal contracts and liabilities, and employee profiles.

You will need to prepare your business and get the following paperwork in order to begin with, prior to putting your business on the market:

- **Profit-and-loss statements (current and for the past three years)**
- **Balance sheets (current and for the past three years)**
- **Bank statements (current and for the past three years)**
- **Tax returns (for the past three years)**
- **List of tangible assets – facilities, furniture, fixtures and equipment**
- **List of inventory**
- **Commercial property appraisal or lease agreements**
- **Insurance policies**
- **Supplier and customer contracts**
- **Employment agreements**
- **Patent documentation**
- **Equipment leases**

AGREEMENT

When a potential deal is struck, you will need to have a well written sale contract in place to protect your interests and ensure that the buyer will uphold its commitments. During the due diligence phase leading up to the final sale, you will also need to be ready to provide information and/or copies of various other sensitive documents that a prudent buyer might ask to see.

If you are contemplating selling your business in the near future you should seek legal advice sooner rather than later to assist you through the whole process and making sure that you make the best of the opportunity to convert your investment and hard work into a successful sale.

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OWNERS CORPORATIONS

TERMINATION OF APPOINTMENT OF MANAGER

BY ROBYN CROZIER

Where an owners corporation has appointed a Manager and executed a Contract of Appointment, can an owners corporation terminate that contract prior to the end of the term?

Generally, the answer is yes.

OWNERS CORPORATIONS ACT 2006

Section 119 (6) of the Act which deals with the appointment and removal of a Manager states:

"An owners corporation may revoke the appointment of a manager".

Section 205 of the Act states:

"A provision of a contract is void to the extent that it purports to exclude, modify or restrict the operation of this Act".

Therefore, it is not possible to contract out of the Act and any provision in a contract that attempts to prevent the owners corporation from terminating the appointment of the manager will be of no effect.

However, the owners corporation must consider the terms of the contract and any resolutions passed by the owners corporation regarding termination of the owners corporation manager.

If the owners corporation has passed a resolution that the Contract of Appointment of Manager can only be terminated at a general meeting of the owners corporation, the owners corporation must abide by its own resolution.

DAMAGES WHICH CAN BE CLAIMED BY A MANAGER

If pursuant to section 119(6) of the Act, the contract has been terminated by the owners corporation prior to the end of the term, what, if any, damages can be claimed by the manager?

The standard Strata Community Australia (Vic) Contract of Appointment of Manager provides for payment of:

(a) an annual fee for services; and

(b) additional services to be charged generally by an hourly rate or fixed fee.

If the contract does not specify a method for determining damages, then general principles of contract law relating to a claim for damages will apply. As a general rule the manager would only be entitled to make a claim for loss of profits not the full annual fees. As a rule of thumb, profit costs would generally be approximately 20% - 25% of the annual fees, but, if disputed, evidence and records justifying the loss of profits would have to be produced.

We recommend that a clause be included in the contract to the effect that if the contract is determined by the owners corporation for any reason other than a fundamental breach by the manager, then the owners corporation would pay to the manager an amount equivalent to a given percentage of the current annual management fee or a stated dollar amount, either of these amounts being a genuine pre-estimate of damages which would be suffered by the manager as a result of early termination of the contract. To avoid disputes arising from such clauses, the manager, at the time the contract is entered into, should be able to substantiate how it calculated the specified percentage or dollar amount in the contract. This necessitates some calculation by the manager prior to entering into the contract. There must be a reasonable basis on which the pre-estimate of damages is made as this may need to be substantiated at a later date.

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LITIGATION HOW DOES IT WORK? PART 3

BY DAVID BRETT

In the last of this series what happens when an action goes to Trial and judgment is obtained.

THE TRIAL

Setting Down for Trial

Once the parties have completed all the interlocutory steps ordered to be taken, the Court will hold another directions hearing and make orders for the final preparation for trial.

These orders may include orders for witness statements, the filing of expert evidence, the preparation of statements of agreed facts or the issues in dispute, and the preparation of court books.

Court books are books which contain all the pleadings that are the subject of the case, and all relevant documents that the parties will rely on in bringing their case. This allows all relevant documents to be effectively collated in one place, which allows for more convenient conduct of the case.

Once these steps have been undertaken, the court will set the matter down for trial, in other words, allot a date for the final hearing.

Depending on the Court, and the number of other cases that are also before the courts, you may or may not actually start your case on the allotted date. If you do not, then another date will be allotted.

Final Hearing

At the final hearing, the parties are represented by counsel, and the parties are provided with an opportunity to put forward their case, to call witnesses, and produce documents that may assist their case and diminish the case of the other parties.

Some cases are held before a jury, but the vast majority of litigation cases are heard by a judge sitting alone.

Once all sides have put forward their cases, and made any submissions to the Court on questions of law, the Court will make its decision. In the Magistrates Court, the decision is likely to be made at that time. In the County and Supreme Court, the decision is usually reserved, which means that the judge will adjourn the case, consider the evidence and the law, and make his decision in due course. There can be, in complex cases in busy courts, quite substantial delays in handing down the final decision.

