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SOLICITORS

Esplins Law Report
AUGUST 2015

Success in High Court

We recently achieved a successful outcome for our clients in the High Court of Australia. The case started in the Federal Court in 2012 where we were successful on behalf of our clients. We then successfully defended appeals to the full Federal Court and the High Court in April 2015.

In 2011 our clients, respected pharmacists, applied under the standard pharmacy rules for an approval to sell pharmaceutical benefits medication from their pharmacy in a small town in rural NSW (a PBS approval). The PBS approval was not granted. Our clients then applied to the Minister for Health. Under the National Health Act 1953 (the Act), the Minister may grant a PBS approval if he/she is satisfied that a community does not have reasonable access to the pharmaceutical benefits and it is in the public interest to grant another PBS approval. Our clients provided sufficient evidence that the community in this particular country town was undersupplied with pharmaceutical benefits. As a consequence the Minister granted the PBS approval.

Owners of the other pharmacies in the same town applied to the Federal Court for judicial review of the Minister's decision. These applicants claimed, among other things, that the Minister did not accord procedural fairness to them because the Minister did not notify them of our clients' application for the PBS approval and did not seek the applicants' comments. Accordingly, they claimed, our clients' PBS approval was ineffective. The Applicants maintained that they should have been heard in relation to our clients' application as they had current PBS approvals for pharmacies in the same town and that any PBS approval granted to our clients had a detrimental financial impact on their pharmacies.

Importantly, the Act does not require the Minister to notify neighbouring pharmacists and seek comments, but gives discretion to the Minister to do so.

In February 2014 the Federal Court decided, in our clients' favour, that the Minister was not obliged to give the other pharmacists in the town an opportunity to be heard, as the Act does not impose any obligation on the Minister to notify and seek comments. Further, the established line of court cases state that financial impact or interest is not sufficient to attract procedural fairness in the pharmacy context.

After successfully defending the applicant's claims in the Federal Court, the applicants appealed to the Full Federal Court, which by majority dismissed the appeal and confirmed the original decision in our clients' favour.

Nevertheless, the applicants applied to the High Court for permission to appeal the matter again. The Full High Court at the hearing refused the applicants permission to appeal. Our clients' PBS approval stands and they continue operating their pharmacy in rural NSW supplying PBS medications to their many customers.

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Binding Death Benefit Nominations

Benefits under your superannuation fund cannot be dealt with by your Will. The death benefits payable under your superannuation fund must be applied by the trustee of your superannuation fund acting in accordance with the governing rules of your superannuation fund and the relevant legislation. A trustee of a superannuation fund must also act in good faith, responsibly and reasonably.

All superannuation funds are governed by the Superannuation Industry (Supervision) Act, 1993 ("the SIS Act") and the Superannuation Industry (Supervision) Regulations 1994 ("the SIS Regulations").

Generally, governing rules of superannuation funds provide a mechanism for members to give a Binding Death Benefit Nomination ("BDB Nomination") to the fund's trustees as to how they wish their death benefits to be paid following death. The BDB Nomination must comply not only with the governing rules of the superannuation fund, but also with the SIS Act and the SIS Regulations.

The SIS Act and SIS Regulations provide that death benefits of a member of a superannuation fund must be paid to the deceased member's legal personal representative or to one or more dependants of the deceased member except in very limited circumstances. The legal personal representative includes the executor or trustee named in your Will to administer your estate. Dependants for the purposes of the SIS Act include:-

- a member's spouse
- any children of the member
- any person with whom the member had a close personal relationship including persons living with the deceased and receiving financial and domestic support and personal care or someone living with the member who suffers a disability.

Death benefits under a superannuation fund can usually be paid in a lump sum or a pension (an income stream). However, the SIS Regulations provide that death benefits in the form of a pension cannot be paid to a child unless that child is under 18 years of age, is between 18 and 25 years of age and was financially dependent on the deceased member at the time of death or is over 18 years and suffers from a prescribed disability.

Therefore if the governing rules of a superannuation fund permit BDB Nominations those death benefits can only be paid to the executor of your Will, your spouse, your children or another dependant.

