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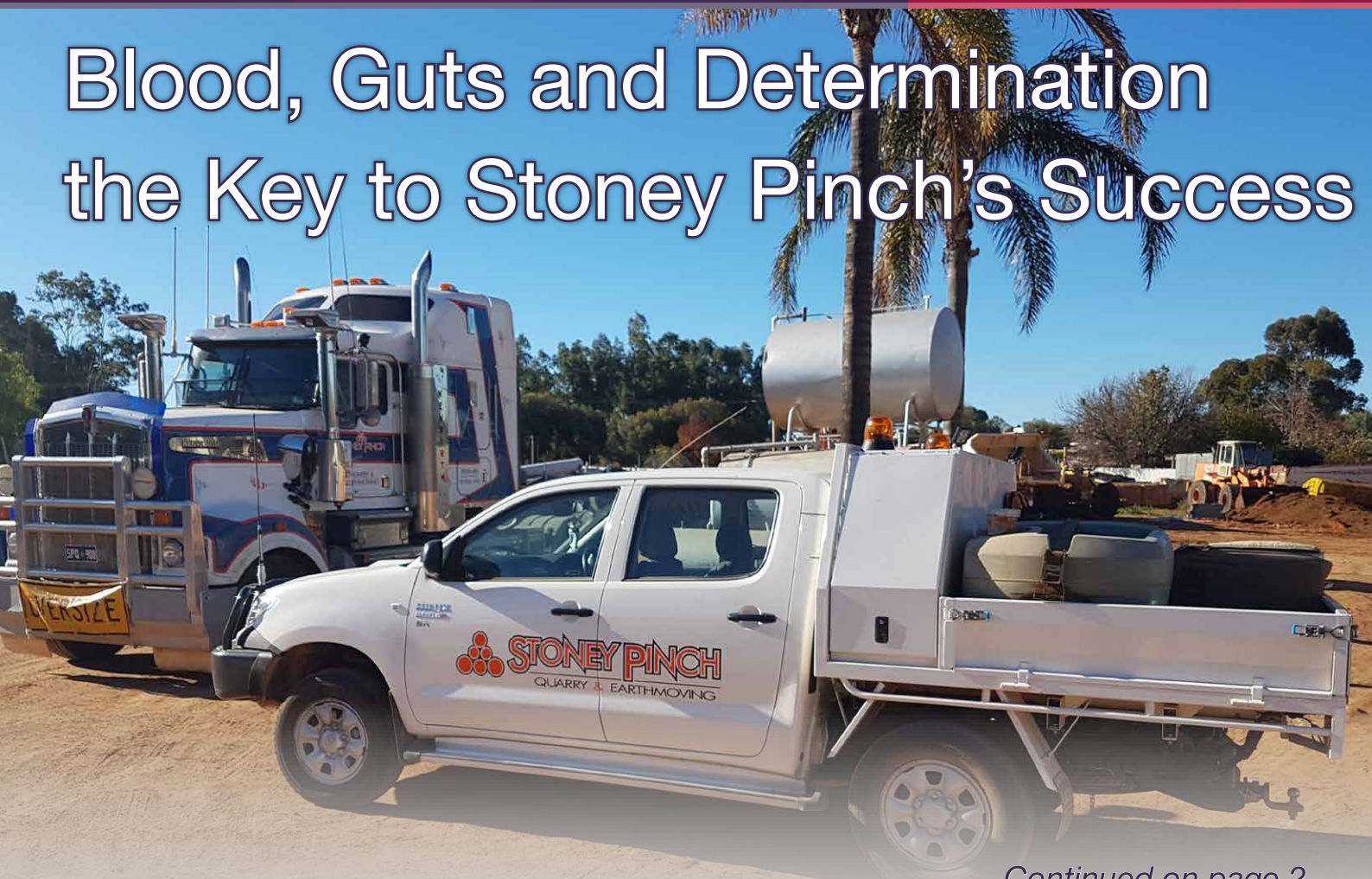
Summer Report

Blood, Guts and Determination the Key to Stoney Pinch's Success



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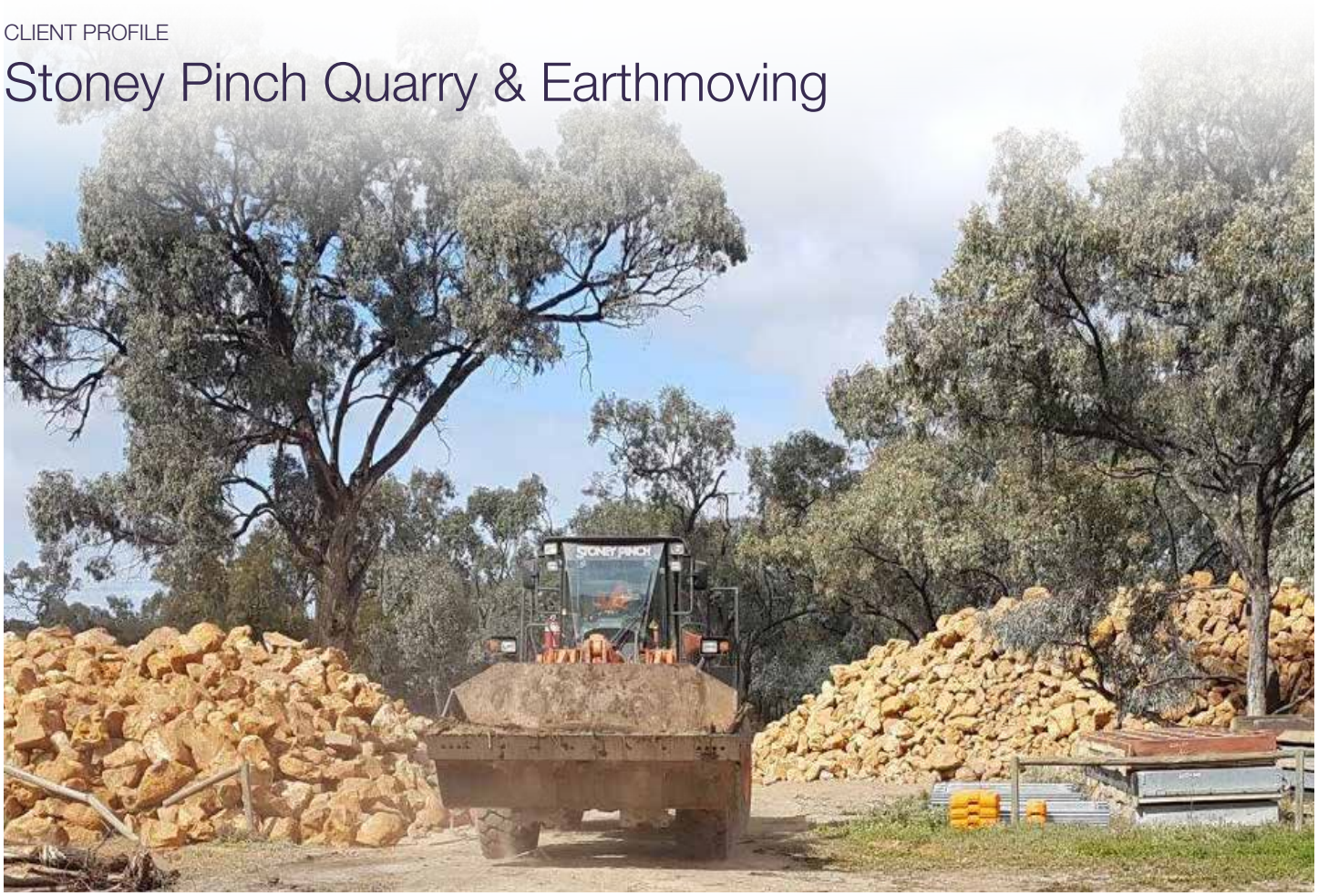
CLIENT PROFILE

Stoney Pinch Quarry & Earthmoving



Crippling drought, severe flood & a "big" cash flow crisis… nothing could keep this rock solid South Australian business from finding success.

Stoney Pinch, our valued client and one of the state's premier quarry and earth movers, is a stunning South Australian business success in the true sense of the word. Since they mined their first bit of hard rock out near Renmark in 2007, the company's commitment to their customers and drive to out-do the competition has seen them rise to the top of their game. Now, with more than 500 customers across the state, Stoney Pinch enjoys an unparalleled reputation in supplying longer lasting hard rock for river control and the finest, purest sand for ceramics, road making and block work for agricultural growers.

How a mantra can make a mountain out of a molehill

To understand where the true grit comes from that underpins everything this company does, we track back to the early days and the company's founder, James Chappel. James already had an established reputation among his staff after 10 years as foreman for another company, they used to say he put *"blood, guts and determination"* into every second of every day. Now when you speak to anyone at Stoney Pinch, those words are a mantra of sorts which has helped them not only see off, but truly succeed in the face of tough times and big challenges.

