

RL NEWSLETTER

FEARLESS LAW

JANUARY - FEBRUARY 2004

"STAY WELL PROGRAMME"

To All Our Clients,

ROSENDORFF LAWYERS takes the opportunity of wishing you all the best for 2004.

We believe that this is going to be a wonderful year for all who are ready, willing, able and prepared. The emphasis is on prepared. With this in mind, we have devised a "Stay Well Programme" which we will be bringing to you on a regular basis through our newsletters this year. This consists of information that is necessary to keep you ahead and healthy in business.

"Attitude Is Everything And Everything Is Attitude"

Joe mentioned to his friend that he was leaving New York to go and live in Los Angeles. Joe asked what the people were like in Los Angeles. His friend replied "How do you find the people in New York?" Joe answered that he found the people in New York selfish and aggressive. His friend responded "that is how you will find the people in Los Angeles!"

Where ever we go we take ourselves with us. With the correct attitude almost anything can be achieved. Our own attitude is either the lock on, or the key to, the door of fulfillment.

Thank you for your support and we look forward to a continuing and mutually successful relationship.

INSIDE THIS ISSUE:

CHANGES TO INDUSTRIAL RELATIONS VICTORIA 2

ESTATE AGENTS AND SALE OF LAND ACTS (AMENDMENT) ACT 2003 2

DIVISION OF MANAGEMENT POWER 2

ROSENDORFF LAWYERS

Level 3

10 Queens Road

MELBOURNE VIC 3004

Phone: (03) 9670 2515

Fax: (03) 9011 8349

Web: www.rosendorff.com.au

SURETY WIVES GUARANTORS AND UNDUPE INFLUENCE

Where one person is in a position of influence over another, equity will presume that any transfer from the subordinate to the dominant party has been brought about by the exercise of undue influence by the latter and will strike the transaction down unless the dominant party can show that it was a product of the free and independent will of the other.

There is no rule of law that where a relationship of influence exists the subordinate party should have independent advice. Obviously, however, if a person has been properly advised by someone independent and adequately qualified to give the necessary advice then the dealing will be difficult to impeach. While there is no rule requiring independent advice, its presence or absence will be an important factor. The mere fact that independent advice has been given will not, of itself, decide the issue. The nature and quality of that advice can be the crucial matter.

The decision of the High Court in *Garcia v National Australia Bank Limited* deals with the controversial issue of the rules to be applied to wives who provide third party loan security for the business debts of their husbands.

In August 1979, Mrs Garcia and her former husband executed a mortgage over the family home in favour of a bank. Mrs Garcia signed the guarantee following requests by her husband who told her that he would then be able to deal in larger amounts of gold. Her husband assured her that there was no danger because "if the money isn't there, the gold is there." Mrs Garcia believed the guarantee to be "risk-proof." Mrs Garcia signed the guarantee as pointed to by the bank officer, in a process which took less than 60 seconds and included no explanation of the nature of the transaction. Mrs Garcia was a capable and presentable professional who understood the nature of the document and knew she was signing a guarantee for the overdraft. However, she did not understand that the guarantee was secured by the mortgage.

The majority of the High Court set out the identifying characteristics of the

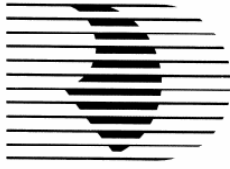
unconscionability, as follows:

- *the surety (the wife) did not understand the purport and effect of the transaction;*
- *The transaction was voluntary in the sense that the surety (the wife) obtained no benefit from the contract the performance of which was guaranteed;*
- *The lender (the bank) is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet*
- *The lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.*

The decision is a better one for wives than for banks. The rationale for relief was the trust and confidence between married couples, which results in many cases in the reliance of wives on their husband's business decisions. The court found in Mrs Garcia's favour despite elements of her case which did not auger well for her success (Mrs Garcia was a shareholder in and director of her husband's company, and was a qualified physiotherapist who was in her own business). The elements set out above are undoubtedly sympathetic to the position of surety wives.

Mrs Garcia succeeded because of the crucial findings that Mr Garcia misrepresented the nature of the risk to Mrs Garcia, the bank had constructive notice of Mrs Garcia's potential vulnerability, and the bank did not take reasonable steps to satisfy itself that Mrs Garcia gave her guarantee freely and fully informed.

The impact of this decision on banking practice will depend to a large degree on the extent to which contemporary banking practices already import the requirements that people in the position of Mrs Garcia have adequate independent legal advice.



ROSENDORFF
LAWYERS

CHANGES TO INDUSTRIAL RELATIONS IN VICTORIA

There have been recent changes introduced by the federal **Workplace Relations Amendment (Improved Protection for Victorian Workers) Act 2003**, that increase the minimum entitlements for Victorian employees on award salaries. The changes provide for:

- payment for hours worked beyond 38 per week;
- an increase in sick leave from 5 to 8 days with up to 5 of those days able to be used as carer's leave; and
- entitlement to two days bereavement leave on the death of a family or household member.