Withdrawal and discontinuance

It is possible for a Plaintiff to withdraw and discontinue proceedings at any time before

trial with or without the Court's approval. This may however, involve a costs penalty, unless it is done with the agreement of the other party.

Subpoenas

A subpoena is a Court issued document requiring a party to attend the Court to produce documents, give evidence or both. A prescribed fee is paid to have the Court issue a subpoena and it is also required that conduct money is paid to cover travel and other reasonable expenses which will be incurred in complying with a subpoena. Subpoenas must be served within a reasonable time of the date for compliance and the Court rules prescribe specific time limits in some circumstances.

ENFORCEMENT OF JUDGMENTS

Winning in Court is only half the battle. Unfortunately, it is not always the case that a successful plaintiff is automatically paid any money due to them without a Court order. It may be that the defendant does not have any assets to satisfy the judgment or the defendant disappears.

Negotiation

It is always possible, even after judgment has been obtained, to negotiate payment. Whether you are a judgment debtor (the person liable to pay the money) or a judgment creditor (the person owed the money) it may be that payment of some money up front or over time is an acceptable solution.

Bankruptcy

While not strictly a method for enforcing judgments, bankruptcy (or in the case of companies, winding up) may be an option if the amount of the debt is greater than the threshold required. You should be aware that this is a costly and highly technical legal area and carries the risk that you open the door to all other creditors, some of whom may have priority over you by reason that they have some security over some of the assets of the bankrupt person.

Examination of the Judgment Debtor

This is a procedure whereby the Court issues a summons requiring the judgment debtor to attend Court to answer questions about their financial situation and to bring specified documents such as tax returns. If the debtor fails to attend the Court may issue a warrant for the person's arrest. The procedure does not in itself provide a means of enforcing judgment but it may provide important details which may help determine which steps to take next.

Attachment of debts and garnishment of wages

This refers to a procedure whereby the judgment creditor can obtain a Court order requiring that a third party who is liable to pay money to the judgment debtor pay it instead to the judgment creditor. The order is known as a garnishee order. It can apply to wages and salary.

Seizure and sale of personal property

Where a judgment creditor knows that the judgment debtor has assets, it is possible to obtain what is known as a writ of execution. This enables the bailiff to seize and sell personal property such as vehicles, furniture and equipment in satisfaction of a judgment debt. There is a similar procedure available in respect of land although it is not often used.

Application to pay by instalments

As suggested earlier the parties can agree to pay by instalments. In the Magistrates' Court, it is also possible for a judgment debtor to apply to the Court to pay by instalments. This application is in writing and supported by an affidavit as to the judgment debtor's property and means.

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REDUNDANCIES UNDER THE FAIR WORK ACT

BY AMY GRANGER

Recent budget cuts and increased operating costs in Australia have forced many companies to reconsider the structure of their workforces, with high profile businesses, such as Fairfax, Hastie Group, Optus and Qantas recently announcing the redundancies of positions within their companies.

WHEN IS A POSITION REDUNDANT?

Under the *Fair Work Act 2009* ("**FW Act**"), a dismissal will be a genuine redundancy (and effectively a defence to an unfair dismissal claim), if the employer can demonstrate that it:

- **no longer requires the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and**
- **has complied with any obligations in a modern award or enterprise agreement that applied to the employment to consult with the employee about the redundancy.**

A dismissal will not be a genuine redundancy if it would have been reasonable in all the circumstances for the employee to have been redeployed within the employer's enterprise or the enterprise of an associated entity of the employer.

When assessing redeployment options, an employer must do more than merely assist in the gaining of employment, such as invite a redundant employee to *apply* for another vacant position within the company. Vacant positions within associated entities of the employer (as defined in the *Corporations Act 2001*) should also be considered. However, the redeployment must be ***reasonable***. That is, an employer will not be expected to redeploy an employee to a position simply because it is vacant, if the employee does not have the required skills and experience to be placed in the position.

WHEN ARE EMPLOYEES ENTITLED TO REDUNDANCY PAY UNDER THE FW ACT?

The FW Act introduced the legislative right to redundancy pay. The National Employment Standards (in the FW Act) set out their entitlement to redundancy pay based on their period of continuous service with the employer.

Prior to 1 January 2010, a right to redundancy pay could have been derived from the employee's individual contract of employment, an award or a statutory agreement. Service prior to 1 January 2010 for the purposes of redundancy payments under the FW Act will be taken into account if an employee had an entitlement to redundancy pay prior to that date. Otherwise, service will commence on 1 January 2010. Employers should seek legal advice as to whether their employees had an entitlement to redundancy pay prior to 1 January 2010, and assistance in the calculation of their employees' legislative entitlement to redundancy pay.

