

Phillips | Family Law Bulletin



CASE IN POINT

A transaction to defeat claims of creditors considered by the Federal Court and a timely reminder about duties of directors

In circumstances where parties to a marriage and their related entities are in financial difficulty at the time of separation, it is important to keep in mind that:-

1. that a Family Law Binding Financial Agreement will not necessarily protect company assets if the transactions pursuant to the Financial Agreement are to defeat the claims of creditors; and
2. such conduct can expose a director to the various penalty and compensation provisions in the Corporations Act 2001 (Cth).

The Federal Court of Australia has recently considered whether a Financial Agreement had been used to facilitate transactions to defeat claims of creditors by transferring company assets to his wife following their separation in *Kijurina (as liquidator of ET Family Pty Limited) v Taouk* [2015] FCA 424.

This decision is an illustration of the corporate veil being lifted, and that it is important to remember the very important fiduciary and other duties a director owes to a company they direct. It is important to seek advice at an early stage and ensure that any proposed settlement is not likely to expose the parties to further issues, especially in the case of companies, which have been wound up or are in liquidation.

To read more and download the Phillips Family Law Newsletter click [here](#)

By Fiona Caulley, Senior Associate

Landslide Family Court victory defeats spousal maintenance claim



Phillips Family Law successfully defeated a claim for spousal maintenance in the Family Court this month. The case, reported as [Cameron & Brook \[2015\] FamCA 307](#), involved a claim for spousal maintenance by the wife (Cameron) against her former husband (Phillips' client, Brook). The husband and wife had been married for 12 years. They had three young children. The parties had assets in the region of \$7M. The husband was a property developer with a taxable income in the region of \$472,000 per annum. The wife was a qualified accountant, but apart from a seven week period of employment the prior year, she had not worked since the parties' children were born. Phillips argued that the wife had the capacity to support herself, and thus the husband was not liable for maintenance. The Family Court agreed, with Hogan J finding:

15. *There is no evidence of the wife's attempts to find paid employment since the contract ended in late 2013. This is because she has not made any attempt to obtain employment since the end of November 2013: whilst asserting she would like to return to paid employment, she accepted that, during 2014, she did not take any steps to achieve this professed desire.*
16. *The wife's decision not to seek out paid employment means that this is not a case in which a party has unsuccessfully attempted to obtain employment in order to support themselves financially. Rather, this is a case in which a party possessing educational qualifications - which equip them to engage in paid employment remunerative of about \$1,000.00 (gross) per week - with relatively recent demonstrated ability to obtain and engage in such paid employment has positively determined not to take any steps to attempt to obtain such employment. This does not, for me, establish an incapacity to support oneself financially.*
17. *The wife impressed as an intelligent and competent person. There is nothing to suggest she suffers from any medical or*

17. *(cont.) psychological condition to prevent her from supporting herself adequately. All of the children attend school during school term. Appropriate arrangements for their care have previously been implemented. There is nothing in the evidence to suggest that, in the event the wife again re-enters the paid workforce, such arrangements could not be put in place again. Additionally, the husband seeks to increase the children's time with him so that they live with each parent for an equal amount of time. If implemented by the parties, this, too, will afford to the wife a further respite from the care of the children and will further increase her ability to engage in paid work.*

The Family Court dismissed the wife's claim entirely, and in a secondary judgement reported as [Cameron & Brook \(No 2\) \[2015\] FamCA 537](#), the Court also ordered that the Wife pay the Husband's legal costs. In that secondary judgment, Hogan J found (at 4):

I have concluded that the following circumstances justify the making of an order that the Applicant pay the Respondent's costs of and incidental to the interim applications heard on 16 December 2014 and disposed of by the order made 30 April 2015:

- a. *the Applicant was wholly unsuccessful in her application for spousal maintenance and in her application for the sale of specific property to provide funds for interim litigation funding; and*
- b. *the Respondent was successful in persuading the Court as to the terms of order to be made to resolve the disputes between the parties; and*
- c. *the Respondent had made his opposition to the application for spousal maintenance clear on a number of occasions well before the matter was heard and had clearly outlined that he would rely upon that position in the event the application was pressed; and*
- d. *the Respondent had made a number of attempts to resolve these applications, including one by which the Applicant would have received more by way of interim spousal maintenance than she received as a consequence of the Order made on 30 April 2015; and*
- e. *the Applicant will have the financial capacity – once the terms of the April 2015 Order are put into effect – to meet such an order.*

By Sarah Bastian-Jordan,
Senior Associate

15th Australian Family Lawyers Conference

I had the amazing opportunity to develop my skills as a lawyer as well as challenge my limited linguistic skills in French by attending the 15th Australian Family Lawyers Conference, which was held in June in the tropics at Noumea on New Caledonia.



It is a picturesque island with great photo opportunities of hills covered in tropical dense green foliage on one side and beach and ocean with glimpses of tropical islands on the other. Noumea is a place of contrasts, the locals who speak French, drive European cars, eat crepes, macarons and other French delicacies that we had trouble translating against a backdrop of island time, where the bus might not come. In all fairness, we didn't know when the bus was supposed to come, it just didn't. The picturesque Anse Vata beach and lagoon where we stayed, calling out for kitesurfers and snorkelers was dampened by the wet weather on our free day.

On the family law front, there are some interesting changes to the legislation about making financial agreements more binding. There are still some creases to iron out, but the speaker was expecting that they will and we will soon see changes about the independent advice that clients will be given. We were rewarded to have expert valuers with years of interesting experience in his field. They spoke about what methods they use to value for which particular items. While they lost a lot of the audience there, we started paying attention when they spoke about how to value rare items; like the Replica of the Endeavour, or the Russian sub and the plane at the Brisbane Airport. Some inspiring speakers included Catherine Boland whose topic was about children refusing to see a parent.

This generated a lot of interest, it is something that we the practitioners do see and sadly, our clients experience. And Federal Circuit Court Judge John Coker gave us something to think about with his talk about Grandparent in parenting matters.

My last favourite session was from Nick Gaudion whose firm is Forensic Accounting was entitled "Divorcing the assets – almost everything you want to know about tax and Family Law but were afraid to ask." And really when separating assets, it is something we will all be asking.

Even if there's no conference, for somewhere close to holiday, where you might not understand what the people are saying, or having trouble converting how much you've spent into AUD, or wishing you hadn't ordered Cuisses de Grenouille à la Provençale or reins sauté de veau, it feels like a holiday and you are bound to have at least one (if not more) of those travel experiences only available when it is not in your tongue.

By Sophia Bookallil, Senior Associate

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