Our physical address:
7th Floor
Civic Assurance House
116 Lambton Quay
Wellington

From **JOHN DEAN LAW OFFICE**
Telephone +64-4-472-9369
PO Box 10107, Wellington
Email jad@jdlo.co.nz
www.jdlo.co.nz

Spring 2017

INSIDE THIS EDITION

Personal Lending Guarantees - Enforceability . 1

The Corporate Veil 2

Domestic Violence Victims Protection Bill 3

Why is Competition Law Important? – NZME and Fairfax Media Merger Case 3

Snippets 4

"The Ruck – a Lawyer's analysis of the rules of rugby's ruck." 4

Quirky Commonwealth Laws 4

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult us before acting upon this information.

If you have any questions about these Lawlines items, please contact us: we are here to help.

Personal Lending Guarantees – Enforceability

A Guarantor is a person who gives a promise to repay the debt of a borrower. By agreeing to pay a debt the Guarantor has made a guarantee to the institution or person lending the funds ("lender"). Frequently when someone gives a guarantee that person is also giving an indemnity. An indemnity is a contractual promise to accept liability for any loss by the lender which is accumulated in the process of the recovery of a debt.

There are different types of guarantees: unlimited, limited, unsecured or secured. An unlimited guarantee generally gives the lender an ability to demand that the Guarantor repays all monies owing, whereas a limited guarantee has an agreed amount payable by the Guarantor. An unsecured guarantee is not attached to any particular asset of the Guarantor. In contrast, a secured guarantee grants security over a specific asset owned by the Guarantor, e.g. a house.

Personal guarantees are becoming more common in the parent-child scenario. The parents, however, sometimes underestimate the extent of the risk they assume when signing a guarantee. Regularly, the guaranteed loan represents a large portion of the parents' assets and, therefore, may have significant consequences on the parents' current and future living standards if the lender demands payment of the debt. It is important to note that a personal guarantee is not for a specific timeframe. The Guarantor, therefore, may be liable for any current loans, future financing or credit card debts.

Guarantees are legally binding documents and are enforceable through the Courts. Extinguishing the obligations under a guarantee can be difficult as the parties must adhere to the terms and conditions of the guarantee. Guarantors may request the lender to release them from their liability under the guarantee. It is, however, the lender's decision to release a Guarantor from his or her obligations under the guarantee.

In the case *Tait-Jamieson v Cardrona*, Mr Tait-Jamieson gave a personal guarantee for the debt owed by a local organisation to Cardrona Ski Resort ("Cardrona"). He did not, however, sign the written guarantee prepared. When Mr Tait-Jamieson realised that he had not signed the guarantee he conveyed to Cardrona in verbal and written form that regardless of his not signing the guarantee he would underwrite the debt. Cardrona subsequently demanded payment of the debt from the Guarantors. Mr Tait-Jamieson stated that the guarantee was not enforceable against him as he did not sign the written

guarantee. The Court, however, held that Mr Tait-Jamieson had adequately expressed his intention to be contractually bound by the guarantee by his previous verbal and written correspondence and, therefore, must honour his obligations under the guarantee.

Tait-Jamieson v Cardrona demonstrates that once a person sufficiently expresses an intention to be bound by a guarantee, the guarantee is likely to be enforceable. In New Zealand, however, lenders who offer guarantees must also adhere to the responsible lending laws of the Credit Contracts and Consumer Finance Act 2003. These state that lenders must ensure a borrower, or Guarantor, is likely to be able to make repayments towards the debt without suffering substantial hardship. This legislation was applied to the case of a pensioner who agreed to guarantee his son's loan of $2,000.00. His son defaulted on the weekly payments immediately. The lender demanded the repayments from the pensioner which would have left a residue of $25.25 of his pension payment per week. The case was heard by Financial Services Complaints Limited which found that the pensioner was not a suitable Guarantor and that the lender had breached its duties under the responsible lending laws. The judgment resulted in the lender discharging the pensioner's liability under the guarantee.

While, therefore, guarantees are frequently enforceable, there is an expectation that lenders will act responsibly when assessing the viability of a Guarantor.