So, what were those challenges, and what lessons are there for other SA businesses who want to star in their own success story? John Chappel, Business Improvement Officer at Stoney Pinch and father of James, explains:

"In hindsight we paid, and then borrowed, too much when we purchased the business in 2007. We still managed OK for the first two years, but then double-

trouble struck in the space of a year. The 10 year drought across South Australia reached its crescendo and there was a major flood event, hitting us real hard at both ends of our business. It was a bad time and we had a big cash flow crisis."

"But I guess that's where the blood, guts and determination came in big time", continues John with a proud smile. *"It just wasn't in our DNA to give up. We knew we had a fundamentally great business in a very lucrative industry, with the right people in place, and we just knew in our hearts it would work if we rode out the storm."*

And here they are now, undoubtedly one of the best in the business, the start-up debt long since paid off, with hundreds of very happy clients engaging Stoney Pinch for civil earthworks and construction, river control, road construction, demolition and tree removal... among them SA government agencies, prominent FMCGs, wineries, growers and many, many local businesses.

Stoney Pinch top tips for facing adversity in business

When we delved deeper into the challenges the company has faced on its road to success and asked for some tips, John offered these three pearls of wisdom.

1. **Don't be tempted to 'play the game' with unethical competition.**

While most competitors in the industry are ethical and happy to operate on a level playing field, as in most business arenas John concedes there are a number of companies who cut corners, show disregard for compliance and move around the market offering super-low costs. John's advice is simple: *"Don't get caught up in cost and lured into playing the game, it's a race to the bottom. Instead double-down on your service, invest in leading-edge tools of your trade, ensure first class compliance and quote your higher price with pride. Eventually your customers will see through the other crap and appreciate your value, long term."*

2. **Never rest on your laurels, keep a constant eye out for the next income stream.**

Across mining and resource services in particular, there is a critical need to keep sourcing the next supply of product – the rocky outcrop on the old Adelaide to Sydney coach road which gave the company it's catchy name has long since been mined out – but John is adamant the advice stands for any business which wants to stand apart. *"Even in lucrative, relatively easy times, never come down off your toes or take your eye off the future"*, John warns us passionately. *"It doesn't take long at all to fall off your perch if you take your finger off the pulse."*

3. **When it comes to having the right people in place, it's about mindset as well as skill set.**

Even in an industry where you might think the resources, the machinery and the guaranteed demand will do all the hard work, the Stoney Pinch success rests very much on the attributes and the attitude of its staff and its suppliers. *"Of course getting superior skill sets in the right places across your team is paramount"*, explains John. *"But so too is finding the right mindset. From our receptionists and machine operators, to our accountant and legal representation... everyone on board believes blood, guts and determination is the key."*

And now, truly international success could be beckoning

For many Australian businesses, finding a top spot in its national market would be enough to sit back, relax and enjoy the success. But the Stoney Pinch team have continued to walk their own talk by recently securing the 'right to mine' a significant high-value silica sand deposit, which was discovered in September 2015 at their Cuttle Street tenement. As a result they've already received lots of overseas enquiries about the high-grade silica product, particularly from China and Germany.

All of us at DW Fox Tucker are looking forward to delivering our continued assistance with this hugely exciting development, which has already attracted serious overseas interest, including big players in construction from China and Germany.

The Stoney Pinch company tagline continues to ring true... business really is *"rock solid"*.

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NEWS & VIEWS | **By John Tucker & Brett Zimmermann**

Tax Changes for Developers of New Residential Property

One of the more significant tax measures to be brought before Federal Parliament on its resumption in February is proposing to give effect to the Government's 2017-18 Budget measure requiring purchasers of new residential premises (or subdivisions) to withhold GST on the sale consideration from 1 July 2018, and remit it directly to the ATO as part of the settlement. This is in lieu of the vendor who, under the ordinary operation of the GST provisions, as the supplier, has the liability to remit GST to the ATO.

The proposed measures do not broaden the base by expanding the land transactions that are subject to GST, the rate, nor the calculation of GST that would otherwise be payable. GST has always been charged on new residential premises and subdivisions.

An Exposure Draft of the proposed legislation was circulated for consultation and received extensive comments from industry and professional bodies. On 8 February 2018 a Bill for the new measures was introduced before Parliament as part of Treasury Laws Amendment (2018 Measures No. 1) Bill 2018. The measures as tabled were substantially altered from the Exposure Draft taking on board many, but not all, of the concerns expressed during the consultation period.

The key changes proposed by the Bill include:

- Where an entity and a term with existing definition under the GST Act (and for this article grouped under "new residential premises") makes a taxable supply of new residential premises or a new subdivision of potential residential land. Instead of the purchaser paying the total consideration (subject to contractual adjustments) to the supplying entity, the purchaser will be required to make a payment of a portion of the 'contract price' to the ATO directly prior to or at the time consideration is first provided (other than as a deposit).

- The amount to be withheld and paid to the Commissioner will be dependent on whether the supply is made under the margin scheme. If the margin scheme does not apply, the purchaser must withhold 1/11th of the contract price (or the 'price' of the supply if the contract does not specify a contract price). If the margin scheme applies to the taxable supply, the purchaser must withhold 7% of the contract price or price, or a greater amount that has been determined by the Minister in a legislative instrument, however any determination cannot require payment of more than 9%. If the amount withheld and remitted proves greater than the vendor's GST liability the vendor will need to claim a credit in its next BAS.

- Unless the purchaser is registered for GST and acquires the land for a creditable purpose, an entity making the supply of residential premises or potential residential land (not just new residential premises) for sale or long term lease must provide a notification to the purchaser before making the supply providing relevant details to the purchaser. Broadly speaking, for supplies of residential premises or potential residential land that is not new residential premises, the vendor need only notify the purchaser that they are not required to withhold. For supplies of what would be new residential premises the notice must additionally include, amongst other things, the amount that must be paid to the Commissioner and time required for payment.

Failure by a vendor to properly notify a purchaser is a strict liability offence and subject

to statutory penalty; it is not necessary to establish fault in failing to make any or all of the required representations. The only defence available (under the Criminal Code) is if the vendor can show they have made an honest mistake of fact, for example if the vendor made an honest and reasonable mistake about whether the property was new residential premises or existing premises; and

- An entity that makes a taxable supply of new residential premises will be entitled to a credit in its BAS for the amount of the payment made by the purchaser to the ATO (to in effect offset the GST debit required to be disclosed in the BAS for having made the taxable supply) thereby preventing double taxation.

Of significance, entitlement to a GST credit is ***conditional*** on the GST that has been withheld being actually paid by the purchaser to the ATO. That is, if the purchaser withholds from the consideration payable to the vendor an amount for GST to be directly remitted to the ATO, and whether fraudulently or innocently fails to actually remit that amount to the ATO, the vendor will not receive a credit in their BAS and consequently remain liable to the ATO for GST on the sale.

Further, unlike other withholding regimes such as the PAYG system that impose a penalty on the withholder for failing to withhold and remit a withheld amount to the ATO and a right for the ATO to recover from the withholder the amount withheld, the proposed withholding measures do not expose the purchaser to subsequent recovery action from the ATO for the withheld non-remitted amount. This is a contractual matter between the vendor and purchaser. Purchasers will however be liable to statutory penalties.

As a consequence these proposed measures represent a significant shift in the due diligence and risk of GST non-compliance to a purchaser as well as a vendor. This is despite, by reason of the vendor's required notification to the purchaser of the amount required to be withheld, time of payment and other requisite information, the purchaser having no excuses for non-compliance. The scheme of the legislation is simply that the purchaser does not have to calculate the remission amount, that is for the vendor to advise.

If suppliers of new residential premises are not to suffer a significant loss from non remittance by purchasers their representatives at settlement will need to ensure the purchaser's remittance to the ATO of the GST amount.

To enable this, we consider supporting provisions in contracts for sale will be required allowing a vendor means to ensure that a purchaser remits the relevant GST amount to the ATO, at best by entitling and authorising the vendor to remit on the purchaser's behalf. On the other hand purchaser's representatives will want to be able to ensure that the purchaser is not exposed to suffering a penalty for non-remittance.

The measures apply to supplies of new residential premises for which consideration (other than a deposit) is first provided on or after 1 July 2018 (with a 2-year transitional period for pre-1 July 2018 contracts where the consideration is provided before 1 July 2020). Given this, vendors of new residential premises need to quickly review, amongst other things, current contracts, settlement procedures and financing arrangements to protect their position with respect to these proposed changes as finally legislated. Real estate agents and conveyancers will also need to update their systems, contracts and practices to build the withholding mechanism into their notification and transaction processes to ensure compliance.

