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In Touch with the law

The law is constantly changing and this newsletter describes developments which may be relevant to you. If you are in any doubt about these or any other aspects of the law, please make an appointment to see us.

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SURVIVING A STATUTORY DEMAND

How to have one set aside

A company served with a formal demand for payment of a debt, known as a statutory demand, has three options to avert bankruptcy action being taken.

The first thing a company can do is to pay the amount demanded or give security for the debt "to the reasonable satisfaction of the creditor".

The second is to reach a compromise with the person making the demand.

The third is to apply to have the demand set aside.

There are four grounds for the courts to set aside a statutory demand:

- if there is a genuine dispute between the company and the person serving the demand about the existence or amount of the debt involved,
- if the company has an offsetting claim,
- if, because of a defect in the demand, substantial injustice would be caused, or
- for "some other reason".

By far the most common ground for seeking to have a demand set aside is genuine dispute. The genuine dispute must relate to the existence or amount of debt.

The court's task is simply to determine the genuine level of a claim, not its likely result. Where the claim contains misleading or ambiguous descriptions of the debt claimed, the court will intervene to set it aside. Whether a company is solvent or not is irrelevant.

Some "other reasons" the courts have set aside a statutory demand include failure to accompany a statutory demand with an affidavit as required by law, and failure by the creditor to provide proper evidence of such basic matters as, for example, that a debt is due and payable. Where the accompanying affidavit is not sworn at the same time as the statutory demand, even if it it's sworn just a few days before, the statutory demand will be liable to be set aside for "some other reason".

Consult us for further information.

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FALSE ADVERTISING

Court remedies can be inventive

A manufacturer making misleading claims about the origins of some of its food products had to make a striking correction on the home page of its website.

The company had claimed on packaging and in newspaper advertisements that its cheese came from the south west of Western Australia. Wrapping contained the words "Fresh from South West" and "Truly 100% Western Australian owned". The cheese was actually produced in Victoria.

As well as apologies in newspapers, penalties imposed by the court included corrective advertising on the company's website. The court ordered that the company publish on its home page for a period of 90 days a specified statement about the breach (with the heading 'By Order of the Federal Court of Australia'). It had to be viewable immediately upon accessing the website, include the company's logo and make up at least 40 per cent of the images on the screen.

EMPLOYMENT CONTRACT

It may outlast the relationship

Termination of the employment relationship may not necessarily end an employment contract.

Although a wrongful dismissal or wrongful act by an employee can destroy an employment relationship, the employment contract remains in force until the employee, or employer, accepts the breach and ends the contract. However, to benefit from the contract remaining, the wronged party has to remain ready, willing and able to perform their contractual obligations.

In a recent case a broker on a fixed-term employment contract breached the contract by resigning and going to work for a competitor. The company did not accept his resignation and obtained a court order stopping him from working for the competitor. It directed him to take leave. At the end of this it directed him to return to work, and when he disobeyed and returned to work for the competitor, the company terminated the employment contract.

The court held that the employee's failure to return to work was a fresh breach of the employment contract. The employer was thereafter entitled to terminate the contract and invoke a clause where compensation is paid by either the employee or employer breaking the agreement. Since brokers were expected to make amounts twice the size of their salary, the damages claimed by the employer were seen as a genuine estimate of loss. The court ordered the employee to pay over $500,000.

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RESISTING A LIQUIDATOR'S CLAIMS

How to hang on to payments made to you

What happens if a company which cannot pay its debts goes into liquidation, and the liquidator sends you a letter alleging that the company has been trading while insolvent and demanding that you return all the payments made to you over the past months?

When an insolvent company is wound up, a liquidator is appointed to gather its assets and distribute the funds in accordance with priorities set out in the law.

Usually, but not always, an insolvent company will have been insolvent for some time before a liquidator is appointed. Quite often, directors continue trading because they feel that the company is about to turn the corner and will be able to pay off all its debts.

Companies in a precarious financial position tend to pay the creditors that are pressing most for payment and fob off those less insistent.

The law makes provision for a liquidator to recover from a creditor money paid to it in certain circumstances, including when the creditor has received an unfair preference.

Sometimes creditors know that a debtor company is in financial difficulty and sometimes not. If the creditor knew or had reason to suspect that the debtor company was in fact insolvent, accepting money from the debtor would amount to a preference.

Care needs to be taken to identify every factor that could have helped you be suspicious of insolvency and see if there is any explanation as to why you weren't.

For example, it may be that payments were constantly being made a month after the date required under the terms of trade. If that had been the consistent pattern of trading with that company, your solicitor will be able to prepare evidence of it to support your case to retain any payments made to you.

Another example would be a dishonoured cheque. The debtor may have given a plausible explanation for the dishonour that did not lead to a suspicion of insolvency. Evidence needs to be prepared about any conversation between the credit department and the debtor regarding an innocent reason given for the cheque's dishonouring.

However, an accumulation of factors may be such that a court finds there were reasonable grounds for you to suspect that the debtor company was insolvent.