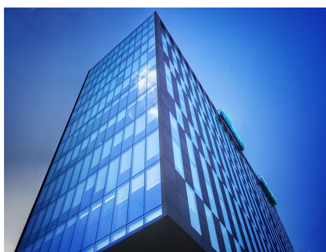
Finally, below are some considerations to contemplate before becoming a Guarantor:

1. Receive independent legal advice;
2. Make sure you understand the wording of the written guarantee;
3. Be aware that the lender does not have to pursue the borrower "to the ends of the earth" before turning to the Guarantor for repayment of the debt; and
4. If possible, engage in a limited guarantee to try and minimise any potential risk.
5. We have acted in a number of cases for guarantors seeking to avoid guarantees and for lenders seeking to enforce guarantees. Talk to us before signing any guarantee document; or if you need assistance relating to enforcing a guarantee, or protecting yourself from a lender.

The Corporate Veil

Section 15 of the Companies Act 1993 ("Act") states that a company has a legal personality in its own right and is separate from its shareholders. This is a principle known as the *Salomon* principle, originating from the case of *Salomon v A Salomon & Co Ltd*. The *Salomon* principle provides that a company is essentially regarded as a legal person separate from its directors, shareholders, employees and agents. This means as a separate legal entity, a company can be sued in its own name and own assets separately from its shareholders.

The corporate veil is drawn from the *Salomon* principle which separates the rights and duties of the company from the rights and duties of the shareholders and directors. Essentially, the corporate veil is a metaphoric veil with the company on one side of it and its directors and shareholders on the other and liability does not pass through.



The corporate veil does not provide protection to its shareholders and directors for their personal conduct or allow companies to be used for sham transactions. Accordingly, the courts may lift or pierce the corporate veil.

The corporate veil and *Salomon* principle were applied in *Lee v Lee's Air Farming Ltd*. The Court ruled that although Lee was the controlling shareholder, sole director and chief pilot of Lee's Air Farming Ltd, he was also considered an employee of the company and thus the company was a separate legal entity, even though Lee's Air Farming Ltd was essentially a 'one-man entity'. This ruling created the opportunity for the corporate veil to be misused and has since been regulated against by imposing reckless trading provisions.

Lifting the corporate veil

The corporate veil can be lifted by the courts if its presence would create a substantial injustice. This is the process used to look behind the corporate façade and identify the true nature of a transaction.

The corporate veil may be lifted in a number of circumstances. For example where a subsidiary company is in liquidation in the context of a group of companies as illustrated in *Steel & Tube Holdings Ltd v Lewis Holdings Ltd*. The subsidiary company was placed into liquidation and the plaintiff sought the debt owed by the subsidiary from the group of companies rather than the subsidiary as a separate entity. The Court of Appeal agreed with this approach as the subsidiary was not run as a separate legal entity. Some of the factors the Court considered were that the directors of the subsidiary managed the subsidiary as officers of the parent company and did not hold separate board meetings for the subsidiary. Technically, the subsidiary was a separate legal entity but it was not managed as a separate entity. Accordingly, the Court lifted the corporate veil to pool the assets of the related companies. The courts may not always apply this approach to groups of companies but this case identifies the importance of ensuring each entity within a group of companies is managed as a separate legal entity.

Piercing the corporate veil

The Courts may pierce the corporate veil and remove the protection of the *Salomon* principle to prohibit fraud. This was evident in *Gilford Motor Co Ltd v Horne* where a managing director agreed not to engage with his former employer's customers but proceeded to do so through a newly formed company. The courts pierced the corporate veil to reveal the sham transactions occurring behind the façade of the company.

Generally, the courts are reluctant to pierce the corporate veil to protect creditors in the absence of fraud. However, where reckless trading takes place by directors, s 135 of the Act allows for the veil to be pierced.

In the case of tax evasion or unauthorised tax avoidance, the courts may look past the *Salomon* principle, pierce the corporate veil and declare the company a sham.

The courts will only lift or pierce the veil where an inequitable situation may be occurring behind the corporate façade based on the facts of each case. The corporate veil is vital for the legitimate use of the corporate structure and the protection of shareholders and directors and thus, by its very existence, promotes the playing field for taking commercial risks.

