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LOOK BEFORE YOU CHOP

ANTHONY O'DWYER

The destruction of the once rescued Moreton Bay fig to make way for major transport infrastructure might have you asking yourself whether you can chop down that large tree blocking your view. With council fines of up to $85,000, you should think twice before firing up the chainsaw.

In Brisbane, there is a range of protections for vegetation. Legislation, local laws, orders, development permit conditions and registered covenants might apply. The Vegetation Protection Order (VPO) is a well known method for protecting specific vegetation. The Natural Asset Local Law (NALL) applies across Brisbane providing protection. Whilst protection is provided by both the VPO and the NALL, applications may be made to the council to interfere with the protected vegetation. Interfering with protected vegetation is not limited to simply removing the vegetation, it includes actions such as poisoning, lopping and damaging roots. Emergencies might provide an excuse for interfering with protected vegetation with appropriate evidence and post emergency reporting.

Whilst a VPO will nominate the protected vegetation, the NALL is more general. Vegetation located along the Brisbane River or in a waterway corridor is protected. Vegetation in a bushland or rural area is protected. Vegetation with local or state heritage values is protected. Vegetation in an urban area may also be protected. The council can nominate trees as significant landscape trees.

There are a range of works that can be undertaken without a permit from the council including limited pruning of trees, other than significant landscape trees, removal of trees within close proximity to a building and regular maintenance of a garden and mowing. All exceptions are subject to qualifications.

Councils regularly impose conditions in development permits requiring registered covenants that protect vegetation through designating building envelopes in which landowners may clear vegetation for their building requirements. The balance of the property is to be kept as bushland. There are examples of this sort of covenant allowing for a 2,000 square metre building envelope in a 6,000 square metre lot. In a 10 lot subdivision this leaves four hectares of bushland and is often seen as a way of allowing environmentally sensitive development to proceed.

Management of these areas in the years ahead has potential to pose problems for the landowners. The areas outside the envelopes are usually unfenced and there is no easy way of determining property boundaries. The vegetated area, even with its protections, requires maintenance yet the covenants often prohibit the removal of fallen timber.

How adjoining landowners would deal with bushfire prevention in those circumstances poses an interesting question or two. It seems inappropriate that land designated for protection at this level is retained in private ownership when it might be better to have that land in council ownership.

It is probably fair to say that vegetation will continue to be protected and the protections will be increased, at least in numbers and layers. Whilst you might see trees making way for major roadworks, you should not assume that there has been any general amnesty for clearing views. Check before you get the chainsaw out, it could be an expensive error not to.

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Recent Will Cases

MICHAEL KLATT

Court refuses to authorise a Will to be made for an incapacitated person

The Court has the power, under the *Succession Act* 1981, to authorise a Will to be made for a person without mental capacity to make a Will. In Mace -v- Malone [2011] QSC 49, Josephine Mace applied for such an Order in respect of her brother, Patrick Keane. Patrick had never married and had no children. He lived with his younger sister, Mary Malone, and Mary's daughter, Leone Kenny, for much of his life. They had operated farms together in the Toowoomba area.

Patrick made a Will in 2000, which left $2,000.00 to Josephine, $2,000.00 to another sister, Joan, and the balance of his estate to Mary, provided that if Mary predeceased him, then the balance of the estate was to pass to Mary's children in equal shares. Mary had Power of Attorney for Patrick and in late 2006 and 2007, Mary caused certain transactions to occur in respect of properties that she owned with Patrick to Patrick's detriment. Sale proceeds were not accounted for and Mary severed joint tenancies in respect of properties held with Patrick, also to his detriment.

Josephine Mace brought the Application, arguing that if Patrick had capacity, he would make a different Will if he had known the circumstances surrounding the transactions.

Mary died in October 2007. Josephine Mace brought the Application, arguing that if Patrick had capacity, he would make a different Will if he had known the circumstances surrounding the transactions. Josephine asked the Court to authorise a Will, which left all of Patrick's estate to herself and her sister, Joan, and under that Will none of Patrick's estate would pass to any of Mary's children. Mary's children opposed the Application.

Justice Daubney was not satisfied that, had Patrick had capacity to make a new Will, he would have disenfranchised Mary's family. His Honour found that Patrick would have known that neither Josephine nor Joan had in any way contributed to his estate, whereas there had been a longstanding history with Mary's family, in both financial and practical circumstances, which lead to him enjoying the benefit of a substantial estate, which was intertwined with Mary's estate and, accordingly, refused to authorise a new Will be made.

