



# P.M. Lee & Co

## Newsletter

### Property & Business Lawyers

Celebrating 30 years of practice in 2015



## Welcome

*to the September 2015 edition of our newsletter for business owners and investors. We can't believe how fast the first half of the year has gone.*

*This edition focuses on trusts in family law and we are offering our readers a special free meeting with our family lawyers to help guide you in family law issues. On the business front, we consider how to protect your business from adverse action claims and provide some tips on pre-contract negotiations.*

*Regards, Peter Lee*

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### Family Law:

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**SPECIAL OFFER**

## **Family Law - free 30 minute advice**

We understand that many clients are apprehensive before their first contact with a solicitor and want to ensure they are getting the right person to assist them in what can sometimes be a difficult time. For this reason we are offering a free 30 minute meeting with one of our solicitors on any family law matter in 2015.

If you have a family law issue you need help with, please call our office for 30 minutes of legal advice at no cost to you if you mention this offer at the time of booking your first meeting.

Our family lawyers can advise, negotiate and represent you in the following areas:

- Property settlement
- Divorce
- Parenting issues
- Binding Financial Agreements



**CAUTION**  
**PROTECTION**  
**REQUIRED**

## *Testamentary trusts –protect assets in family law matters*

It is not an uncommon concern to worry about the choices your spouse or children may make after you are gone. In certain cases, we recommend that a testamentary trust is included in your will to give you greater control over how your wealth is distributed to your beneficiaries and provide asset protection.

In a recent case, where a will maker (testator) lacked capacity to vary their will, an application was made to the court by the testator's husband to amend the will from a gift of property to their son to a gift to trustees of a testamentary discretionary trust. The testator's son had separated from his wife and a testamentary trust would have the purpose of protecting the assets the son was to inherit in pending Family Court proceedings. The son's wife opposed the Application on the grounds that if the will was amended it would be to the advantage of the Son/Husband in Family Court proceedings. The trial judge rejected the Application to amend the Will however on appeal the trial judge's decision was set aside and the appeal court made an order in favour of the Applicant on the basis that the 'amended' Will was one the testator would have made if she had testamentary capacity.

The weighting that the Family Court would likely give to the son's expectancy under the earlier will would be much greater than the weighting it would give to his financial resource or expectancy under the amended will (testamentary trust). As stated in this case "there is a fundamental difference between assets which form part of the matrimonial pool and thus can be the subject of a property adjustment pursuant to section 79 of the Family Law Act 1974 and financial resources which sit outside of the pool and cannot themselves be divided".

Careful estate planning could alter the outcome of Family Court property proceedings. If you are concerned about your estate being subject to family court proceedings please contact us to discuss this with you. You should review your will regularly. We have set up many testamentary trusts for our clients and would like to help.



### **Trusting consent orders**

Parties to a family law matter are required to make full and frank disclosure in both parenting and financial matters. Such disclosure must be made by both parties so that the court is informed of the financial positions of the parties. This process must be followed regardless of whether the parties reach an agreement and make consent orders.

In a recent case a husband made an application that a consent order be set aside for reason that the wife failed to give the value of her interest in a family trust. She had given its value as "\$ not known" in the consent orders. A year after the consent orders were made the wife received \$1 million from the Trust.

The court dismissed the husband's application and said that the husband was aware that the trust would be worth millions and that the wife's failure to fully disclose did not constitute 'suppression of evidence' and that there had not been a miscarriage of justice.

We frequently see that family law solicitors do not understand the complexities of trusts and consequently the property pool is not correctly valued.



## *“Subject to contract” – so I am not bound yet, right?*

Before a contract is signed parties often make offers about price and other important terms and when they reach an agreement they often express it to be “subject to contract” and consider that they are not bound until a formal contract is signed by both parties.

However, this is not always the case!

In a recent Supreme Court case a verbal offer was made during negotiations by the buyer to purchase a service station business and property for \$1.6 million. The seller’s agent then emailed the buyer setting out the basis in which the seller would sign a contract, such as the price, deposit and settlement date. There were further negotiations by phone and email. The buyer confirmed its offer by email, *“subject to contract and due diligence as previously discussed”*, and asked for the offer to be accepted immediately so that its investigations could commence.