Domestic Violence Victims Protection Bill

Domestic violence ("DV") has proven to be a significant issue in New Zealand. For example, in 2016 the New Zealand ("NZ") Police investigated 118,910 incidents of family violence. That equates to approximately one DV incident every five minutes. The most recent parliamentary debate on the issue has resulted in The Domestic Violence – Victims' Protection Bill ("Bill"), originally proposed by the Green Party, which had its first reading in March 2017. This Bill aims to offer greater protection to victims of DV ("Victim/s") in an employment context. The Bill aims to reduce:

1. The stigma attached to being a Victim;
2. The abuse of Victims in the workplace; and
3. To require employers to adhere to more understanding practices.

The Bill proposes to assist Victims by introducing a definition of "a victim of domestic violence" under section 5 of the Bill, and amending several different pieces of employment legislation to better cater to the needs of Victims.

The Bill defines a Victim as a person who suffers DV who can produce a "domestic violence document" ("DVD") because they have suffered DV or provide care to an individual in their immediate family who suffers DV. A DVD is a collection of documents which provide evidence that a person falls within the definition of a Victim. Examples of these documents are a police report or criminal proceedings.

The proposed changes to employment legislation are the introduction of DV leave, flexible working for Victims, Health and Safety Requirements and new prohibited grounds of discrimination. These are described below.

1. DV leave: The Bill proposes to amend the Holiday Act 2003 by introducing 10 days within a 12 month period paid "domestic violence leave" for Victims. To be eligible, the person must supply their employer with their DVD. The employer will be expected to approve the leave "as soon as practicable".
2. Flexible working for Victims: The Bill proposes to amend the Employment Relations Act 2000 so that Victims can request flexible working arrangements such as working from a different location or unusual hours. Employees who make this request will need to have been employed by the same employer for at least six months and have not made a flexible working request for at least 12 months.
3. Health and Safety Requirements: The Bill proposes to amend the definition of "hazard" to include situations arising from DV. This would require persons conducting a business or undertaking (PCBU's) to have a policy for dealing with hazards which arise in the workplace due to DV. A PCBU will also have to take reasonable and practicable steps to provide health and safety representatives with training to support workers who are Victims.
4. Prohibited grounds of discrimination: The Bill proposes introducing being a Victim as a prohibited ground of discrimination under the Human Rights Act 1993 and the Employment Relations Act 2000.

The current government states that this Bill is seeking to remedy something that has already been addressed by the existing provisions within current Employment and Health and Safety legislation. Immigration Minister Mr Woodhouse also stated there was no need for the initiative as many employers go above the minimum employment standards; for example, Countdown already offers 10 days DV leave.

The discussion above suggests that the current government is content to leave more comprehensive DV initiatives to businesses. They have voiced the opinion that they believe the extra leave will burden small businesses and, therefore, do not support the Bill in its current form. Leaving the instigation of DV initiatives to businesses, however, may result in Victims only receiving the limited support offered by current legislation.

Currently, it is estimated that DV is costing $368 million or more a year, particularly through lost productivity, businesses losing staff, and retraining. The Human Rights Commission has launched a campaign to encourage businesses to introduce more comprehensive family violence policies in their workplaces. Equal Employment Opportunities Commissioner, Dr Jackie Blue, states "*By implementing a family violence policy, the cost savings to the business will be truly significant but crucially, for victims, it can be life-changing and life-saving.*"

Where many New Zealand businesses are going beyond the current legislation to provide support to Victims, some are not. This Bill, if passed into law, will recognise DV as a workplace hazard and accordingly require New Zealand businesses to implement new workplace policies. So, with the report from Parliament due on 8 September 2017, this is one space to watch.

Why is Competition Law Important? – NZME and Fairfax Media Merger Case

Competition law promotes or seeks to maintain competition in marketplaces. It does this by restricting anti-competitive trade practices, mergers and business acquisitions, and economic regulation.

The Ministry of Business, Innovation and Employment's ("MBIE") Report titled "Competition in New Zealand Industries: Measurement and Evidence" (the "Report") submits that competition in the market can create a positive relationship between profits and productivity for businesses. An increase in competition stimulates managerial efforts and promotes businesses to be more innovative which increases productivity over time. As competition increases, the less efficient businesses tend to exit the market, encouraging quality products within the

market. In contrast, a lack of competition arguably results in an average performing economy due to the absence of competition as a driver towards productivity and quality.

The Report addresses the possibility of high levels of competition decreasing the productivity and quality of the market place. Studies of the relationship between competition and innovation, however, often show that a majority of markets would perform better with the competition. The Report records that New Zealand markets are small and isolated due to New Zealand's geographical position. Increased competition, therefore, is likely to stimulate rather than curtail innovation.