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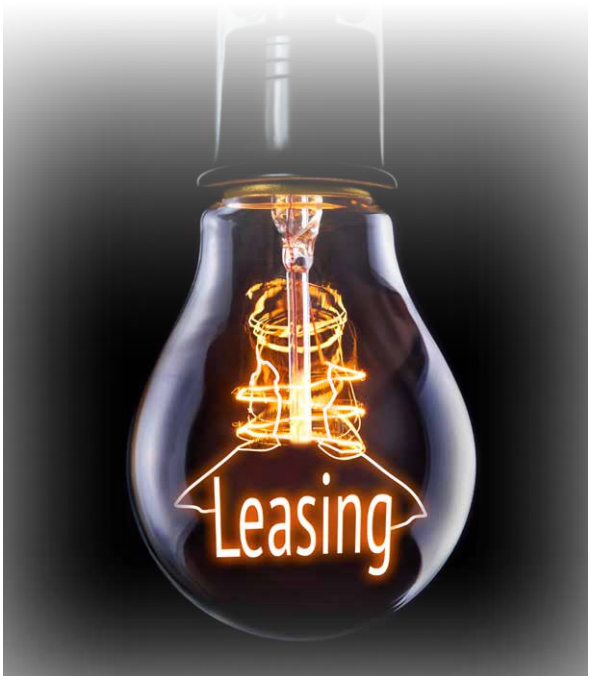
NEWS & VIEWS | **By Julia Schinella**

Attention Landlords, Leasing Agents and Tenants!

Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017 – what you need to know and where to from here



In December 2014, the Small Business Commissioner initiated a formal review of the *Retail and Commercial Leases Act 1995 (SA) (the* **Act**), in order to support the small business sector. The review was completed in April 2016 by retired District Court Judge Alan Moss who made 20 recommendations on a broad range of issues relating to the Act. In July 2017, the Retail and Commercial Leases (Miscellaneous) Amendment Bill 2017 (SA) (the **Bill**) was introduced.

The Bill passed through the House of Assembly, and having waited for consideration by the Legislative Council of the South Australian Parliament has now lapsed. Nevertheless, the Small Business Commissioner insists that the changes introduced under the Bill be recommended to the new Government. Landlords, leasing agents and tenants should take note of the key proposed changes:

1. Copy of lease and information brochure

The Bill provides that as soon as a landlord (or their agent) enters into negotiations with a prospective tenant, and ***before*** a lease is entered into, the tenant ***must*** be provided with a written copy of the proposed lease (but not necessarily including the particulars of the lease, such as rent and term). The maximum penalty for non-compliance has increased to $8,000.

Further, at the time the proposed lease is provided to the prospective tenant, the tenant ***must*** also be provided with a copy of an "Information Brochure" about retail leases published by the Small Business Commissioner. The maximum penalty for non-compliance is $800.

Importantly, these provisions do not apply to lease renewals.

2. Disclosure statement

The Bill contains more defined provisions relating to Disclosure Statements. A landlord (or their agent) ***must***, and ***before*** a lease is entered into, provide the tenant with a Disclosure Statement:

a. In duplicate; and

b. Signed by or on behalf of the landlord.

Further, a tenant (or their agent) must return to the landlord (or their agent) a signed acknowledgement of receipt of the Disclosure Statement within 14 days of service of the Disclosure Statement.

Notably, the Bill now provides that a Disclosure Statement does not need to be provided to a tenant upon lease renewals.

3. Bank guarantees

The Bill includes new provisions regarding bank guarantees. A landlord is now obligated to return a bank guarantee to the tenant within ***2 months*** after the tenant completes performance of their obligations under the lease (for example, after completion of make good). The maximum penalty for non-compliance is $8000.

This does not apply to bank guarantees that are expired or cancelled, or where the landlord's claim to the bank guarantee is the subject of court proceedings. Further, where a landlord is unable to return the original bank guarantee, they

can simply provide a consent or release required to have the bank guarantee cancelled.

Importantly, a landlord is liable to pay the tenant compensation for any loss or damage suffered by the tenant as a result of the failure to return the bank guarantee, and the reasonable costs incurred by the tenant in cancelling the bank guarantee because the landlord was unable to return it.

4. Certified exclusionary clause

Currently, the Act provides that the statutory rights of security (for at least a 5 year term) can be excluded by a certified exclusionary clause. This is a provision of a lease whereby a certificate signed by a lawyer (not acting for the landlord) endorses the lease to the effect that the lawyer has, at the request of the prospective lessee:

1. explained the effect of the provision and how the Act would apply if the provision wasn't included; and
2. the tenant gave the lawyer apparently credible assurances that the they were not acting under coercion or undue influence in requesting or consenting to the inclusion of the provision in the lease.

The Bill now provides that this can be completed by the Small Business Commissioner (who may require payment of a fee for this service).

5. Further clarifications:

The Bill now also provides the following (long-awaited) clarifications:

1. The prescribed rent threshold (in order to determine whether the Act applies to a lease) is $400,000 per annum, *exclusive of GST;*
2. A security bond cannot exceed 4 weeks' rent, *exclusive of GST;*
3. The Act may apply, or cease to apply, to a lease from time to time. Therefore leases can "move into" or "out of" the jurisdiction of the Act. For example, depending on whether the rent is increased or decreased, or whether the tenant changes from being a public company to a proprietary company and vice versa;
4. The terms "public company" and "subsidiary" now have the same meaning as in the *Corporations Act 2001.*

While not fundamental, the amendments to the Act contemplated by the Bill will provide the retail leasing sector with long-awaited clarity and reform. Landlords, leasing agents and tenants will need to "watch this space" for progress on the Bill enactment.

IF YOU HAVE ANY QUERIES REGARDING THE PROPOSED AMENDMENTS OR THE ACT PLEASE CONTACT:

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INSIGHT | **By Russell Jones**

The Benefits of Incorporating a Testamentary Trust in your Will

What is a trust?

A trust is a relationship that arises at law under which an entity (trustee) holds property for the benefit of another (beneficiary). A common example is where a person (the "settlor") transfers the legal and equitable title of certain property to another person or entity to hold that property on the behalf of, and for the benefit of, one or more third parties.

What is a testamentary trust?

The term "testamentary trust" refers to a trust created under a Will.

In practice, a person will include a provision in their Will appointing an individual (or individuals) to be their testamentary trustee(s). The testamentary trustee(s) is obligated to hold certain property for the benefit of the beneficiaries of the testator's Will upon the person's death.

If the testamentary trust is in the form of a discretionary trust, the trustee may have the power to distribute the income or capital or both of the trust amongst the beneficiaries in such proportions and at such times as the trustee thinks appropriate.

The trust might be timed to end once all beneficiaries are of full age and capacity, or at some other specified time but it can exist in perpetuity.

The testamentary trustee(s) has the same fiduciary obligations and is required to maintain the same strict standards as other trustees.

Why make a testamentary trust?

A testamentary trust can be structured to give beneficiaries up to three significant benefits.

Income splitting

A testamentary trust in the form of a discretionary trust can be advantageous when it comes to income splitting. That is, if one beneficiary has a high income and another a lower one, the trustee may decide to apportion more income from the trust to the latter. A consequence of this may be that less income tax is paid on the trust income than if it accrued to a single beneficiary.

Of particular significance in this context is that income flowing from a testamentary trust to a minor beneficiary can be taxed in the same way as that

... if one beneficiary has a high income and another a lower one, the trustee may decide to apportion more income from the trust to the latter. A consequence of this may be that less income tax is paid ...

flowing to an adult, meaning the tax free threshold and progressive rates apply, unlike the case with income flowing to a minor from a discretionary trust created by a living person. For this to be the case the income needs to qualify as "excepted trust income" defined in Section 102AG(2) in the *Income Tax Assessment Act* (1936).

Asset protection

A 'normal' Will would leave assets directly to beneficiaries (for example, if a spouse dies, then to the surviving spouse). If that surviving spouse later becomes bankrupt or remarries and the new marriage later breaks down, those assets, if held by the surviving spouse personally, can be attacked by creditors or the ex-partner.

If held under a testamentary trust, assets are not held by the spouse personally. Instead, the assets can be held in the testamentary trust for the potential benefit of the surviving spouse and others (e.g. children). This way, if there is a risk of claims by a creditor or an ex-partner, the trustees of the testamentary trust can:

- (to the extent that it is legally possible to do so) preserve those assets until the risk passes; and then
- pass control of those assets to the surviving spouse at a later time, when the assets are less likely to be attacked by creditors or an ex-partner.