The offer was accepted by the seller by email, *“subject to execution of the contract provided”*. There was further negotiation as to the terms and conditions of contract but no formal contract was ever signed. However, in the meantime the seller found another buyer for a higher price and denied that a binding contract existed. The buyer sought to enforce what it argued was a valid and binding agreement comprising the email communications and correspondence between the agents and solicitors.

**The Court found for the buyer that there was a binding contract of sale for the service station. The court said that the parties intended to be bound by the terms expressed in the initial offer, even if a formal contract was not signed, with the intention that they would be formally recorded later.**

The Court said:

*“The response from the defendant (sent within an hour of receiving the offer email) is consistent with the position that a contract had been formed. Although there is a reference to “subject to execution to of the contract ...” that should not, in the light of the document which preceded it, be seen as a qualification to the acceptance, rather it is more consistent with the parties having agreed on the essential terms with the intention that they would be formally recorded later. Indeed, the words “agreed amendments” is consistent with something already having been resolved and it being acknowledged that there may be amendments to that agreement.”*

Courts assess the intention to enter into an immediately binding contract on an objective basis – what would a reasonable person believe the parties intended from their words and conduct?

This case demonstrates that pre-contract negotiations can lead to a binding agreement, even if an email refers to the negotiations as ‘subject to contract’. Parties need to communicate clearly as to their intention that no binding agreement is reached until a formal contract has been executed. If the parties’ actions and words are inconsistent with this intention, a court may find that a binding contract has been formed where such a finding may be undesirable to one of the parties.

We recommend you talk to us before you enter pre-contract negotiations to ensure the terms of the contract and your intention is clearly communicated.

## Employment – adverse action

We recently acted for an employee in an adverse action claim which was settled before the hearing, to our client's satisfaction. Under the Fair Work Act (FW Act), an employee may be protected from dismissal or disciplinary warning, if they are able to successfully show that a reason for the dismissal or warning was the exercise of a "workplace right." An example of an employee's workplace right includes "make a complaint or inquiry ... in relation to (their) employment". This means that an employee may potentially make a claim for adverse action if they raise an issue of concern with the employer that has some direct or indirect connection with their employment and they are subsequently dismissed.

Employers should also be aware that individual employees may be liable for conduct and be penalized for adverse action. A couple of recent adverse action cases included claims against individuals such as Human Resources representatives alongside the employer. For the individuals to be held personally liable the individual must:

- intentionally participate in and effect the unlawful conduct;
- have knowledge of the essential facts constituting the unlawful conduct; and
- be linked in motive.

In one recent case the Human Resources manager was fined \$3,000.00.

There are a number of steps that employers can take to limit their liability, including:

- keep a paper trail and ensure that the people involved in dismissal decisions are aware of adverse action claims.
- make contemporaneous file notes of meetings with employees;
- attempt to have a witness present during a meeting which may require later verification;
- follow all processes in the modern award;
- train human resource staff in record keeping and performance management processes.

Potentially employers may need to consider indemnifying employees in roles where they make decisions that are regulated by the FW Act. Please contact our office if you wish to discuss this with us in greater detail.

## ABOUT P.M. LEE & Co.



**Peter Lee**

PM. Lee & Co. are specialists in property law, business and franchise law, estate planning and litigation. Since 1985 we have provided legal services to some of Brisbane's largest corporations, small and medium business and valued individuals. Our firm has built a solid reputation as experts in property law, body corporate and leasing, franchise law, business transfer, taxation as well as acquisition and conveyancing.



**Graham Knight**

Our firm is also well known in commercial litigation, debt recovery and family law.

Estate planning is essential for everyone with a family, or assets. Clients have trusted P.M. Lee & Co. for their sound advice in wills, power of attorney and family trusts.



**Melanie Cule**

We believe in providing professional, quality legal advice at reasonable rates. Please contact us to see how we can help you.

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