



Newsletter

December 2004

Economic Disparity – What Does This Mean for You?

Section 15 of the Property Relationships Act 1976 was introduced to address issues of inequality between partners following a breakdown of their relationship. The section empowers the Court, following a division of relationship property, to compensate a spouse/partner if his or her living standards and income will be significantly less than the other party because of the division of functions in the relationship.

Why?

The intention behind the section is to recognise that one partner may be economically disadvantaged as a result of a relationship ending because of the division of functions during the relationship. That disadvantage will not be overcome by an equal division of relationship property.

Reported decisions on the section are now accumulating and the limits of the section are being tested.

When Will It Apply?

The section will apply where there is a real and significant difference between the respective income and living standards of each partner. The disparity must arise from the division of functions in the relationship and not, for example, from a difference in earning capacities which existed before the relationship began.

The most typical circumstance will be where one party compromises a career to look after children and/or to assist a high flying partner to increase his or her earning capacity.

Finally for an award to be made, there must be circumstances which convince the Judge that it is just to compensate the disadvantaged party. In considering whether it is just to make an award, a Judge will usually consider factors such as:

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- The length of the relationship;
- The length of the career break;
- The length of time required to rectify the break in career path;
- The position of the children now and in the future;
- The career possibilities available to the disadvantaged person; and
- The amount of property available for division.

While this section has not and will not produce a flood of claims, it is important that the circumstances of each possible claimant are considered at the point of separation. A departing partner who treats the other

partner of lesser means with consideration and kindness following the separation may well be limiting the chance of a successful claim being made against him or her. Ongoing support following a separation through assistance with housing or voluntary maintenance payments, will certainly influence the Court in the exercise of its discretion. In reality, the partner providing the assistance is already recognising the economic disadvantages which have flowed from the separation.

Be Aware

A successful award of compensation can result in a significant payment. One recent court decision, in recognising the economic disparity, made an adjustment to the division of assets of \$75,000.00.

Closing the Gaps – Holidays Amendment Act 2004



Are you required to work on a public holiday? Thinking of calling in sick, being paid time-and-a-half, and getting an additional holiday? Recent amendments to the Holidays Act 2003 ("Act") will foil any such plan.

The Act came into force on 1 April 2004. Following the introduction of the Act, a number of unintended consequences soon came to light. Controversy surrounding these consequences quickly led to the drafting of the Holidays Amendment Act 2004 that took effect on 25 October 2004, just in time for Labour Day.

The Situation

There are 11 statutorily recognised public holidays. Employees are entitled to be paid for public holidays if the holiday falls on a day that would otherwise be a working day for the employee. Many people are not actually required to work on public holidays and for them the Act works well.

The Problem

If an employee does not work on a public holiday but would otherwise be required to work, the employee is still entitled to be paid at his or her "relevant daily pay rate". The Act defines how relevant daily pay is calculated. The calculation can be complicated as it may include productivity or incentive based payments (including commission); overtime payments; and the

cash value of any board or lodgings provided by an employer.

Where an employee is required to work on the public holiday (where it falls on a day that is otherwise a working day and the employee's employment agreement expressly requires it) the employee must be paid at time-and-a-half for the time actually worked on the public holiday, and is also entitled to an alternative holiday.

But what if the employee is sick on that public holiday? The Act provides that after six months continuous employment, an employee is entitled to five days sick leave in a 12 month period. The employee must be paid an amount equivalent to his or her "relevant daily pay" for each day of sick leave. One interpretation was that in this situation the employee was entitled to pay at time-and-a-half for the sick day plus an alternative holiday - hence the bonanza! The Act was unclear as to whether or not this was the correct position.

The Solution

The amending Act clarifies this situation by stipulating that the day's leave is to be treated as an un-worked public holiday (not as sick or bereavement leave) and states that an employee is not to be paid at time-and-a-half and is not entitled to an alternative holiday.

Although the amendment aims to address a number of controversial and unintended consequences of the

Act, there are outstanding issues in the finer details of the Act and the amendment that have the potential of involving ongoing challenges and significant cost to employers. Albeit, plans to call in sick when required

to work will no longer provide a windfall for an employee.

Have you Played the Pokies Lately?



The Gambling Act 2003 ("Act") became law on 18 September 2003, replacing the Gaming and Lotteries Act 1977 and the Casino Control Act 1990. The aim was to provide a harmonised regulatory framework for gambling in New Zealand. Key objectives of the Act include:

- controlling the growth of gambling;
- preventing and minimising the harm caused by gambling;
- ensuring that money from gambling benefits the community; and
- ensuring community involvement in some decisions about the provision of gambling.

A wide range of gambling is now available in New Zealand including casinos, Lotto, TAB, housie and gaming machines. The Act provides broad powers to make regulations to keep up with technological changes and new forms of gambling as they emerge. It also classifies gambling based on the amount of money involved and risks of problem gambling and criminal activity associated with an activity.