This is the first case in Queensland in which such an Application has been opposed.

The wording of your Will in "one in a million" circumstances

Many people think about what they would do if they ever won the lottery. Their plans for how they will spend their lottery winnings necessarily depend on one key factor: that they presented the winning ticket and redeemed their prize.

In a recent case heard in the Supreme Court of Queensland in Townsville, the Court was asked to consider the wording of Mr Szanto's Will in circumstances where he died the day after his lottery ticket won a prize of $1,818,181.82. At the time of his death on 14 February 2010, the winning ticket was located in a granny flat occupied by Mr Szanto since 1993.

Mr Szanto's Will provided that he left "all furniture and chattels that are in the house" to his daughter and son-in-law; and the remainder of his Estate to his three other children in equal shares.

The question before the Court, therefore, was whether the winning ticket could be classified as a chattel "in the house". If the ticket *was* a chattel "in the house", then Mr Szanto's daughter and son-in-law were lawfully entitled to the ticket, and thus the lottery winnings. If the ticket was *not* a chattel "in the house", then Mr Szanto's three other children were entitled to share the winning ticket and prize money equally.

Importantly, when the lottery ticket became a winning ticket, it became a ***right*** to collect the lottery winnings. The Court upheld a long-standing principle that a ***right*** does not have a location, because a right does not have a physical form.

The Court determined that the words, "in the house" limited the gift of chattels to those chattels that were located in the granny flat. Since the ticket amounted to a right and therefore had no location, the Court held that the winning lottery ticket was not a chattel "in the house".

This case serves as a reminder that the wording of your Will is of the utmost importance and can have unforeseen consequences, especially in "one in a million" circumstances.

AT YOUR OWN PERIL

CHRIS HARGREAVES

Many people incorporate companies as business vehicles without fully understanding their duties as directors, believing that the company will absorb all of the risk without any possible liability to the directors personally.

That is not the case.

In a recent decision *(Phoenix Constructions Queensland Pty Ltd v Coastline Constructions Pty Ltd and Others [2011] QSC 167),* the Supreme Court of Queensland gave a timely reminder that directors are subject to stringent duties under the *Corporations Act.* Conduct in breach of those duties, will result in potentially serious penalties or damages being awarded against the directors personally.

Mr McCracken was the sole director of Coastline Constructions. Mrs McCracken was the owner of certain land. Coastline and Mrs McCraken entered into a joint venture agreement to develop that land. As part of that agreement, Coastline obtained an interest in the land. Coastline subsequently breached its contract with Phoenix Constructions (the plaintiff) and became indebted to it.

However, by agreement on 19 February 2007 Coastline and Mrs McCracken varied the terms of the joint venture, so that Coastline abandoned its entitlement to rights in most of the remaining land. There was no benefit to Coastline in this decision, but there was a benefit to Mrs McCracken.

The plaintiff alleged that Mr McCracken had breached his duties in section 182 of the *Corporations Act* by improperly using his position to:

1 gain an advantage for Mrs McCracken; or

2 cause detriment to Coastline.

> If you are unsure of your duties as directors or have any doubts about a course of conduct, then you should get advice.

The Court accepted that:

1 by abandoning the land interests, Mr McCracken had breached this duty;

2 it was appropriate to order damages against Mr McCracken pursuant to section 1324 of the Act.

The Court awarded damages against Mr McCracken in the sum of $1,495,208.71, plus interest of just over $500,000.

With nearly $2 million to pay, getting advice in relation to his duties beforehand would have been a significant and sensible move to take on the part of the director.

If you are unsure of your duties as directors or have any doubts about a course of conduct, then you should get advice.

TRANSFER DUTY CHANGES – WHO ARE THE WINNERS AND THE LOSERS?

REBECCA CASTLEY

The Queensland State Government Budget, tabled on 14th June 2011, included changes to transfer duty rates and concessions as well as the introduction of the $10,000 Queensland Building Boost Grant.