The form of BDB Nominations varies depending on whether it is given to the trustee of a self-managed superannuation fund ("SMSF") or to superannuation funds which are not self-managed (e.g. industry superannuation funds). For SMSF the BDB Nomination must simply comply with the governing rules of the SMSF. For non-SMSF the BDB Nomination must be in a form which complies with the governing rules, the SIS Act and the SIS Regulations which contain a number of formal requirements.

Superannuation benefits paid following the death of a member are taxed differently depending on whether they are paid to:-

(a) dependants of the deceased member (as defined in tax legislation);

(b) non-dependants of the deceased member; or

(c) the executor of the estate of the deceased member.

Whilst the taxation laws are complex the following general observations can be made:-

1. any lump sum payment of a member's death benefit to a dependant (of any age) of the deceased member is not subject to tax;

2. any pension (income stream) payment of a member's death benefit to a dependant of the deceased member is not subject to tax if the deceased member or the dependant recipient is aged 60 years or over. However if the deceased member and the dependant recipient is less than 60 years of age the pension (income stream) is taxed at the recipient's marginal rates with the recipient entitled to a 15% tax offset;

3. any lump sum payment of a member's death benefit to non-dependants of the deceased member is generally taxed at 15% irrespective of the age of the member or the non-dependant. Pensions (income streams) cannot be paid to non-dependants;

4. any lump sum payment of a member's death benefit to the deceased member's estate is generally taxed at the same income tax rate as if the payment was paid directly to the beneficiaries and this income tax will have to be paid and deducted by the estate. However, if it can be determined that the death benefit is expected to be paid to dependants or non-dependants of the deceased member the rate of tax will be equivalent to the tax that would have been payable to the dependant or non-dependant.

Therefore, the safest and most tax efficient manner for payment of a superannuation death benefit of a member is to pay a lump sum payment to a dependant. If the deceased member or dependant is over 60 years of age a pension (income stream) payment can be made.

If any assistance is required in relation to this complex area of superannuation and taxation please contact Stephen Rush or Lesly Alburquerque.

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Home Building Amendment Act 2014 - Statutory Warranties

One of the key changes introduced in the Home Building Amendment Act 2014 ("the Amending Act") which commenced on 15 January 2015 was in respect of statutory warranties applicable for residential building works in New South Wales.

The statutory warranties under the Home Building Act 1989 provide a framework for consumer protection and create legally enforceable standards for building work.

Prior to the commencement of the Amending Act, statutory warranties applied for 6 years for structural defects and 2 years for other defects. The distinction between structural and non-structural defects was critical and often led to disputes.

The Amending Act abolishes the terms and distinctions between "structural" and "non-structural" defects and introduces a new concept of "major defects" for building works which have a 6 year warranty period. In short, "major defects" refers to defects to a major element of the building which causes or is likely to cause a building to become uninhabitable or unable to be used for its intended purpose, or causes or is likely to cause the destruction or collapse of the building or any part of the building. Defects which do not fall under the definition of "major defects" are still only covered by a 2 year warranty period.

The Amending Act also introduces a new definition for "completion" for building work for strata schemes to clearly identify the date when the statutory warranties will start to apply. Under the Amending Act "completion" will be taken to generally occur on the date an occupation certificate is issued that authorises the occupation and use of the whole building. This new definition will apply to new building contracts entered into after the commencement of the Amending Act.

Finally, the Amending Act clarifies that a home owner who suffers loss arising from a breach of a statutory warranty has a duty to mitigate that loss. Home owners will also need to make reasonable efforts to notify a builder of an alleged breach of the statutory warranties within 6 months of the breach becoming apparent – that is, when the home owner first becomes aware (or ought to reasonably to have become aware) of the breach.

This article provides a brief overview of the amendments to the statutory warranties under the Home Building Act 1989. We will be happy to assist if you have any further questions in respect of these amendments or any other amendments introduced under the Amendment Act.