Flexibility

When drafting a Will, it can be difficult to know what each beneficiary's personal and business circumstances will be at the time of the testator's death. Rather than receiving an inheritance in their personal names, a beneficiary may prefer to have assets to be inherited held by another entity, such as a company or a trust.

Because a 'normal' Will would leave assets directly to the beneficiary, the beneficiary may have to pay stamp duty or capital gains tax if an inherited asset is received by the beneficiary and then transferred to the preferred holding entity.

By using a testamentary trust those inherited assets may be able (if the beneficiary chooses) to be transferred directly to the preferred holding entity without paying stamp duty or (in some circumstances) capital gains tax.

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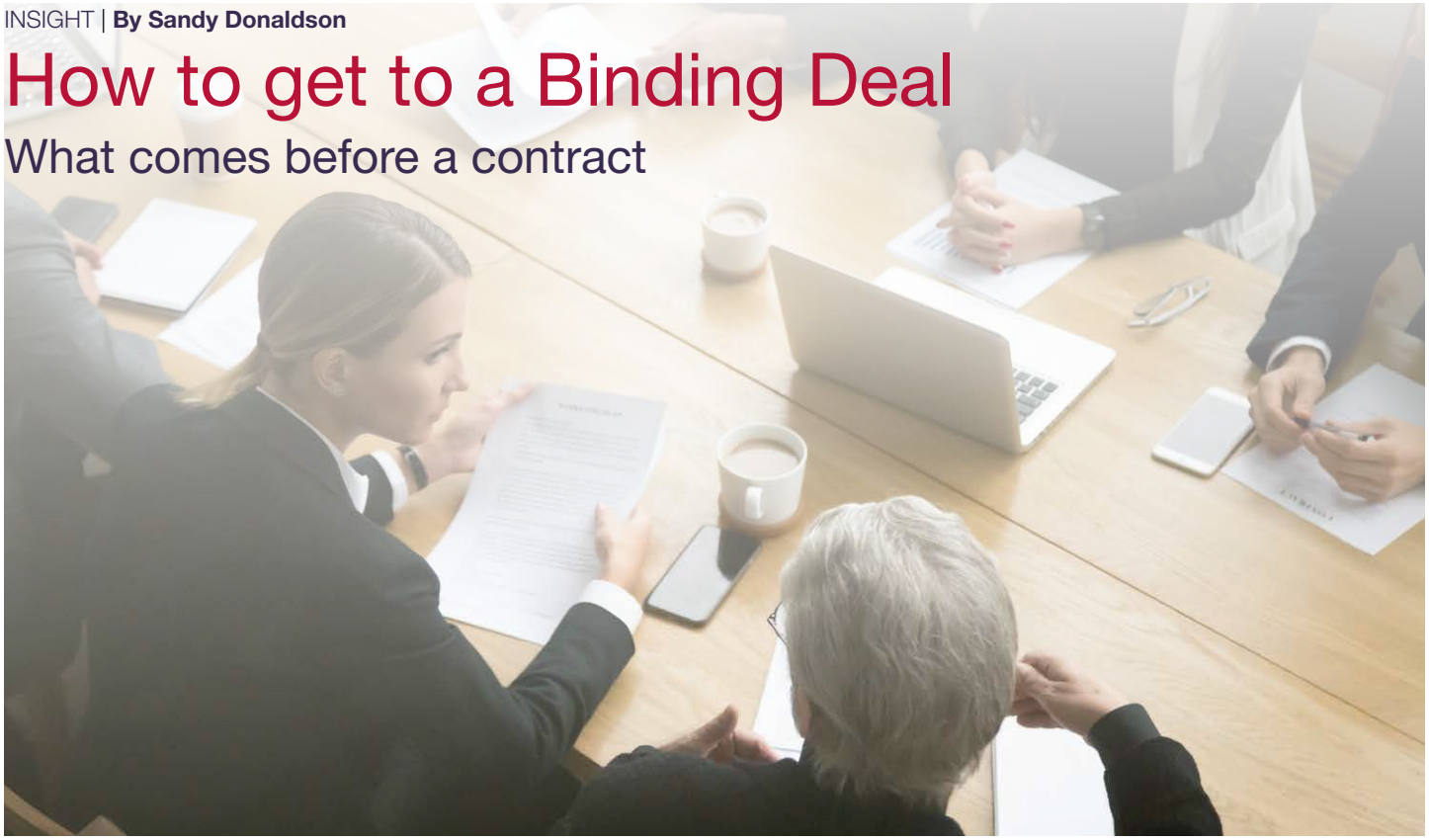
INSIGHT | **By Sandy Donaldson**

How to get to a Binding Deal

What comes before a contract



Whatever type of deal parties may be contemplating, there are usually a substantial number of terms to be agreed and which should be included in contracts, agreements or documents between the parties. These documents are often not simple or standard and can take time, and careful consideration, before they are finalised.

This applies to all forms of commercial arrangements, ranging from real estate transactions, technology start-ups and investments, joint ventures and IT consulting and development arrangements, to name but a few random examples.

Pre-contract document

Parties will usually want to get the deal done and the paperwork signed as soon as possible but, as noted, this will take time. In the interim, parties can, and usually should, prepare a form of preliminary document setting out their intentions and understanding of key points.

What's in a name?

This document may, variously, be called:

- Heads of Agreement (HoA);
- Letter of Intent (LoI);
- Memorandum of Understanding (MoU);
- Term Sheet;
- Deal Memo,

or some other name. We will refer to it as a HoA simply because that was the first name that occurred to us, but they are all names for the same sort of pre-contract document.

Non-binding/subject to contract

In almost every case, it should be very clearly expressed in the HoA that it is not legally binding and is to be subject to negotiation and

The main practical use of a Heads of Agreement is to summarise and to have parties focus on the main commercial points of the intended deal.

... it should be very clearly expressed in the Heads of Agreement that it is not legally binding and is to be subject to negotiation and execution of a formal contract ...

execution of a formal contract, or contracts, and other necessary documents between the parties. Most cases involving HoAs that come before Courts involve the question of whether or not a HoA is a binding contract. Even if only expressed in summary form, a HoA can be a contract if the parties intend to be immediately bound, or if they act in a way that indicates that the HoA is binding, even if they also intend to have terms of agreement contained in a further contract or documents.

Having a non-binding document often gives rise to some angst for parties who want to have a deal "tied up" without delay. But, the safest course is nearly always to ensure that the HoA is not binding, as even if the parties think that the terms of the HoA are clear, they will not contain the detail or all of the terms of the final agreement or documents and, in the event of ambiguity or areas not covered, may lead to an interpretation that a party did not intend.

Can some terms be binding?

Some terms of a HoA can be binding and, if so, should be clearly expressed to be binding in the document. Examples are:

- confidentiality of information of parties (although this may be covered in a separate nondisclosure or confidentiality agreement);
- a period of exclusive negotiation;
- requirements for exchange of information for due diligence or consideration.

Negotiation in good faith

Some HoAs contain a term which requires parties to negotiate ***in good faith*** to reach final agreement. Whether this is enforceable is doubtful, and such a clause may be viewed as merely an "agreement to agree". A Court will not make a contract for parties, even if there is such a clause. A requirement to negotiate in good faith may, however, impose obligations to act honestly in the disclosure of information and in other ways in dealings between the parties.

The deal points

The main practical use of a HoA is to summarise and to have parties focus on the main commercial points of the intended deal. This will, hopefully, mean that the preparation of the final and binding contract or documents is an easier exercise, even if this will still take time. The existence of a HoA which does address the main issues will make it much easier to instruct lawyers, or other professionals, and to expedite completion of the final documentation.

Although a HoA may be non-binding it will usually be advisable for parties to refer this to lawyers, and other professionals if required, for consideration before it is finalised so that potential issues are addressed up-front in the HoA.

Negotiating and finalising contracts and documentation for commercial transactions can be a complex, time-consuming and sometimes frustrating experience for parties, but the preparation of a HoA which does cover the main points of agreement can greatly assist and expedite the process, and give the parties at least some comfort pending the finalisation of formal documents.