Gaming Machines in Pubs and Clubs

Number of Machines - in recent years, although the number of venues with gaming machines has remained steady, the number of machines increased every quarter to a high of 25,221 at 30 June 2003. Since the Act was introduced, that number has reduced each quarter to 22,646 at 31 March 2004.

Community Grants - gaming machines in pubs are licensed only as a form of community fund-raising. The societies who own them must pay duty of 20%, GST and a problem gambling levy. These taxes and levies total 33% of the gross profit. Societies must minimise costs and maximise returns to the community in the form of grants (the minimum return by way of grants is 33% of gross profit). Under the previous regime it was not clear whether that figure included GST. Most operators chose to make it GST

exclusive which meant that effectively only 29% of the gross profit was paid out in grants.

You may not think that is much of a difference - but consider this. Estimates for the last year are that the national gross profit from gaming machines in pubs was \$800 million. The difference between 33% and 29% meant that community groups were deprived of as much as \$32 million last year.

Major Changes

Number of Machines - under the Act, where a venue was established after 17 October 2001, no more than 9 machines may be operated at that venue. Venues that were already operating machines on 17 October 2001 may operate up to 18 machines. This has led to a reduction in the number of machines operating nationwide.

Community Grants - new regulations passed this year mean that gaming machine societies will have to distribute at least 37.12% of the GST exclusive gross profits to the community (from 1 December 2004) and must maintain a website (from 1 July 2005). The requirement for a website is a response to community groups feeling shut out of the grant application process. Access to those societies through a website is intended to ease this frustration. Societies will also have to keep data, maintain and manage gambling equipment, and provide information to the public.

Other Measures - the Act is also aimed at minimising the harm caused by gambling. Two ways this is effected is by putting limits on banknote acceptors (up to \$20 only) and controlling the placement of automatic teller machines in gambling areas. Casinos will not be able to extend the use of cashless technology on gaming machines without the Department of Internal Affairs approval.

Conclusion

Time will tell whether or not the new Act and regulations will achieve the objectives set out in the Act, but the early signs are encouraging.

Who Pays the Ferryman?

According to Greek mythology, to be properly buried, a coin called an obol needed to be placed under your tongue. This would then be presented to Charon (the ferryman of the River Styx), as payment for the crossing of the river. The entrance to Hades, the underworld, was on the other side of the river.

If you were not buried with a coin in your mouth you were destined to wander the banks of the Styx until you found the paupers entrance to Hades.

So, who pays the ferryman in New Zealand? The answer it seems is your executor - if there are assets in your estate.

Recent Case

Recently the High Court was asked to consider the following situation:

Mr V had died and the Public Trustee had been appointed as the executor of his estate. Mrs V made the funeral arrangements and asked the funeral directors to forward the account for the costs of the funeral to the Public Trustee.

The Public Trustee was then faced with the problem that the only asset in Mr V's estate was a one third share of the house that he shared with Mrs V. There were no cash assets or any other assets in the estate, from which it could pay the account.

The account was not paid and the funeral directors brought proceedings in the District Court to recover payment either from Mrs V (who had arranged the funeral) or the Public Trustee as executor. The

funeral directors were successful, with the Public Trustee being found liable to pay the account.

The Public Trustee appealed the decision, questioning whether they should be required to pay when there was no money available, and the only asset in the estate was a share of the house. Everybody agreed that Mrs V was not at fault and was not liable. The question for the High Court on appeal was whether in the circumstances, the Public Trustee could also escape liability.

In the High Court it was held that where there were assets in the Estate, (even if not in money form), the executor was liable to pay. The Public Trustee, (or any executor) had the power to realise the assets or raise a loan against the assets to pay if necessary, although it was clear that it was not going to happen in this case. The Public Trustee had to pay the account from its own funds.

It is still unclear whether an executor will be personally liable for costs where the estate has no assets. In fact the Judge in this case was careful not to answer that question or a number of others that were posed, including the liability of executors to dispose of the body of the deceased.

The moral of this story is - be aware of your obligations as an executor. If you are appointed as an executor, be sure to consult with a solicitor before undertaking any action on behalf of the estate, including making funeral arrangements, especially if there is doubt about the estate's ability to pay for the funeral. Be careful - for it may be you that is liable to pay the ferryman.

