

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

ISSUE 7: AUTUMN 2008

FREEZING ORDERS, MONETARY LIMITS AND PRACTICE NOTE SC GEN 14

By Simon Gregory

As readers of Brief Note would be aware, the 'drastic' interim remedy of a freezing order is available (even before judgment) to prevent frustration or abuse of the process of the Court by prohibiting the respondent from removing from the jurisdiction, disposing of, dealing with or diminishing the value of his or her assets. Practice Note SC Gen 14 deals with such relief and provides an example form of order.

It is usual for freezing orders to include exceptions for living expenses and legal expenses, and thus the example in the Practice Note provides in part:

"This order does not prohibit you from:

- (a) paying [up to \$... a week/day on] [your ordinary] living expenses;
- (b) paying [\$... on] [your reasonable] legal expenses;

..."

The order, and therefore the exceptions, characteristically govern the period between the making of an order *ex parte* and a contested hearing of the application or until final disposition of the matter. The terms of the exceptions can have significant strategic and practical implications.

Given:

- (1) the difficulties inherent in projecting legal and living expenses (particularly, in the case of legal expenses, given that the scope of the litigation may expand considerably beyond what was envisaged when the order was made (whether *ex parte* or with the respondent represented)),
 - (2) the potential for an order to restrict the respondent's means to finance litigation (including that in which the order is made) and to support his or her usual lifestyle and
 - (3) the cost, delay and disclosure often involved in obtaining a variation (particularly one to which the applicant does not consent),
- a respondent to an application for a freezing order is well advised to avoid monetary limits.

The Practice Note expressly recognises the fact that the example form of order does not and cannot limit the judicial discretion in formulating an order. In addition, the example form does not posit exceptions which necessarily include monetary limits. In *Westpac Banking Corporation v McArthur* [2007] NSWSC 1347 Barrett J, when continuing freezing orders against one of the respondents and on bases not specific to the case before him, declined to accede to the plaintiff's application for a continuation of monetary limits. His Honour's reasons may be usefully advanced in opposing the imposition of such limits.

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Michael Windsor
Christopher Wood
Steven Woods

CORPORATIONS – Directors’ Penalty Notices and s 1318 – Dick v Deputy Commissioner of Taxation [2008] HCATrans 084

The High Court has refused the taxpayer leave to appeal from the decision of the NSW Court of Appeal (see Brief Note Issue 5). The High Court considered that the decision of the Court of Appeal was correct.

The decision of the High Court means effectively that for all Australian courts, the decision of the Court of Appeal that section 1318 and these directors’ penalties provisions are inconsistent, prevails. The *ITAA* provisions constitute an exhaustive code which leaves no room for the operation of the section 1318 discretion.

By Andrew Bouris

LEASES - Gumland Property Holdings Pty Limited v Duffy Bros Fruit Market (Campbelltown) Pty Limited [2008] HCA 10

Lawyers who advise clients on commercial leases should be aware of this recent High Court decision. In a joint judgment, the court (Gleeson CJ, Kirby, Heydon, Crennan and Kieffel JJ) held:

1. After terminating a lease, a lessor is entitled to recover loss of bargain damages, where express contractual provisions provide for that remedy;
2. The right to seek damages for breach of the covenant to pay rent touches and concerns the land;
3. With the legal consequence that the assignee of the leasehold reversion can terminate the lease and recover loss of bargain damages, notwithstanding the absence of privity of contract between the assignee and lessee; and
4. A guarantor’s covenant to guarantee payment of rent by the lessee touches and concerns the land and passes with the leasehold reversion.

By John Graves SC

PRIVILEGE – Client legal privilege in the absence of a valid retainer: Hawksford & Anor v Hawksford & Ors [2008] NSWSC 31

Does the absence of a valid retainer affect client legal privilege?

A solicitor purportedly acted for two corporate defendants. His retainer was successfully challenged as there was no resolution of directors authorising it. A question then arose about access to documents of one of the companies which would clearly be privileged if the retainer had been valid.

White J followed a line of authority that held that the intention of the parties is the key in deciding whether a client/lawyer relationship exists. Those

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that purported to act for the company, as well as the solicitor, believed that a client/lawyer relationship had been entered into. Therefore notwithstanding the absence of a valid retainer, the company was entitled to claim privilege.

The court held that there is no express requirement in s 118 of the *Evidence Act 1995* (NSW), or in the definition of “client” or “lawyer” which requires that a person only becomes a client if there is a contract of retainer or if the lawyer has accepted instructions to act.

By Nic Angelov

PRELIMINARY DISCOVERY – “reasonable inquiries” & relevance of FOI - Roads & Traffic Authority of NSW v Australian National Car Parks Pty Ltd [2007] NSWCA 114

The NSW Court of Appeal dismissed an appeal against the dismissal of an application to set aside orders for preliminary discovery under *UCPR* r 5.2(1). The orders required discovery by the RTA as to the registered operators of 294 motor vehicles known by the respondent to have parked in its car park without paying.

The respondent did not make an FOI application seeking the release of the information because it considered the process would be slow and the cost of the individual applications would be costly when compared to the small amount of the unpaid parking fees.

The RTA contended the application for preliminary discovery should be refused because the respondent was side-stepping the procedures of FOI. The respondent submitted that in the circumstances the FOI route did not constitute “reasonable inquiries” within the threshold requirement of r 5.2(1)(a).

In dismissing the application for leave to appeal, the Court of Appeal recognised that the respondent had alternative rights and was not duty bound to first proceed under FOI in an attempt to obtain the information or in order to establish that it had made reasonable inquiries.

By Gary Doherty

ANNOUNCEMENTS

New Members and Readers

Thirteen Wentworth Selborne welcomes **David Liebhold** and **Benjamin Kasep** as members of the floor. Benjamin was previously a licensee.

Publications

Nic Angelov is now one of the contributing authors to the **Leslie & Britts Motor Vehicle Law NSW** (Thomson) loose-leaf service.