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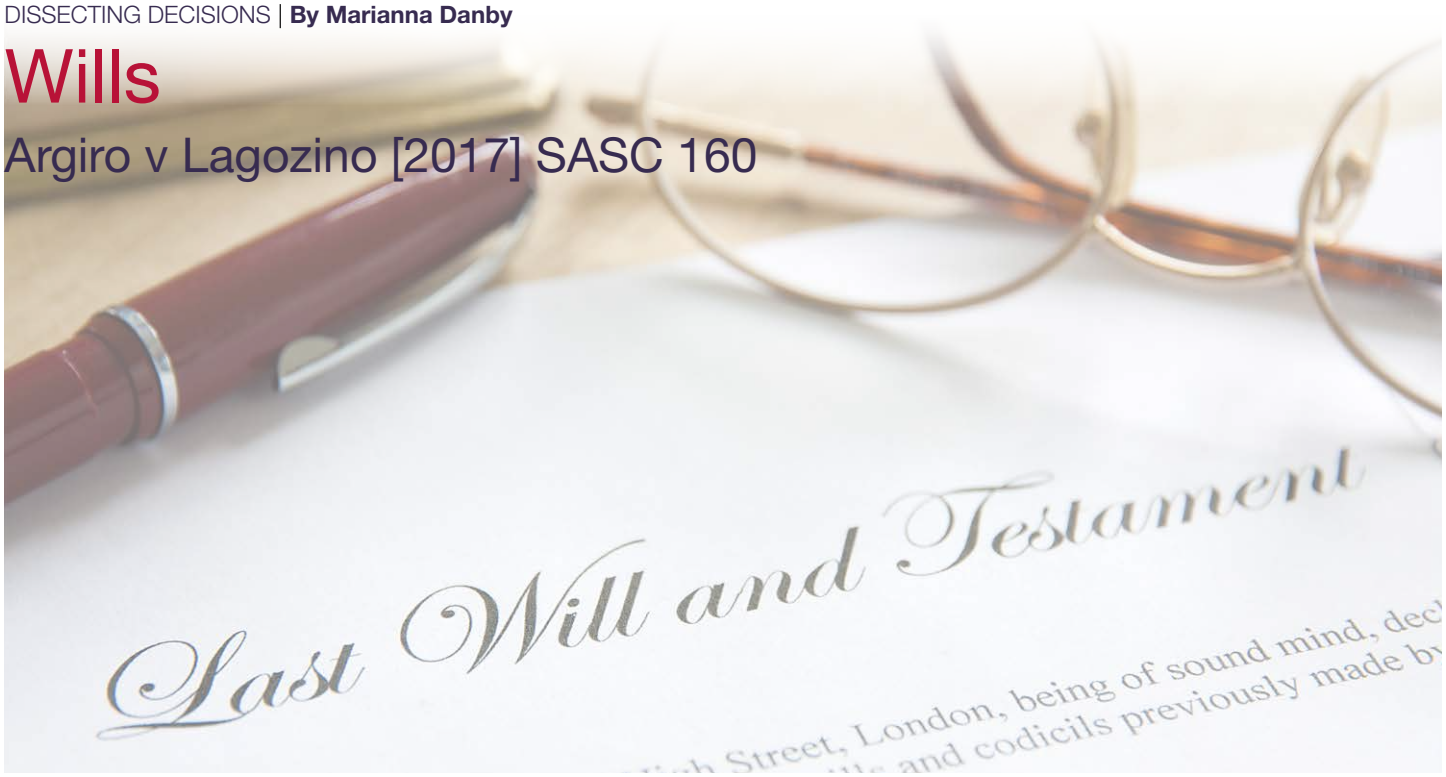
DISSECTING DECISIONS | **By Marianna Danby**

Wills

Argiro v Lagozino [2017] SASC 160



In a nutshell: Will making - where loss of testamentary capacity is a precursor to a statutory Will.

This is the story of Mr Lagozino's testamentary wishes and his battle with Alzheimer's dementia.

Mr Lagozino did not marry or have any children. His only surviving sibling was his sister who lived in Italy with her children. Mr Lagozino and his sister had a cordial relationship growing up and she was originally the sole beneficiary under a Will he made in 1980.

In 2009 Mr Lagozino was diagnosed with Alzheimer's dementia. Around the same time, he fell out with his sister. However the evidence in the trial highlighted that the views Mr Lagozino held about his sister were delusional, misinformed and coincided with his declining health.

The applicant in this case was the guardian of Mr Lagozino at the time and they joined Mr Lagozino's sister as an interested party in the proceedings.

The storm began in 2014 when Mr Lagozino created a new Will. This was controversial because he firstly made specific lump sum bequests of $50,000, $35,000 and $50,000 to three friends who were dear to him, and only made provision for his sister to receive 30% of the residue of his estate with the other residual 70% to be distributed between her children. If he had not been advised by his solicitor at the time that his sister may otherwise make a claim on his estate subject to the ***Inheritance (Family Provision) Act 1982*** (SA), he may not have included her at all.

... the Court was required to decide whether the 2014 Will accurately reflected the intentions of Mr Lagozino and if he now had testamentary capacity, or whether or not his diagnosis in 2009 had affected these views ...

Alas, the Court was required to decide whether the 2014 Will accurately reflected the intentions of Mr Lagozino and if he now had testamentary capacity, or whether or not his diagnosis in 2009 had affected these views insofar that a statutory Will reflecting his true intentions should be granted, pursuant to Section 7 of the ***Wills Act 1936*** (SA).

The provision granting a statutory Will is a remedial and protective

It's never too early to take precautions and to make your Will well before a condition, which may be out of your control, really does take everything out of your control.

measure and the wide discretion of the Court to order one is not given readily. Rather the Court must initially be satisfied that:

1. the testator lacks testamentary capacity;

2. the proposed Will would accurately reflect the likely intention of the person if they still had testamentary capacity; and

3. it is reasonable in all circumstances that the order be made.

The circumstances of what is reasonable is an important discretional finding that should be based upon the satisfaction of further criteria, namely:

1. any evidence relating to the wishes of the person (which was widened by the 2016 South Australian Supreme Court case ***In the Matter of K, JL*** [2016] SASC 53 in order to be flexible in matters of detail when deciphering what the likely version of the testator's testamentary intentions would have been on the facts);

2. the likelihood of the person acquiring or regaining testamentary capacity (unfortunately Alzheimers is not as forgiving as other ailments to which this consideration may apply);

3. the terms of any previous Will made by the person (noting the 1980 Will);

4. the interests of:

   i. beneficiaries under any Will (which in this case, was the sister as sole beneficiary);

   ii. any person who would be entitled to receive any part of the estate of the person if the person were to die intestate (which again would be in favour of the sister in this case);

   iii. any person who would be entitled to claim in the benefit of the ***Inheritance (Family Provision) Act*** as cited above;

   iv. any person who has cared for or provided emotional support (which allowed for the proper consideration of the three friends who were now to benefit);

   v. any gift for a charitable or other purpose the person might reasonably be expected to give by Will;

   vi. the size of the estate (which ended up being a focal point in the judgment); and

   vii. any other matter that the Court considers relevant (for instance, Mr Lagozino's appearance swayed the judges view when considering his current testamentary capacity (if any) because he presented as dishevelled and unshaven in Court which was considered to be out of his normal character).

Reasons

As aforementioned, it was held that the testator's instructions were influenced by the hostility that he felt towards his sister, which was ill informed by a view that he formed around the same time he was diagnosed with dementia. He was under the belief that his sister had acted to prejudice his interests in property and assets held for him in Italy. It was proven that these views were misinformed and therefore founded on delusional belief.

The cornerstone case of ***Banks v Goodfellow*** (1870) LR 5 QB 459 outlining the test for testamentary capacity for the past 121 years was cited and reinforced that testamentary capacity requires the testator to have the ability:

1. to understand the nature and effect of a Will;

2. understand the extent of property being disposed of; and

3. appreciate claims to which he should give effect to.

continued overleaf...

...from previous page

As the Judge's remedial decision is based on a hypothetical scenario, the subjective views which informed Mr Lagozino's objective mindset when testamentary instructions were given in 2014 were weighed up by the Court along with the witness evidence from his GP and lawyer.

Lastly, the size of the estate at the time of trial had significantly diminished since 2014. The judge queried whether by taking into consideration the total amount of the estate today, Mr Lagozino would still have made such generous and specific bequests to his three friends. He further noted that the making of a statutory Will now would save the estate the added expense of future litigation.

Take Away Message: It's never too early to take precautions and to make your Will well before a condition, which may be out of your control, really does take everything out of your control. Furthermore, lump sum bequests can be tricky, as the set amount can end up either lesser or greater than the appropriate proportion you may have considered at the time of giving your Will instructions.

Proving the above issues can be tough as the Court takes one's testamentary wishes and capacity very seriously, so if you have an issue similar to Mr Lagozino's matter then come and see us to start gathering and presenting the evidence which may be required for either:

1. proving testamentary capacity; or
2. for the remedial purpose of creating a statutory Will.

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INSIGHT | **By William Esau**

Easements in Gross

An easement gives a party (the grantee) the right to use land for a particular purpose, such as right of way access. An easement is usually created by the owner of the land (the grantor) over which the easement is to extend (the grantor) in favour of land owned by the grantee.

Easements are commonly granted for purposes such as vehicle access, pathways, walkways, supply of utilities such as water and gas, and parking.

