

## **SPEED.VALUE.QUALITY.COMMITMENT**

October 2010 Newsletter

### **>> EMPLOYERS SAFETY OBLIGATIONS**

#### **What is the Employer's Obligation When it Comes to Guaranteeing Safety? ...**

Since the early 1980s, the law has been that the employer has an obligation to ensure safety of the workplace. This obligation has been absolute and was guaranteed. The duty was extended to employees that acted in ways that were careless, inadvertent or inattentive.

In February 2010, the High Court of Australia handed down its decision in the case of Kirk and it overturned this absolute general duty to ensure safety. The High Court opted for a more workable interpretation of the duty. It is important for every employer to understand the decision because of the impact it will have on prosecutions.

Employers still have a high duty to ensure safety in the workplace, however the approach to be taken is more realistic.

The case of Kirk involved a company that owned a rural property. The controller of the company was elderly and did not involve himself in the day-to-day management of the company that employed a manager. In March 2001, the farm manager was driving an all-road vehicle to deliver steel to an area where contractors were working. He left the road and proceeded down a steep hill. The vehicle overturned and he was killed. No-one knew why he acted so recklessly.

WorkCover prosecuted the owner for failing to ensure the safety of the farm manager. They alleged a general breach of duty, but did not identify how the duty was breached or what matters should have been taken to prevent the death. Applying the law as it stood, the New South Wales Industrial Relations Commission found the charges proved and convicted the owner. In the High Court, it was argued that the Commission's interpretation of the general duty made compliance impossible.

The High Court held that there was still a very high duty to ensure safety. However, the obligation requires the employer to identify the risks and take measures to obviate any identifiable risk. There is only a breach of the general duty where there is a failure by the employer to take particular measures to prevent an identifiable risk. An employer is not required to ensure that every possible risk is eliminated. The employer must take measures that are reasonably practical, which involve a common-sense assessment.

In the past, a prosecutor was not required to demonstrate what particular measures should have been taken, but, rather, only that there was a general risk and safety was not secured. After the Kirk decision, the more practical approach can be taken and perfection is not required.



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## >> TRUSTING AN OLD FAMILY FRIEND CAN BE COSTLY

### Trusting an old family friend can be costly...

It is not unusual to trust a family friend to look after your investments. This happens most particularly if you are not in the country.

The case of Fan v Tang is a reminder of the risks of such trust.

Mr Frank Fan lived in Hong Kong and decided to rely on James Tang, a family friend of thirty years, with looking after his investments in Australia. Mr Tang was married to Vicky Yang. Mr Tang and Ms Yang had a company, JV Capital Pty Ltd.

Mr Tang as Mr Fan's investment manager, was the signatory on a number of bank accounts. In May 2003 Mr Fan authorised Mr Tang to apply some of these funds to an investment in his name in the Melbourne suburb of Box Hill. Mr Tang withdrew more funds from the account than Mr Fan had authorised. Some of the funds were applied in the acquisition of the Box Hill property and contrary to Mr Fan's instructions, the Box Hill property was purchased in part, in the name of the company JV Capital Pty Ltd and Ms Yang.

JV Capital and Ms Yang acquired a forty percent interest in the property with Mr Fan's funds.

Unfortunately for Mr Fan, that was not the end of the matter. Mr Tang and Ms Yang mortgaged her and JV Capital's interest in the Box Hill property to St George Bank and used those funds for their own purposes.

Mr Fan sued Mr Tang, JV Capital and Ms Yang for the unauthorised use of his money in an attempt to recover the lost funds and equity in the property.

Mr Fan's first claim was in respect of the Box Hill property. The Court held that because all of the funds to purchase the interest in the property had come from Mr Fan, JV Capital and Ms Yang held their interest in the property on trust for Mr Fan.

Mr Fan's second claim related to the mortgage taken out by JV Capital and Ms Yang over the property. The funds borrowed under this mortgage - \$1,990,000.00 were used for Mr Tang's own purposes. The Court held that Mr Tang knowingly assisted in JV Capital's and Ms Yang's breaches of trust, knowingly received the trust funds and breached his own fiduciary duty. In these circumstances, the Court held that Mr Fan was entitled to receive equitable compensation from Mr Tang.

Mr Fan proposed that the correct order for compensation was that the defendants pay to him an amount representing forty percent of the outstanding liabilities to St George. The Court accepted this argument and made the order.

The Court ordered also that the interest, in the Box Hill property held by JV Capital and Ms Yang be transferred to Mr Fan.

Although everything worked out in the end for Mr Fan, the case highlights the problems that can occur and the care that needs to be taken when trusting a friend with one's property or financial resources.

## >> TRADE PRACTICES ACT

On 1 July 2010, changes to the Trade Practices Act came into force. These are the national unfair contract provisions. They will apply to both new consumer contracts and those renewed or varied on or after commencement. All businesses should immediately review their standard form consumer contracts to ensure that the terms comply with the new legislation.

### Jackson Lalic Lawyers

Level 7, 217 Clarence Street  
Sydney, NSW, 2000

T: (02) 9262 1770 F: (02) 9262 1771

DX: 13132 Sydney West

Post:

PO Box Q245 Queen Victoria Building Post Office  
Sydney 1230.