It is hoped by the Government that the grant of $10,000 will help to inject some activity in what has been a slow residential construction market for some time. The rules regarding eligibility have still not been finalised at the time of writing, but the details available so far are as follows:

- The grant is for $10,000 for a person, corporation or trustee buying or building a "new home" in Queensland for a value less than $600,000.
- It runs from 1st August 2011 to 31st January 2012.
- A "new home" is a home that has not been previously occupied or sold as a place of residence or is a substantially renovated home.
- Where the new home is already built and being purchased, then both the purchase price and the value of the home must be less then $600,000. In the case of a building contract, the sum of the value of the land and the price for the building work must be less than $600,000.
- The grant is open to home buyers and investors. Foreign investors will not be eligible.
- An off-the-plan purchase will be able to qualify for the grant.
- There are construction time limits. For a home building contract, the building work must commence within 26 weeks of the date of the contract and be completed within 18 months. For an off-the-plan contract, the building work must commence by 31st January 2013 and be completed by 31st January 2015.
- The home must be occupied as a place of residence for at least three months in the first year of ownership, but it does not matter if the applicant does not occupy the home (e.g., it can be rented to a tenant). So if a builder builds the home and sells it before it is occupied, the builder cannot claim the grant.
- An applicant can obtain more than one grant for each new home purchased or built. The grant does not affect eligibility for the first home owner grant or first home concession.

Whilst this is some good news in these tough times, it comes with changes to transfer duty. From 1st August 2011, the principal place of residence concession will no longer be available. Only a first home buyer will be able to claim a concession for transfer duty. This is a significant change and means that a home buyer who is not buying his or her first home will be up to $7,175.00 worse off than under the current rules.

AUSTRALIA V SRI LANKA

THE COUNTDOWN BEGINS!

ZOHEB RAZVI

When Australia and Sri Lanka are used in the same sentence most would think it is about a game of cricket. But in this case, it is quite the opposite. It is a race to see who is elected to host the 2018 Commonwealth Games. The two remaining candidate cities bidding for the games are the Gold Coast and Hambantota. One famous for its sun, surf and sand and the other undergoing major development after the 2004 Indian Ocean tsunami.

The responsibility for selecting the host city for 2018 rests with the 71 member Commonwealth Games Associations (CGAs). Both the Gold Coast and Hambantota will be entitled to a 30-minute presentation at the meeting of the General Assembly to convince the CGAs that they should host the games. Once the presentations have finished, the voting begins. Each CGA is entitled to one vote. After the votes have been cast and verified by independent scrutineers, the President of the Commonwealth Games Federation will announce the winner. This is to occur on 11 November 2011 at St Kitts & Nevis.

Whilst making this informed decision, I'm sure each CGA will take into consideration the events that occurred leading up to and during the Delhi games in 2010. There were several concerns raised over the preparations of the Delhi games, which included infrastructure issues, poor living conditions, withdrawal of prominent athletes and alleged corruption by officials. All eyes will be on Glasgow who will be hosting the games in 2014. One of the key aspects of Glasgow's successful bid was that it already had 70% of the planned venues in place.

Hosting the 2018 games on the Gold Coast would be a once in a generation opportunity. There are a number of ways you can support this process, including visiting www.behindthebid.com and joining the virtual beach line.

JOHN MULLINS
EDITORIAL

At the time of dictating this, the United States has had their AAA credit rating downgraded by at least one of the agencies and the stock market has lost ground. There is great debate going on about the state of the Australian economy and the impact that these global events will have on the Australian economy, and in fact, how good or relatively good things are in Australia compared to elsewhere.

All of this makes for fairly negative sentiment and if you add to that the current issues with the Malaysian refugee deal and the carbon tax debate it would be fair to say that we live in interesting times. With all of this uncertainty it is nice to reflect on a few basic principles:

a) Australia's debt level is relatively low;

b) Australia's interest rates whilst being high internationally at the present time are still at historically moderate rates in Australia;

c) Unemployment is under 5%; and

d) We live in a region which is undergoing significant economic growth.

Sentiment has a big impact on the Australian economy, and at the moment, demand for goods, services and property is extremely low as people reflect on concerns on the economy both home and abroad.

The next six, 12 and 18 months are going to continue to be very interesting, but this isn't a dress rehearsal, this is the circumstances in which we live so in looking at that glass I would encourage us all to look at it as half full rather than half empty.

Whilst all of this is spinning all around us life goes on and in this edition of the report we talk about highly topical things such as chopping down trees in our suburbs and the prospects of the Gold Coast getting the Commonwealth Games.

Litigation in relation to Wills all continue as the baby boomers get into older age and die with substantial assets often having complex modern family arrangements. There are a couple of very interesting articles in this edition including one in relation to a lottery win.

At Mullins Lawyers we welcome Tony Hogarth and Michael Potts as partners. Both are highly respected and experienced lawyers.

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