A grant of easement normally requires dominant and servient land. Dominant land is the land that holds the benefit of the easement. Servient land is the land over which the easement is to extend.

An easement will either be contiguous or non-contiguous. A contiguous easement will be where the dominant and servient land are adjacent to each other. An example of a contiguous easement is an easement for an access driveway which extends over a block of land to a neighbour's block next door.

For a non-contiguous easement the dominant and servient land are separated by other land.

In some cases an ***easement in gross*** may be created. An easement in gross is where there is no dominant land. In other words, there is not a particular piece of land which holds the benefit of the easement.

Under Section 41A of the ***Law of Property Act 1936*** (SA) an entity may be declared as an entity to

which an easement in gross can be created without there being appurtenant land.

Easements in gross will usually be granted to statutory authorities such as local councils, SA Water and Distribution Lessor Corporation (for electricity transmission).

They are typically granted in favour of companies or private trusts established for the supply of utilities, such as water or power, to a local community or local enterprises. The benefit of an easement in gross is that these easements can be granted over parts of land in favour of a company or a trust rather than in favour of any particular owner of dominant land.

An application for an entity to be declared under Section 41A of the *Law of Property Act 1936* (SA) as an entity to which easements in gross can be granted is made to the Attorney General of South Australia. The application is made in letter form and supported by relevant documents. The Attorney General's Office will then consider the application and, if the Attorney General is prepared to support the application, he will recommend to Cabinet that the entity be declared a body for the purposes of Section 41A. Provided Cabinet accepts the recommendation and approves the entity, the next step will be for a proclamation to be made by the Governor of South Australia on the advice of the Executive Council. The proclamation is then gazetted, after which time the entity is able to accept the grant of easements in gross for registration at the Lands Titles Office.

Easements in gross will usually be granted to statutory authorities such as local councils, SA Water and Distribution Lessor Corporation.

FOR FURTHER ADVICE REGARDING THE GRANT OF EASEMENTS IN GROSS PLEASE CONTACT:

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NEWS & VIEWS | **By Amy Bishop**

Mandatory Data Breach Notification

On Thursday 22 February 2018 the Notifiable Data Breaches Scheme (NDB Scheme) commenced. Businesses subject to the *Privacy Act 1988 (Cth)* (**Privacy Act**) are now obligated to report and notify the Office of the Australian Information Commissioner if a data breach occurs.

Entities which are affected by the changes should urgently be reviewing existing cybersecurity arrangements and, if not already in place, implement a cybersecurity policy which deals with the obligations arising under the new law. This should include a method to clearly identify what personal or other information is held and address implementation of risk management policies and procedures in the event of an *eligible data breach* (as defined in the Act).

The mandatory data breach notification scheme will apply to all entities which currently have obligations under the *Privacy Act*. This includes Commonwealth Government Agencies, private sector businesses and not-for-profit organisations with an annual turnover of more than $3 million, entities which are holders of tax file information (known as file number recipients under the Privacy Act), certain credit providers and credit reporting bodies and other specified entities.

Eligible data breaches

The new laws apply in the event of an "eligible data breach". An *eligible data breach* will have occurred where the information is *personal information* or other regulated information under the *Privacy Act* and:

"1. Both of the following conditions are satisfied:

a. there is unauthorised access to, or unauthorised disclosure of, the information;

b. a reasonable person would conclude that the access or disclosure would be likely to result in serious harm to any of the individuals to whom the information relates; or

2. the information is lost in circumstances where:

a. unauthorised access to, or unauthorised disclosure of, the information is likely to occur; and

b. assuming that unauthorised access to, or unauthorised disclosure of, the information were to occur, a reasonable person would conclude that the access or disclosure would be likely to result in serious harm to any of the individuals to whom the information relates"

The intent of the Act is to assist people whose personal information may have been compromised by keeping them informed and enabling them to protect themselves and their personal information, for example by changing their passwords. Although broadly capturing any unauthorised access, disclosure or loss, one limitation with the Act in achieving this goal might be the requirement that there be potential for "serious harm" to occur. The Explanatory Memorandum for the Act notes that this is intended to include serious harm to a person's reputation, so it is not restricted to monetary harm only. However, the Explanatory Memorandum goes on to envisage that the term refers to more than just distress. It will be interesting to see how this is interpreted in practice.

Statement and notification

If an *eligible data breach* occurs then the entity must prepare a Statement for the Privacy Commissioner containing relevant information and in the form prescribed under the Act.

Additionally, the entity will be required not only to notify the individuals in relation to whom the *eligible data breach* is likely to result in serious harm but, if practicable, all individuals to

Non-compliance by an entity can result in serious civil penalties - up to $360,000 for individuals and $1.8million for organisations.

whom the information relates. It is only where it is impracticable to inform all individuals to whom the information relates that the obligation is reduced to only notifying the individual (or individuals) at risk.

Where affected individuals cannot be contacted or located, the entity must publish the contents of the Statement on the entity's website and take reasonable steps to publicise the contents of the Statement provided to the Commissioner.

The new regime does contain some exceptions. Particularly notable is the case of an entity which is able to remedy a data breach before it results in loss or harm. In such circumstances, if the entity takes action before an individual suffers loss or serious harm then they will not have to comply with the requirements of notification.

The new laws also put a positive obligation on entities to investigate data breaches if there are ***reasonable grounds*** to suspect that there may have been an ***eligible data breach***. If the Commissioner becomes aware of reasonable grounds to believe there has been an ***eligible data breach***, he has power to direct an entity to comply with its notification obligations.

Non-compliance by an entity will amount to ***interference with the privacy of an individual*** which carries serious civil penalties - up to $360,000 for individuals and $1.8 million for organisations - under the *Privacy Act*.

Therefore it is important for organisations to recognise irregular or unusual activities and ensure that proper investigations of possible data breaches are undertaken and completed within 30 days. As entities will now have to fulfil their positive duty to investigate such occurrences, it is critical for entities to put proper procedures in place and ensure adequate staff training.

Call us for a free 'no obligation' discussion where we can talk about how this applies to your business, reporting obligations and the steps needed to prepare a Data Breach Response Plan.

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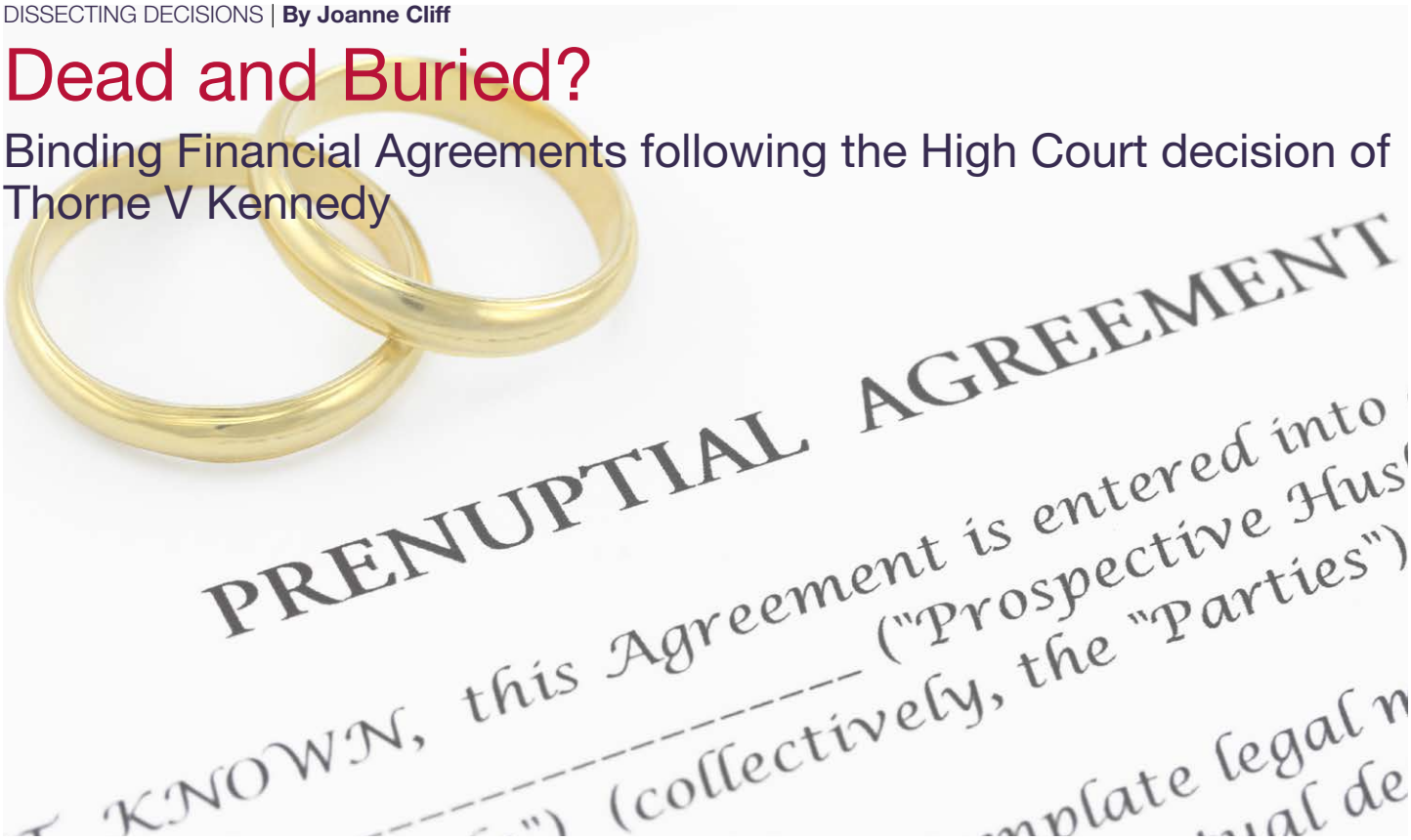
DISSECTING DECISIONS | **By Joanne Cliff**