IMPLICATIONS FOR EMPLOYERS

When considering redundancies, the employer must be aware that:

- **Thorough assessments of reasonable redeployment opportunities for the employee should be made and documented, not only within the employer's enterprise, but also within associated entities; and**
- **In order to satisfy the reasonable redeployment requirement under the FW Act, it may be that the employer must offer a vacancy to a redundant employee if the employee has the skills to perform the position or, can be retrained to perform the position, rather than implementing a selection process.**

It is advisable for employers to obtain specialised legal advice prior to implementing any redundancies within their business, to ensure that they meet consultation requirements and reduce the risk of litigation being commenced against them by employees.

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Client Alert – Purchasing Property and Cooling Off

Due to an amendment to *Section 31* of the *Sale of Land Act* which came into operation on 1 March 2012, purchasers of residential real estate will no longer lose their right to terminate a contract within 3 clear business days of signing it (generally referred to as the "cooling off" right) where the purchaser obtained legal advice prior to signing of the Contract.

There is now no excuse whatsoever for you to sign a contract to purchase residential real estate without first obtaining legal advice. To ensure your rights are fully protected, seek legal advice before you sign any contract to purchase real estate and avoid the pitfalls that many purchasers fall into in Victoria where the principle of "*caveat emptor*" (buyer beware) is still very much prevalent.

For advice on any proposed purchase of real estate contact us prior to signing any Contract of Sale.

MCKEAN PARK BREAKFAST SEMINARS

McKean Park understands that dealing with the law and its intricacies can be a confusing and expensive experience for both businesses and personal clients alike. Many problems can be avoided if clients are aware of the possible pitfalls in certain situations, and take steps to protect themselves accordingly.

Our free Breakfast Seminar Series this year continue on the third Tuesday of every month. We have chosen topics that will be informative and beneficial to both business and personal clients, and have structured the topics to reflect that.

The remaining seminar programme for 2012 is as follows:-

19 June 2012	Personal Property Securities Register - How is it Working in Practice? (1)
26 June 2012	Personal Property Securities Register - How is it Working in Practice? (2)
17 July 2012	Debt Collecting - Keep your Debtors Under Control.
21 August 2012	Pitfalls and Problems with Property Development.
18 September 2012	Caring for the Elderly - Legal Documents you should consider.
16 October 2012	Purchasing an Apartment or Unit? What does the Owners Corporation Mean to You?

A light breakfast will be served from 7.30am. The seminars will commence promptly at 8.00 and finish equally promptly at 9.00 a.m.

The seminars are designed to provide an overview of each particular topic, some tips for avoiding problems and recognising potential problems.

If you are interested in attending any or all of the seminars, please contact Charmaine Groves on (03) 8621 2860 or email her on charmaine.groves@mckeapark.com.au. We will then contact you closer to the date of the seminars that you have expressed an interest in, to confirm whether you are still able to attend. We are more than happy if you wish members of your staff to attend particular seminars, and, if you are able to ensure that you have more than 10 people attending, we are happy to run a seminar at your premises.

If you have any other queries, please contact either David Brett (Head of the Litigation Department) on (03) 8621 2818 or david.brett@mckeanpark.com.au or Charmaine Groves.

NEW STAFF Welcome to Andrew Woods and Divya Sharma

ANDREW WOODS

Andrew has been practising law for 30 years, including 15 years experience specialising in Wills and Estates with a listed trustee company based in Melbourne and 10 years as head of the Wills and Estates section of a top tier offshore law firm based in Bermuda.

Andrew returned to Australia in 2011 and recently joined McKean Park as a Consultant Lawyer in our Wills & Estates team and is admitted to practise in Victoria and Bermuda.

Whilst practising in Victoria, Andrew became an Accredited Specialist in Wills & Estates on 1 July 1998. His accreditation lapsed following his departure to Bermuda in 2001 and he is currently seeking re-accreditation.

Outside the office, Andrew enjoys travel, films, reading, walking, markets and good food and wine. He has cruised around the world once – by steamship! While based in Bermuda spent much of his spare time exploring Europe and the Americas.

DIVYA SHARMA

Divya Sharma has recently joined McKean Park as a Lawyer in our Commercial and Property Law teams, having worked as Corporate Solicitor for a well known petroleum products company. She has been practising law since 2004 including three years in an overseas jurisdiction mainly in commercial, property and litigation areas. She is admitted to practice in Victoria and India and has had experience in both private practice as well as practising as a Corporate Lawyer.

Divya moved to Australia in 2007 and since has gained experience in the acquisition and disposal of businesses, commercial and residential properties, commercial leasing, licensing, due diligence investigations, ownership structuring, tax, securities, debt recovery, bankruptcy, insolvency, commercial litigation and alternative dispute resolution and has lately developed interest in the new PPSR regime.

Outside the office, Divya enjoys teaching, travelling, socialising, shopping, movies, bollywood dancing, singing and sports. She holds a Masters Degree in Commercial Law and has mentored and tutored law students in their legal studies both in India and Australia. In addition to her law degrees she also holds a Bachelor of Commerce Degree with honours in Business Finance and Accounting. If she has any spare time left, as a current member of the Law Institute of Victoria, Divya endeavours to be an active participant in the Young Lawyers Section of the Institute.

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