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Swimming Pool Compliance Deadline Extended

In our May 2014 newsletter we set out the requirement for a selling or leasing owner of a property with a swimming pool to obtain a certificate of compliance. The stated deadline for obtaining that certificate was previously announced as 29 April 2015, however the deadline has been extended a year until 29 April 2016.

This is the second time the deadline has been extended and it is partially due to the lack of certified inspectors. The Minister for Local Government, Paul Toole said in his press release that *"the evidence showed there was a high failure rate for initial inspections and a heavy demand to make pools compliant"*. Mr Toole also said that the extension allows home owners more time to find an available contractor to certify their pools and also allows more inspectors to become certified and conduct inspections before the deadline. Councils will continue to run "risk based inspection programs" including mandatory inspections of strata units, tourist and visitor accommodation every 3 years.

Notwithstanding the extension, if you wish to lease or sell your property with a swimming pool we suggest you begin the process of obtaining a certificate of compliance sooner rather than later. We would be happy to advise further on the requirements or process of obtaining a certificate of compliance for your swimming pool.

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A Co-guarantor's Right to Contribution

Earlier this year in *Lavin v Toppi* [2015] HCA 4 the High Court held that a guarantor who pays a creditor more than his/her proportionate share of a guaranteed debt is entitled to recover contribution from his/her co-guarantor. This applies even if his/her co-guarantor has entered into a deed of release and settlement with the creditor and the creditor has covenanted not to sue the co-guarantor for payment of the guaranteed debt.

Ms Lavin and Ms Toppi were directors and equal shareholders of Luxe Studios Pty Limited ("Luxe Studios"). As at 2008 Luxe Studios had obtained total loans from the National Australia Bank ("the NAB") of more than $7.7 million. Five guarantors jointly and severally guaranteed Luxe Studios' loan: Ms Lavin, a company associated with Ms Lavin, Ms Toppi, Ms Toppi's husband and Luxe Productions Pty Limited (a company jointly owned and controlled by Ms Lavin and Ms Toppi).

Luxe Studios subsequently went into receivership and the NAB demanded repayment of the loans by 2010. Luxe Studios owed approximately $4 million to the NAB. Ms Lavin and her company entered into a deed of release and settlement with the NAB which provided that upon Ms Lavin paying $1.35 million of the guaranteed debt (and repayments of some personal, unrelated loans) the NAB covenanted not to sue Ms Lavin or her company in relation to the guarantee. The deed also provided that "[nothing] *in this deed, compromises, prejudices or affects NAB's rights against [Toppi's husband] … Toppi, Luxe Productions Pty Limited … and or Luxe … whatsoever, including without limitation in respect of the Guarantee".*

Ms Toppi and her husband subsequently paid the balance of the outstanding loans of approximately $2.9 million thereby discharging the guarantors' obligations to the NAB. Ms Toppi and her husband then sued Ms Lavin and her company for $773,661.04 being half the difference between the amounts the two "camps" of guarantors had paid the NAB. The primary judge in the NSW Supreme Court ordered that Ms Lavin and her company pay the contribution to Ms Toppi and her husband. Ms Lavin and her company appealed, unsuccessfully, to the Court of Appeal and subsequently, also unsuccessfully, to the High Court.

The Court unanimously held two reasons for dismissing the appeal. The first was based on coordinate liability. The NAB's covenant not to sue Ms Lavin and her company did not discharge any of the guarantors' liability to the NAB, it only meant that the NAB could not enforce Ms Lavin and her company's liability through legal proceedings.

The High Court's second reason was based in equity as a creditor's actions cannot defeat the right of the co-guarantor. This includes the creditor preferring one co-guarantor (by entering into a deed of release and settlement) and making the other co-guarantor(s) the "victim" (by seeking the disproportionate balance from him/her).

Co-guarantors should be aware of their legal obligations not only to the creditor but also to each other. It is advisable the all co-guarantors are included in settlement negotiations with the creditor and for that settlement agreement to address the co-guarantors' rights and obligations between themselves as well as with the creditor.

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Team Esplins at the celebration of Lesly's wedding earlier this year.