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NEWSLETTER

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Buying at Auction

There is an increasing trend today for properties to be bought and sold at auction. If you are considering buying at auction for the first time, be aware that there are some matters which differ from the usual 'offer on paper' approach and which require your attention beforehand.

Register Your Interest

Firstly, you would do well to advise the real estate agent of your interest. Then, if the vendors are considering a pre-auction offer, the agent will be able to contact you and, if necessary, help you to submit your own offer. Reference to a sale by auction does not prevent the vendors from selling prior to the auction date.

Unconditional Offer

Secondly, all offers at auction must be unconditional. If you require a mortgage to purchase the property you must arrange finance beforehand. Generally you will be required to pay a deposit of 10% of the purchase price on the day of the auction.

Because you cannot make the agreement conditional on any matters, it is advisable to ask your lawyer to read and approve the auction contract before the auction. The contract contains the terms and conditions of the sale, legal description of the property and list of chattels. If you wish to change any of the details, e.g. the amount of the deposit or the settlement date, you will need approval from the vendors prior to the auction.

If you want to undertake any further investigations of the property you must arrange for those to be completed beforehand. Obtain a LIM report or a building inspection before the day of the auction.



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Know The Value And The Process

Make sure you have a realistic idea of the value of the property and the amount you are prepared to pay for it.

You may need to look at other properties of similar value, or if in any doubt, obtain a valuation from a valuer.

Talk to the real estate agent so that you know what the auction process involves and, if necessary, enlist his or her assistance on the day. You may like to attend other auctions beforehand to familiarise yourself with the process.

Vendor Bidding

Finally, be aware that if the property has a reserve price, the vendors may reserve the right to bid themselves. That right is generally assigned to the auctioneer and must be disclosed at the start of the auction.

The High Court last year considered a case where the auctioneer appeared to be taking bids from different parts of the room when in fact he was bidding himself on behalf of the vendor. On receiving a complaint, the Commerce Commission alleged that the auctioneer had engaged in conduct that was deceptive or misleading.

Although there was insufficient evidence in that case to uphold the claim, the Court of Appeal held that the auction must be conducted in a manner which does not mislead or deceive. It would be misleading of an auctioneer to create the illusion of real competition where there is none, and it must be made clear when vendor bids are being made.

So, if you have done your homework and consulted the relevant professionals beforehand, good luck with your bidding!

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:

- The length of the relationship;
- The length of the career break;



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- 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.



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The Solution

The amending Act clarifies this situation by stipulating that the day's leave is to be treated as an unworked 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.

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.

If you have any questions about the newsletter items please contact us, we're here to help.



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