Dead and Buried?

Binding Financial Agreements following the High Court decision of Thorne V Kennedy



On the 8th of November 2017 the High Court of Australia handed down a widely anticipated decision in *Thorne v Kennedy* [2017] HCA 49 *(***Thorne v Kennedy**). Some legal commentators say it sounds the death knell for Binding Financial Agreements (**BFA**) as both a pre-marriage (pre-nuptial) and post-marriage (post-nuptial) BFA were set aside by the High Court for unconscionable conduct and undue influence.

On 27 December 2000 the *Family Law Act 1975 (Cth)* (**FLA**) Part VIII(A) was amended to allow couples to make their own financial agreements prior to the commencement of a relationship, during a relationship or after separation. The agreements became known as Binding Financial Agreements and one of the attractions of using a BFA was that, unlike with the FLA which requires the Court to consider whether proposed financial orders are just and equitable between the parties, a BFA could be financially advantageous to one party over the other.

Since 2000, the Courts have set aside BFAs for often technical reasons, such as whether legal advice was obtained at the right time, but the importance of *Thorne v Kennedy* coming from the High Court is that it deals with the issue of fairness and the conduct by one of the parties in negotiating the BFA.

The facts of *Thorne v Kennedy* are as follows:

- Mr Kennedy was a 67 year old wealthy property developer with assets of between $18M and $24M. He had three adult children from a previous relationship.
- Ms Thorne was a 36 year old Romanian woman living in the Middle East with no children. She spoke little English.
- The couple met online in 2006. Ms Thorne came to Australia on a tourist visa to marry Mr Kennedy. She was hopeful of having a child.
- The marriage was scheduled to take place on the 30th of September 2007.
- On the 19th of September 2017 Mr Kennedy told Ms Thorne that she was going to a solicitor to sign a BFA and, if she did not sign the agreement, the wedding would be off. Mr Kennedy told Ms Thorne that his wealth was for his three adult children.

- Some key features of the BFA were as follows:
    - Ms Thorne was to receive maintenance during the marriage of the greater of:
        i. $4,000 per month; or
        ii. 25 per cent of the net income from the management rights of a proposed development Mr Kennedy was pursuing.
    - Ms Thorne would be permitted to live rent free in a penthouse located in the proposed development and her family would be permitted to live rent free in a unit located in that development.
    - If the parties separated within the first three years of marriage, with or without children, Ms Thorne would get nothing and the rights mentioned above would also cease.
    - If the parties separated at least after three years without children, Ms Thorne would receive a single lump sum of $50,000 indexed to the Consumer Price Index.
    - If Mr Kennedy died while the parties were living together and were not separated, then the agreement allowed for Ms Thorne to be entitled to:
        i. a penthouse in the proposed development or, if this was not possible, a unit she chose in the same city not exceeding a market value of $1,500,000;
        ii. 40 per cent of the net income of the management rights of the proposed development or $5,000 per month indexed annually, whichever was the greater;
        iii. a Mercedes Benz motor vehicle that was presently in Ms Thorne's possession or a replacement vehicle of the same or higher value.

As is required by BFAs, Ms Thorne sought independent legal advice from a lawyer on the 20th of September 2007. Ms Thorne told her lawyer that the Local Council had refused to grant planning permission for the proposed development.

The lawyer advised (confirmed in writing) that there was no provision for an increase to the $4,000 monthly maintenance during the marriage, making the provision of that amount of maintenance particularly low given Mr Kennedy's circumstances.

The lawyer also considered that the allowance of $50,000 was "piteously small" and overall the BFA was the worst she had ever seen.

While consulting with her lawyer Ms Thorne received a phone call from Mr Kennedy to discuss the signing of the agreement. This reaffirmed the urgency with which Mr Kennedy expected the agreement to be signed and compounded the pressure Ms Thorne was under to do so.

- At the time the advice was given by the lawyer, Ms Thorne's family had come to Australia for the wedding, the reception and accommodation had been booked, and the wedding dress had been made.

The High Court emphasised that undue influence can arise from widely different sources, one of which was excessive pressure and that the pressure does not necessarily have to be illegitimate or improper.

continued overleaf...

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- Despite legal advice not to sign the BFA, Ms Thorne signed the agreement four days before the wedding on the 26th of September 2007.

- Shortly after the wedding a second agreement (post-nuptial agreement) with substantively the same conditions was signed despite Ms Thorne receiving further legal advice not to sign it.

- On the 16th of June 2011 Mr Kennedy signed a separation agreement.

- In April 2012 Ms Thorne commenced proceedings seeking orders that both agreements be declared not binding and/or be set aside and, orders for property settlement and spousal maintenance.

In May 2014 while the Court proceedings were underway, Mr Kennedy passed away and his estate continued to defend the action.

Ms Thorne was successful at trial because the Trial Judge held that Ms Thorne had signed the agreements under duress borne of inequality of bargaining power where there was no outcome for her that was fair and reasonable. The Trial Judge believed that Ms Thorne's situation was ***"much more than inequality of financial position"*** and he set out six matters which, in combination, led to the conclusion that Ms Thorne had no choice and was powerless:

1. the lack of financial equality with the husband;

2. her lack of permanent status in Australia at the time;

3. her reliance on the husband for all things;

4. her emotional connectedness to their relationship and the prospect of motherhood;

5. her emotional preparation for marriage;

6. the publicness of her upcoming marriage.

The Trial Judge went on to emphasise that Ms Thorne was in Australia to further her relationship with Mr Kennedy and she left behind her life and possessions. If the relationship ended she would have nothing: no job, no visa, no home, no place, no community.

Mr Kennedy's estate appealed to the Full Court of the Family Court. The Full Court reversed the Trial Judge's decision and held that both agreements were binding. The Full Court accepted that Mr Kennedy had not engaged in duress, undue influence or unconscionable conduct, holding that the Trial Judge had failed to provide adequate reasons for making those findings and concluding that the agreement bound both parties.

Ms Thorne subsequently appealed to the High Court and was successful.

The High Court held that both agreements were voidable due to both undue influence and unconscionable conduct (the Court found it unnecessary to decide whether there was duress). According to the High Court, the Full Court had not fully considered the principles of duress, undue influence and unconscionable conduct that Ms Thorne had been subjected to.

The focus of the appeal was on whether the agreements should be set aside because Ms Thorne was subject to mitigating factors, namely undue influence and unconscionable conduct when entering into these agreements.

The High Court emphasised that undue influence can arise from widely different sources, one of which was excessive pressure and that the pressure does not necessarily have to be illegitimate or improper. The Court was keen to state that pressure can deprive a person of free choice.

In essence, the High Court substantively agreed with the findings of the Trial Judge taking into consideration the following factors:

1. Whether the agreement was offered on a basis that it was not open to negotiation;

2. The emotional circumstances in which the agreement was entered into, including the threat to end the engagement.

We expect that BFAs will still be a valid course of action for some individuals who want to protect their assets in the event of a separation ...

3. There was no time for Ms Thorne to have any careful reflection on the terms of the agreement.

4. Consideration was given to the nature of the parties' relationship with Ms Thorne having come to Australia on a tourist visa with no friends, family or job and not being able to speak English.

5. The relative financial positions of the parties, with Mr Kennedy having millions of dollars' of assets, whilst Ms Thorne had no assets.