It is also important to remember that the defence needs to be made out for each and every payment date. It is possible a defence can be made for some dates and not others.

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FRANCHISES

Breaking the rules but not the agreement

The Franchising Code is a mandatory industry code governing the conduct of franchisees and franchisors from before the entering of a franchise agreement until its termination. It is part of the Trade Practices Act.

Recently, the High Court examined some controversy about the Franchising Code. It held that a franchisor breaching the code did not automatically destroy the franchise agreement.

The court considered that the Trade Practices Act and the code are intended to improve franchisor/franchisee practices, protect franchisees who often have less bargaining power or knowledge than their franchisor, and reduce legal actions.

While it held that non-compliance with the compulsory industry code was a breach of the Act, it found that this did not necessarily make a franchise agreement void.

However, the court stated that franchisors should be mindful that in some cases non-compliance could be "such as to warrant the court striking a contract down on the application of a franchisee".

Where a franchisor has not complied with the code and the Act, a franchisee is permitted to seek remedies under the Act. The most helpful include compensation for loss or damage experienced by the franchisee as a result of the franchisor's non-compliance, changing the terms of the franchise agreement, and termination of an agreement.

It is unlikely that the courts would set aside a franchise agreement on application by the franchisor following breach of the code. Further, if a franchisee applied, the breach would have to be so detrimental that none of the remedies listed above were sufficient for the franchisee.

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CONFIDENTIALITY

Potential sub-contractor sues tenderer for breach

Considerable steps are usually taken to ensure the protection of information exchanged between a principal and a tenderer. However, issues of confidentiality can also arise between the tenderer and potential sub-contractors.

In a recent case, a potential sub-contractor provided draft sketches of its design for a solution to occupational health and safety issues the tenderer had raised about conventional trailer designs.

Another company was ultimately awarded the sub-contract to design and manufacture the trailers. This design was alleged by the first company to incorporate its innovative and unique occupational health and safety solutions.

For a breach of confidence claim to be successful, the court must be satisfied that the information is confidential, that it was given in circumstances that generate an obligation of confidence, and that it was used in an unauthorised manner and to the detriment of the party that originally communicated it.

The court found that the information in the sketches and drawings had the necessary degree of confidence, as the design contained novel features compared to other existing trailers. It also found the secrecy of the information was of substantial concern to the sub-contractor.

Finally, the court decided the information was used in an unauthorised way, causing detriment to the sub-contractor. The court explained that the design information had been given for use in the tender, and this was the only purpose for which it was authorised.

To use the designs as part of the tender, the tendering company would have had to enter a manufacturing contract or pay a licensing fee to the designing company.

Principals and tenderers should be careful during the tender process when using and sharing information owned by another party and, where appropriate, obtain the necessary licences or deeds of assignment.

Contact us if you have concerns over contracts.

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LEGAL ACTION ON CLIMATE CHANGE

Public authorities at risk of being sued

Litigation on climate change has been with us for some time, with the first significant US court decision in 1990 and the first Australian one in 1994.

Australian court cases claiming negligence against producers or users of fossil fuels are likely to face considerable obstacles, but legal actions for failure to adapt to climate change, particularly against public authorities, could fare better. One might challenge, for example, the appropriateness of development approvals in flood-prone or bushfire-prone areas.

Private nuisance cases could be possible where a public authority undertakes works to reduce the effects of climate change. If such works actually make the problem worse, or shift the problem to other locations, affected landowners could possibly take the public authority to court in a case based on private nuisance laws.

In the US, cases of public nuisance have been brought by governments suing industrial contributors to global warming. In the past the courts had dismissed such cases, but recently they have reconsidered and decided that one against American Electric can be examined by a court of law.

In Alaska a native village has begun a public nuisance case against oil, power and coal companies. The village suffers from the melting of Arctic ice, which used to protect its coasts from erosion. Current erosion of coastal areas means that the village will have to be relocated or abandoned, and the villagers are seeking monetary damages from the companies for their contribution to climate change.

WHEN THE TAX OFFICE WANTS A CUT

Housing a family member can come at a cost

There can be unfortunate tax consequences when you decide to protect your mother or father's interests in the event that anything should happen to you in advance of their death.

If you sign a deed giving your mother or father the legal right to live in a unit you own for their lifetime provided they pay rates and other outgoings, you can face an unfortunate tax sting. You may be subject to capital gains tax on the market value of their right of residence.

The tax office says that the creation of a personal right to live in a property for life triggers a tax event which deals with the creation of a right that did not previously exist.

There are no capital gains tax consequences if nothing is given for the creation of that right. However, if money or property is given in exchange, you will be taken to have received the full market value of your parent's right to live in the unit for their lifetime.

Depending on their age and the value of the unit, this could be very little or quite a lot.

While you might say that your mother or father is not giving you anything for the right to live in the unit, the tax office sees things differently, holding that, for capital gains tax purposes, the provision of an indemnity amounts to giving property. And while there may be arguments, it seems likely that your parent's legal obligation to pay rates on the unit that you would otherwise be liable for, amounts to an indemnity and therefore the giving of property.

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