

NEWSLETTER

SOS – LIABILITY OF DIRECTORS

IN THE BUILDING INDUSTRY

A number of recent developments have led us to once again consider the need for asset protection for those engaged in the building industry. Most importantly the establishment of the Weathertight Homes Resolution Service (“WHRS” - the quasi court dealing with leaky homes) has dramatically altered the exposure of directors of companies to personal liability. Despite the normal legal principles which would suggest that company directors (along with agents, shareholders and other officers) are protected by the “corporate veil” of a limited liability company, in the case of Weathertight Homes proceedings it has now been made clear that this protection will not always apply. The adjudicators of the WHRS appear to have little hesitation in finding that directors can have personal liability for the actions taken by them whilst conducting the business of their company. Directors of companies involved in the following industries should take particular note:

- Property Development;
- Building;
- Architectural;
- Roofing;
- Plumbing;
- Weatherproofing; and
- Project Management.

In a revision of the Weathertight Homes legislation the Building Issues Minister, Chris Carter, suggested some changes to the existing regime in an attempt to make the process simpler and faster for home owners. One of the most significant changes being considered is the possibility of automatic director’s liability when a company ceases to trade, is liquidated or becomes insolvent.

In light of these developments the need for directors of companies to consider some form of asset protection is dramatically highlighted.

In many cases the best form of asset protection will be achieved when the directors establish a trust. Although there can be no “watertight” – excuse the pun – guarantee that assets will always be protected, it is generally accepted that the earlier a trust is established the greater the chance of protection.

OUR WEBSITE

Visit us on the internet at www.turnerhopkins.co.nz.

NEWSLETTERS

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ESTABLISHING A TRUST

When we are asked by our clients how they may protect assets, including property, from creditors, one option is to transfer these assets and/or property to a Trust. While creditor protection is one of the objectives of forming a Trust, it should not be used as the only reason for setting up a Trust.

A Trust is also one of the tools that can be used when assisting an individual and their family in carrying out an Estate plan on their behalf. Other reasons for setting up a Trust are as follows:

- Potential taxation benefits including a lower tax rate than the highest personal tax rate and the ability to income-split.
- Control over your assets and property (together with any income that they may provide) as well as control over how the assets and property may be distributed.
- Protection of family assets and property. This includes ensuring that they are left to members of the family that should receive them and that the assets and property are not at risk due to family members entering into unsatisfactory marriages or de facto relationships.
- Means testing. It is possible that a Trust could help avoid means testing by Work and Income New Zealand for the purposes of government funded care.
- Protection for the next generation. This allows an element of control over a person's assets and property after their death, and can protect these from members of the family who may not have the necessary financial skills to look after and manage the assets.
- Creditor protection. It is possible to "ring-fence" your assets and property from possible creditors by transferring them to a Trust. It is important that the transfer of assets and property to a Trust is completed at a time where a potential liability is neither existing nor contingent.

John Stirling of this firm would be happy to meet and discuss with clients their family and business situation with the intention of making recommendations for an Estate plan, including possibly setting up a Family Trust.

FLEXIBLE HOURS AMENDMENT BILL

New legislation has been proposed to allow employees with young and dependent children the right to request flexible and/or reduced working hours.

The Employment Relations (Flexible Working Hours) Amendment Bill has recently passed its first reading in parliament.

The Bill will allow employees who have worked with the same employer continuously for the six months prior to their request to have the right to change their working hours when they have full time care of one or more children under the age of 5 or one or more disabled children up to the age of 18.

The employee will be required to make a specific application setting out the proposed change and to explain what effect that change would have on the employer and how it might be dealt with. The employee must also outline the current childcare arrangements and how the proposed changes would enable them to look after their child/children.

Any application for changes to employment conditions can relate to either the hours that the employee works or the days on which the employee is required to work.

From the employer's point of view they will be required to acknowledge and deal with the application as soon as possible and can only refuse the application if it cannot be reasonably accommodated due to one or more of the following grounds:

- Inability to re-organise work amongst existing staff;
- Inability to employ additional staff;
- A detrimental impact on the quality of work;
- A detrimental impact on the performance;
- Insufficient amount of work during the period that the employee proposes to work;
- Planned structural changes.