6. The independent legal advice that was received and whether there was time to reflect on that advice.

Despite legal advice to Ms Thorne not to sign the agreements (which she did not follow), this in itself did not count against her. In fact, the High Court pointed out that because Ms Thorne received strong advice not to sign the agreements but went ahead and signed, this in itself was an event capable of being a circumstance relevant to whether an inference should be drawn of undue influence.

Ms Thorne was deprived of the ability to exercise any or any genuine free choice in deciding whether to sign the agreements due to the will of Mr Kennedy and because she relied fully on Mr Kennedy as a result of him bringing her to Australia to marry him.

The High Court took the view that Ms Thorne had a special disadvantage which extended beyond a difference in bargaining power and Mr Kennedy had partly created this special disadvantage by creating the urgency with which the agreement, prior to marriage, was required to be signed and the haste around signing the post-nuptial agreement.

Conclusion

We expect that BFAs will still be a valid course of action for some individuals who want to protect their assets in the event of a separation, however there is no doubt that the High Court decision requires careful consideration of the facts of each case and the proposed division of property.

An obvious point to make is that any agreement that is produced just prior to a wedding is likely to be scrutinised very carefully by a Court and would probably run the risk of being set aside. A more appropriate course of action is not to link the signing of an agreement to any specific date or event. There should be time allowed to enable reflection on both the terms of the agreement and any legal advice that a party may receive. One would also expect that if children are born to the parties that appropriate financial allowances for children should be incorporated into any agreement.

Overall it appears that the best way to ensure that a BFA will be held to be binding is to require the terms of the agreement to be fair to the party with less wealth.

Not all factual scenarios will be a stark as in ***Thorne v Kennedy*** but the High Court has squarely raised the issue of fairness. If you are considering entering into a BFA then, now more than ever, it is essential to obtain detailed legal advice, so talk to us about the terms and enforceability of the agreement.

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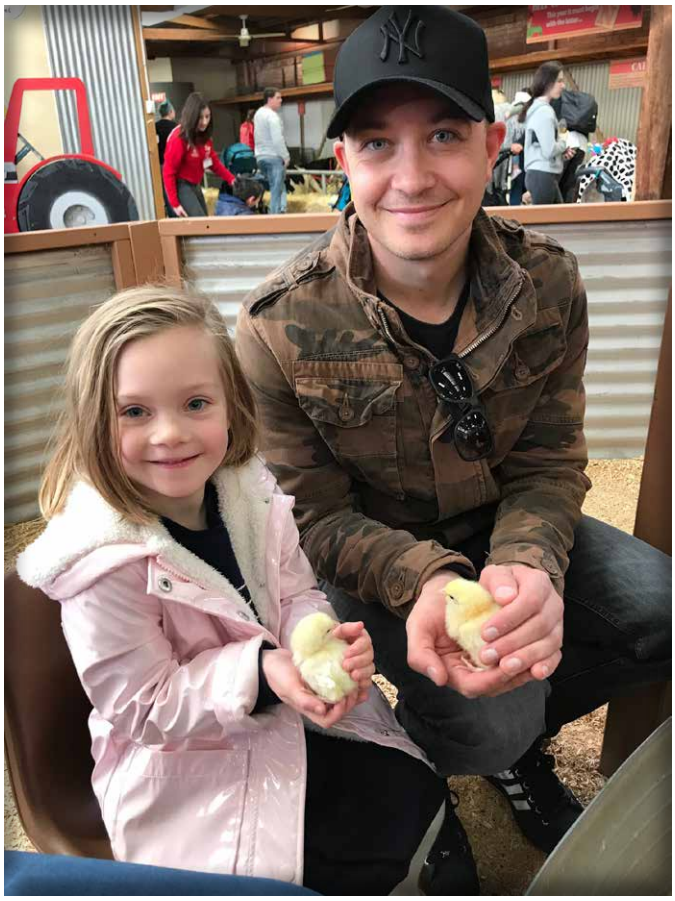
SUITS OFF | **Staff Profile**

On the Ball

Patrick Cook Senior Associate

From representing iconic brands in growth strategy & stock market activity, to defending the 'little guys' on the big stage... Patrick loves every aspect of business law.

Meet Patrick Cook, one of those utterly dedicated individuals who's made it his business to master every corner of his craft. He came to DW Fox Tucker with an already impressive list of achievements on behalf of his clients, across many facets of business law, and since joining us he's continued the success in grand style... establishing himself as one of our true experts in the field.

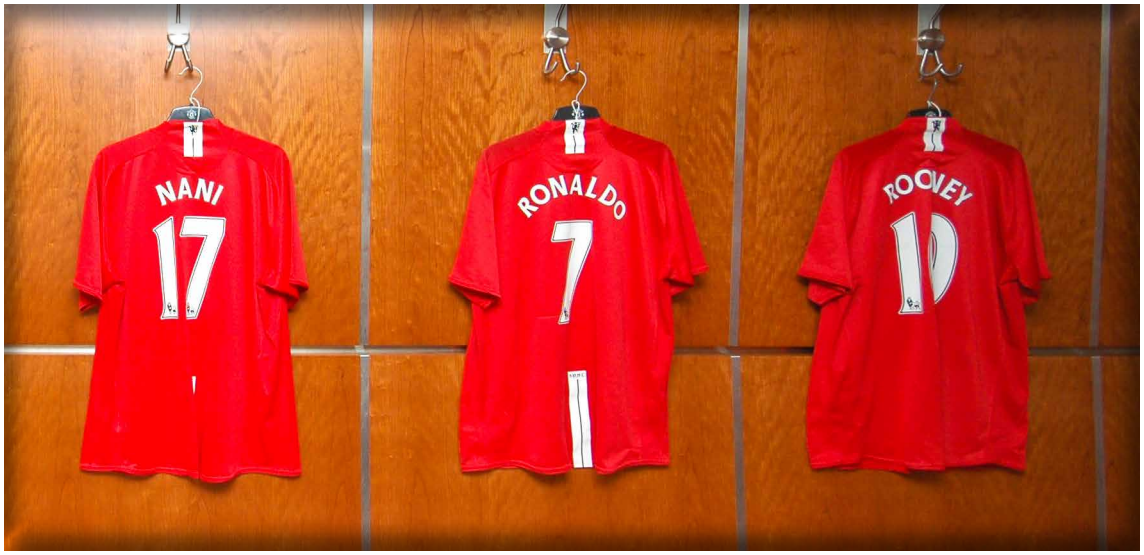


He's pretty good at being humble, too. When we asked him for the top three reasons he's so driven towards commercial and corporate law, he said, *"Seeing my clients succeed, the odd corporate golf day and dealing with lots of different people from all areas of life"*.

Any business big or small is very happy to have Patrick on board.

Patrick's passion for business law spreads in a perfect symmetry across the biggest end of town to the smallest SMEs and start-ups. Iconic wine businesses, household consumer goods retailers and many fashion labels have left themselves safely in his hands on many matters over the years... meanwhile he's had global giants like eBay, Ventia and INPEX on the ropes as he's wrestled them in commercial negotiations on behalf of the 'little guys'.

To understand someone who clearly loves legal life on both sides of the track in such equal measure, a look back at Patrick's early days might give us a clue. To say he went straight in at the deep end is an understatement, working for ASIC first as a graduate recruit, then soon after moving into their renowned "Project Wickenby" team as a specialist investigating large scale tax and corporate fraud.



Patrick's ASIC role working with the ATO, ACCC and Austrac, including the execution of warrants alongside the AFP on high profile raids, is exciting stuff, even to the most experienced lawyers among us.

Patrick has many tales to tell, dating back to Christopher Columbus.

With so much experience in so many varied business arenas, it's no surprise that Patrick has some fascinating stories to tell. The gripping drama about when he was dragged up to a Darwin LPG processing plant by a couple of oil and gas giants for some high-level intimidation tactics. The passion as he explains how he helped his client sell a business he built up from an initial investment of $500K into a $30m behemoth in 10 short years. The list goes on.

One such yarn dates back to when Patrick was acting for a South Australian client in the negotiation of a joint venture **(JV)**. The JV was with a very large Austrian company, a dinner was had between executives and a few wines were sipped. Patrick's SA client started proudly touting the long history of their company, *"We've been around for more than a hundred years don't you know?"*. To which a humble Austrian replied, *"Yes, our company has been around a while too, more than 500 years... in fact, you may have heard of one of our early clients, a chap by the name of Christopher Columbus."*

Here's to many more years of Patrick scoring goals.

As much as we'd like to think Patrick will stay on our team forever, we know the law has only ever been his second choice. Because like George Best, Eric Cantona, David Beckham and Cristiano Ronaldo before him, he would drop everything, including us, to wear Manchester United's coveted number 7 shirt.

Although we've never seen him kick a soccer ball... and we plan to keep him too busy to practice.

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