The changes regarding payment for hours worked beyond 38 hours per week require employees to be paid at least the equivalent of the total hours worked multiplied by the minimum hourly rate for their role (based on the Property and Business Services Sector Industry Sector rates). The changes will impact most on employees who are paid at or around the award rates. For these employees, the rate to be paid for additional hours is at least the ordinary rate of pay.

The changes are unlikely to affect employees on salaries well in excess of the award, but records should be kept to ensure that salaries are at least equivalent to or above the award entitlements.

The way in which personal leave will accrue is yet to be confirmed.

For all your employment law requirements please do not hesitate to contact Alan Rosendorff or Trevor Rosenthal of our office who have extensive experience in this field.

ESTATE AGENTS AND SALE OF LAND ACTS (AMENDMENT) ACT 2003

Dummy bidding will be banned under the **Estate Agents and Sale of Land Acts (Amendment) Act 2003**, which will come into effect on 1 February 2004. A consequence of this is that practitioners seeking court orders for the sale of co-owned land are advised that from 1 February 2004 changes to the law affecting the conduct of public auctions will mean co-owners will be precluded from bidding at public auctions to buy out the interest of other co-owners. The changes are contained in the **Estate Agents and Sale of Land Acts (Amendment) Act 2003**.

The practical effect of the changes will be that auctioneers will be unable to conduct auctions where co-owners want to bid as it will result in conflicts of interest and potential breaches of the **Estate Agents (Professional Conduct) Regulations**. Practitioners seeking court orders for the sale of co-owned land will need to consider whether the order requires a sale by private treaty or by public tender.

Rosendorff Lawyers is a Melbourne based boutique law firm, with origins dating back to 1898 through the historically regarded law firm McCay & Thwaites.

The firm has a strong past, a dynamic present and a future grounded in the belief that solutions provided to our clients must be relevant, pro-active, commercial and above all, beneficial.

Rosendorff Lawyers believes in adopting an innovative and often lateral approach to finding legal solutions which will suit clients' requirements while maintaining the highest quality legal service.

Commercial and Corporate Law

Alan Rosendorff heads the business and company law section of the practice. The firm provides advice and representation in all areas of commercial and business law, including corporate restructuring and advising on the most efficient business structures to meet the needs of particular clients, preparation of commercial agreements, and the acquisition and sale of companies and businesses.

Commercial litigation

The commercial litigation section is headed by Trevor Rosenthal and provides advice and commercial support in commercial litigation and insolvency in all jurisdictions.

Migration

The firm has extensive experience in assisting clients enter Australia under the Skilled Migration category.

International and Interstate agents.

Through our international and interstate agents and representative firms Rosendorff Lawyers can provide assistance or representation worldwide.

DIVISION OF MANAGEMENT POWER

The NSW Court of Appeal has provided some clarity in relation to the residual or reserve power of shareholders to act in circumstances where the board of directors is unwilling or unable to act. The decision revisits some fundamental principles of corporate law relating to the division of power between the board and the general meeting.

The power of management is ordinarily vested in the board of directors, except where the Corporations Act or the company's constitution specifically requires the power of the company's shareholders in general meetings. The law had also developed a "residual or reserve" powers doctrine. This doctrine provides that, where the board is unwilling or unable to act, the general meeting of shareholders are able to exercise residual or reserve powers.

The exact scope of the doctrine is subject to some debate. The wider view, that the power exists where the board is unwilling or unable to act without qualification - propositions that seem to emerge from

Marshall's Valve Gear Co Limited v Manning Wardle & Co Limited [1909], **Danish Mercantile Co Limited v Beaumont [1951]** and **Alexander Ward & Co Limited v Samyang Navigation Co Limited [1975]** - has been expressly rejected by the NSW Court of Appeal.

According to the Court of Appeal, the doctrine does exist, but it must be considered a matter of implication or with reference to the presumed intention of the company's shareholders, and taking into account the other provisions of the company's constitution. So, where the company's constitution confers an express power on the general meeting to appoint additional directors, one could not regard a deadlock on the board of directors (eg arising from disagreement) as conferring a general power of management on shareholders in general meeting. In these situations, the appropriate course of action is for the shareholders in general meeting to appoint

additional directors to resolve the deadlock.

The Court of Appeal suggested that even in the absence of an express provision in the company's constitution providing for the appointment of additional directors by shareholders in general meeting, the power of the general meeting to remove directors and replace them with other directors may of itself be sufficient to prevent the implication of any reserve or residual powers in the general meeting.

The decision, which appears to be the highest authority in Australia directly on this point, supports the narrower view of the residual powers doctrine.

The distinction between the two principal decision-making organs of the company, the board of directors and the general meeting, is a distinction which is often not appreciated or understood by directors, particularly in relation to smaller companies where the shareholders and the directors are commonly the same persons.