Similar legislation passed in the U.K. several years ago saw over 1 million affected employees make requests under the legislation for reduced/flexible work arrangements. Of those requests over 70% were granted by the employers.

The Flexible Hours Amendment Bill is currently at Select Committee stage. The Select Committee is seeking submissions and release their report late August 2005.

RELATIONSHIP PROPERTY: ECONOMIC DISPARITY – WHAT DOES THIS MEAN FOR YOU?

Section 15 of the Property Relationships Act 1976 was introduced to address issues of inequality between partners following a breakdown of their relationship. The section empowers the Court, following a division of relationship property, to compensate a spouse/partner if his or her living standards and income will be significantly less than the other party because of the division of functions in the relationship.

Why?

The intention behind the section is to recognise that one partner may be economically disadvantaged as a result of a relationship ending because of the division of functions during the relationship. That disadvantage will not be overcome by an equal division of relationship property.

Reported decisions on the section are now accumulating and the limits of the section are being tested.

When Will It Apply?

The section will apply where there is a real and significant difference between the respective income and living standards of each partner. The disparity must arise from the division of functions in the relationship and not, for example, from a

difference in earning capacities which existed before the relationship began.

The most typical circumstance will be where one party compromises a career to look after children and/or to assist a high flying partner to increase his or her earning capacity.

Finally, for an award to be made, there must be circumstances which convince the Judge that it is just to compensate the disadvantaged party. In considering whether it is just to make an award, a Judge will usually consider factors such as:

- The length of the relationship;
- The length of the career break;
- The length of time required to rectify the break in career path;
- The position of the children now and in the future;
- The career possibilities available to the disadvantaged person; and
- The amount of property available for division.

This section has not produced a flood of claims but there has been a handful of decisions in both the Family Court and the High Court throughout New Zealand with awards ranging from \$11,500.00 to \$142,000.00.

A good example of a successful claim by a former wife is the decision of *Waters v Waters*, a decision which was heard in the Family Court at Hamilton in August 2004.

The case of *Waters* involved a marriage of 17 years with two children as a result of the marriage. The husband was a policeman and the wife had been involved in management before the birth of the first child. The wife had taken time out from her career because of childcare obligations and responsibility of the household management. The husband's ability to contribute on the domestic front had been limited by his shift work as a policeman. There was an expectation by both parties that the wife would remain at home and take responsibility for the children, enabling the husband to work away from home and provide income.

The Judge held that the wife had given up career opportunities and compromised her earning ability. The husband on the other hand had been able to enjoy an uninterrupted career from which he benefited post-separation. It was that division of responsibilities that the Judge concluded was the basic reason for the disparity in their respective economic divisions post-separation.

The Judge concluded that if the wife had not left her employment following the birth of her first child, she would most likely have become a management accountant. References indicated she was a capable employee and would have rapidly advanced within her company.

Evidence showed that remuneration consultants in the production sector (in which she had previously worked) were capable of attracting an income of \$76,600.00 per annum but that given her break from the industry it was not likely that she would achieve an income of that level for at least seven years post-separation.

Taking all those factors into account the wife was awarded a sum of \$75,000.00 in recognition of the economic disparity, such payment being by way of an adjustment to the division of matrimonial assets.

Be Aware

These decisions make it clear that in the event of a break-up, one partner may be entitled to make a claim under section 15 and the result is that, if successful, he or she may be entitled to a greater share of the relationship assets.

If you believe that you are in this situation you should contact either Michael Robinson or Claire O'Donnell of our office to discuss your rights.

STAFF NEWS

- *Many of you will know Lesley Thomson, who has been with Turner Hopkins as a Legal Executive for 12 years. Lesley has now moved on and we welcome Kristina Kulma to our firm. Kristina has nearly 30 years' experience working in the legal field, many of these as a Legal Executive. She will be principally involved in the administration of Turner Hopkins Solicitors Nominee Company and also general conveyancing.*
- *Natalie Hall, who has previously worked at Turner Hopkins, has rejoined the firm and is assisting Kristina.*

Disclaimer

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