Govett Quilliam News

Continuing Education



The following seminars have recently been attended by members of our firm. It is a requirement that all solicitors attend seminars to keep up with legal developments in their fields of expertise. If you would like information on any of the following topics please contact us:

- ★ *Reading Accounts & Balance Sheets*
Kirsty Rowe
- ★ *The Company Lifestyle*
Kirsty Rowe
- ★ *Credit Contracts & Consumer Finance Act 2003*
Alex Smith
- ★ *Evidence - How it Works*
David Anderson
- ★ *Rural Law 2004*
Paul Franklin
Geoff Shearer
Richard Flitcroft
- ★ *Developing a Non-Nonsense Approach to Practice Development*
Paul Anderson
- ★ *PRA for Property Lawyers*
Alex Smith
Richard Flitcroft
- ★ *The Lawyer as Negotiator*
Keryn Broughton
- ★ *Advance Counsel for the Child*
Paul Shearer
- ★ *Introduction to Criminal Law Practice*
David Anderson
- ★ *Introduction to Family Law Advocacy & Practice*
Keryn Broughton

New Appointment



On 18 November 2004, the partners and staff of Govett Quilliam had much pleasure in attending the District Court in New Plymouth to witness Judge Smith taking her oaths of office as a District Court Judge.

Judge Smith has been with the firm since 1990 initially as a staff solicitor and for the last 10 years as a partner. For many of those years, Judge Smith has been the leader of the firm's family law section.

Beyond her contributions to the firm which have been enormous, she has been an executive member of the Taranaki Family Courts Association and a Regional Representative for Taranaki for the NZLS Family Law Section. She was at her appointment the President of the Taranaki District Law Society and a member of the New Zealand Law Society.

Judge Smith is married to Simon Heale an employee in another of the local law firms and they have three young children.

Judge Smith leaves the firm with our warmest congratulations for her appointment and the confidence that her departure will afford the rest of the family law team now lead by Paul Shearer an opportunity to grow and expand thereby filling the void created by Her Honour's appointment.

The appointment of Judge Smith means that there are now three retired partners of Govett Quilliam currently sitting on the bench, such being Justice Laurenson and Judges Walsh and Smith. Indeed, Judge Smith's appointment raises the number of ex partners of Govett Quilliam to occupy positions on the bench to 6.



Farmers' Page

Paul Franklin, Geoff Shearer and Rich Flitcroft attended a recent rural and farming seminar in Rotorua and obtained some additional expert information in several areas relating to farmers' businesses. Some of the topics which should interest our farming clients are estate and tax planning structures.

With the ever increasing expectations of government in respect to health, education and welfare it seems likely in the future that people with significant assets will be further attacked with various duties and taxes on their wealth. The reality is that the ratio of workers to retire will drop significantly in future years (projected 1:2 by 2040) which will lead to extra taxation pressure. It is probably inevitable that some form of wealth tax and death duties will be introduced to assist with propping up the burgeoning demands of the welfare system. Farmers and their advisers should be considering their individual situations and the best structures for ownership of their farm properties and farming assets to best defend against future taxes and also problems which develop from matrimonial breakdowns. Key points to consider with your legal and accounting advisers are:

Your wealth accumulating assets should perhaps be owned by a trust or preferably a company with major trust shareholding.

Your Wills are set up so bequests are made to trusts rather than to individuals.

Once appropriate structures are in place that a gifting programme is commenced.

Transfer of ownership and control can be achieved without selling the underlying assets to avoid potential capital gains tax. A company structure with a majority trust shareholding is ideal to cover this situation.

We are now tending to find that the most preferred succession planning structure is often a Company with its major shareholding being held by a family trust or family trusts. This structure works well as it allows flexibility for changing shareholders at any stage without selling the farming asset. Also any ongoing growth in share value is retained within the trust and not in the individuals' names. Further to this your children should be considering building their wealth through trusts and not in their individual names to protect against potential difficulties within matrimonial and de facto relationships.

When considering changing your farming structure it is important that you involve both your solicitor and your accountant to ensure that the tax consequences are minimised and that the correct structure is put in place for your circumstances. We would suggest that you may like to have a preliminary no obligation discussion with any of our commercial and farming law partners to discuss your situation and whether you should be considering changing your ownership structure.

Joint Ventures

There was an interesting paper at the rural seminar on joint ventures. With the increasing size of farming operations, and the difficulty and cost in achieving farm ownership, investment into a joint venture is a method of buying into farm ownership on large scale units. We are able to advise you on the merits or otherwise of entering into joint ventures. The variety of joint venture arrangements through partnerships, companies etc. is vast and it is important that you seek professional advice prior to considering a joint venture. Govett Quilliam can provide you with advice on the best type of joint venture arrangement to suit your business goals.

Please note that all the Govett Quilliam Guides to many interesting legal topics and opportunities are available on line on www.thelawyers.co.nz. Please download them at your leisure

Please call this office if you would like further information on newsletter items



Govett Quilliam will be open during the Christmas and New Year period.

*We wish all our clients and friends a very Merry Christmas
and thank you for our association during 2004.
We look forward to continuing our association with you in 2005.*