New Zealand Commerce Commission

The Commerce Commission ("the Commission") operates under the Commerce Commission Act 1986 and monitors and governs competition in the markets. The Commission examines anti-competitive practices such as agreements between businesses which have the potential to increase prices or reduce the choice of goods or services. A relevant case study is the application for a merger between the two largest news companies in New Zealand, New Zealand Media and Entertainment ("NZME") and Fairfax New Zealand ("Fairfax").

Merger between NZME and Fairfax

In late 2016, NZME and Fairfax proposed a merger between the two companies which would see NZME paying Fairfax Australia $55 million if the merger was allowed.

Allegedly, the merger was proposed due to Fairfax's falling revenue. Fairfax Australia reported that for the New Zealand Branch revenue fell eight percent for the last six months of 2016 and its operating profit dropped 10 percent due to a consumer shift from traditional media sources to online media sources. Greg Hywood, the Chief Executive of Fairfax Australia, said that they had plans to restructure Fairfax into a more sustainable business model if the merger was not approved.

Despite Fairfax explaining its market challenges to the Commission, the Commission gave a preliminary "no" to the merger on 8 November 2016. The Commission then rejected the merger completely on 2 May 2017. The decision released by the Commission stated that if the merger were allowed to proceed it would result in *"an unprecedented level of media concentration for a well-established democracy."* Due to the extent of the two organisations' investments, the Commission's decision reports that the merger would be likely to lessen competition by increasing prices and/or decreasing quality for the readers, and/or advertisers in advertising and reader markets, and as a result, the merger should not be cleared.

Fairfax has now appealed the decision of the Commission to the High Court on the basis that the Commission exceeded its authority by considering social and political considerations. The companies also reported that the Commission had breached procedure due to the anonymity and confidentiality afforded to the parties that made submissions against the merger. The companies allege that the Commission had breached the principles of natural justice and procedural fairness. The High Court process began at the end of May; and there have been no further updates.

Conclusion

Without competition law regulating mergers, the merger between NZME and Fairfax would not have been questioned and the possible consequences would not have been explored. The NZME and Fairfax case study demonstrates that competition law can assist in protecting consumers and citizens alike and, therefore, is very important to the development of our economy and society at large.

Snippets

"The Ruck – a Lawyer's analysis of the rules of rugby's ruck."

All Black, Richie McCaw, ended active play many times by successfully tackling the opposing team's ball carrier to the ground. Quickly joined by his team mates who bind together over the ball, each team's players use their feet to play the ball. The winners of the ruck are the team which can drive the ball behind to the rear player's back foot where it can be picked up and passed along. Offside lines for each team are drawn at the opposing rear player's feet, and any encroaching team risks a penalty. As a result, the ruck has a material impact on the ability for teams to contest ball possession.

But what happens if the defending side chooses not to ruck?

Earlier this year, in a controversial match between Italy and England, Italy chose not to contest any rucks. As a result, there was no offside line, and the Italian players were able to obstruct the flow of the game. The All Blacks use the rule more subtly with about half their tackles transitioning into rucks. It is also why many argued Richie McCaw was offside.

Therefore, rucking, or a lack of, seems to be wholly legal and within the black letter law of rugby.

Quirky Commonwealth Laws

Legislation does not always keep up with society so archaic but quirky laws of the Commonwealth remain on the statute books as shown in the examples below.

1. United Kingdom:

1.1 Under the Metropolitan Police Act 1839 it is illegal to beat or shake any carpet or rug in the street. Beating or shaking a doormat, however, is allowed before 8am; and

1.2 Under the Salmon Act 1986 it is illegal to handle salmon in suspicious circumstances.

2. Australia:

2.1 The Summary Offences Act 1966 states that it is an offence to fly a kite or play a game in a public place "to the annoyance of another person"; and

2.2 The Marketing of Potatoes Act 1946 states that it is illegal for a distributor of potatoes to be in possession of more than 50kg of potatoes which are sourced from a person or organisation other than the Potato Marketing Corporation.

It is apparent that the world moves on and people forget to clean up the statute books. Because repealing these laws does not seem to be a priority, these quirky laws seem to be here to stay.