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NEWSLETTER
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ARE YOU COVERED BY YOUR DISCLAIMER NOTICE?

It is standard practice for organisations to place disclaimer notices in prominent positions with the intention of exempting themselves from liability should any loss or injury occur to people while on their premises or in the course of using goods which they have manufactured.

The case of *R P Naidoo vs Birchwood Hotel*, which was decided in the South Gauteng High Court earlier this year, will certainly cause many institutions to re-evaluate the effectiveness of their disclaimer notices.

In this case, a Mr Naidoo sustained serious bodily injuries when a gate fell on him as he was leaving the Birchwood Hotel. The hotel relied on disclaimer notices which they had placed at the gate, as well as on those contained in the hotel register which Mr Naidoo had signed, thereby binding himself to the terms and conditions which included an exemption clause.

In reaching its decision the Court considered the provisions of the Constitution, which state that a contract which seeks to deprive a party of judicial redress is *prima facie* contrary to public policy. The Court concluded that, in determining whether to enforce a contractual term, they must decide whether that term dealt an injustice and, if so, then the clause would not be binding. In this particular case, the Court concluded that a guest of a hotel does not take his life into his hands when he exits through the hotel gates.

This differs considerably from situations where a party undertakes an activity which, by its very nature, carries inherent risks such as taking a dangerous ride at an amusement park.

Those who rely on an exemption clause need to carefully consider whether it will, in fact, exempt them from liability and, if not, take appropriate action to protect themselves, which may include revisiting their insurance cover.

Submitted by Kay Naidoo, director in LLI's litigation department.

TIME IS RUNNING OUT FOR TAX AMNESTY TRANSFERS

We remind anyone who wishes to take advantage of the tax amnesty in terms of Paragraph 51A of the Eighth Schedule to the Income Tax Act, which enables those holding domestic property in the name of a Company, CC, or Trust to transfer the property into their personal names, that the disposal needs to take place on or before 31 December 2012.

This amnesty is of particular benefit to those who hold their primary residence in such a vehicle as it will enable them to make use of the primary residence rebate of R2 million on Capital Gains Tax when the property is finally sold.

In making this decision, proper professional advice should be sought as the amnesty is not available in all instances and, furthermore, there may well have been sound business reasons for acquiring the property in the Company, CC, or Trust in the first place.

Submitted by Barry Lewis, director in LLI's property department.

LLI supports LIV

*LLI made a donation to **LIV**, a non-profit organisation that provides holistic residential care for vulnerable children with the core vision to **rescue a child, restore a life, raise a leader, and release a star.** Seen at LIV are (from left): Mark Emerson (LIV Marketing), Wesley Smith (LIV Business), Mrs Subashnee Moodley (Director LLI), Mr Douglas Tatham (Managing Director LLI)*

Cohabiting couples

It has become fairly common practice for parties to live together as man and wife, sharing a joint household, without actually marrying. Problems arise, however, when the relationship turns sour and the parties separate and the question of dividing the assets rears its ugly head.

Two recent cases in the SCA dealt with this thorny issue. In both instances the parties lived as man and wife but never married. After their separation, no agreement could be reached regarding the division of the assets and the Courts had to resolve the dispute.

The Court stated that the basis for a claim would be one of a tacit universal partnership, taking into consideration the three essential elements for a partnership to exist.

These are:

- each of the parties needs to bring something into the partnership or bind him/herself to bring something into it, whether it be money, labour, or skill.
- the partnership business should be carried on for the joint benefit of both parties;
- the object should be to make a profit.

In both cases the Court reached the conclusion that the claimant was entitled to a share of the net asset value of the partnership on the date that it ended as she had fulfilled the legal requirements.

The lesson to be learned from this is that if parties decide to live together as man and wife without being formally married, they should enter into a written agreement to regulate the affairs of the 'partnership'.

Submitted by Gordon Pentecost, director in LLI's litigation department.

Suretyships in lease agreements

In commercial leases, it is common practice for suretyships to be called for at the time of the conclusion of an agreement of lease where the tenant is a juristic person (i.e. not a natural person).

A recent case heard in the Pietermaritzburg High Court relating to the recovery of outstanding rental is of particular significance to landlords.

The parties had entered into a lease agreement and it was subsequently renewed in terms of a further written agreement.

The tenants fell into arrears during the renewal period and the landlord sought to recover the rental which was outstanding from a surety, who had bound himself as surety and co-principal debtor with the tenants in terms of the original agreement of lease. However, no such suretyship had been signed at the time of the renewal and the payment was not forthcoming.

The Court was required to determine whether the wording of the suretyship which was signed at the time of the original lease applied to the renewal period.

The Court concluded that it was not clear that the original suretyship applied to any subsequent leases and, as a result, the landlord was not in a position to recover from the surety.

It is extremely important for a landlord who is entering into an agreement of lease which contains a suretyship to ensure that the suretyship is drafted in such a way that it will apply to any subsequent renewals of the lease agreement or, alternatively, ensure when the lease is renewed that a fresh suretyship is signed.

Submitted by Lance Coubrough, director in LLI's commercial department.

By fair means ... or foul

A considerable amount of media space has been devoted to the pressure of expectation on schoolboy rugby players to win at all costs, in some cases leading to the use of illegal performance-enhancing substances. There is, however, another and equally concerning aspect to this approach to schoolboy sport and players, parents, and coaches involved in sporting activities which, by their very nature, involve the possibility of injury to others, need to take careful note of the recent SCA judgment *Roux vs Hattingh.*

Briefly stated, the facts of the case are as follows:

In a rugby match played between the under 19A teams of Laborie High School and Stellenbosch High School, an injury occurred to the Laborie hooker during the course of a scrum.

At the time the scrum was forming, the Stellenbosch hooker called a move given the name 'jack-knife' by his team. As the scrum engaged the Stellenbosch hooker moved to his right, blocking the channel into which the Laborie hooker's head was meant to go. When the forwards engaged, he found his channel was blocked and his head was forced down and under that of the opposing hooker. The pressure of the Stellenbosch hooker (and pack) on his neck caused him to scream in pain, the scrum collapsed, and he was left severely injured.

In delivering its judgment, the Court pointed out that not all conduct resulting in harm is actionable. In order to be liable for someone else's loss, the conduct must show all three of the following elements: it must have caused the loss; it must have been negligent or intentional; and it must have been wrongful. On the facts of this particular case, the Court found that the action of the Stellenbosch hooker fulfilled all three of these requirements and he was found liable for damages.

The Court did, however, spend some considerable time discussing the element of wrongfulness, particularly in relation to sporting activities such as rugby. Whether a Court will deem the conduct to be wrongful will depend on whether it would be reasonable to hold the defendant liable for damages as a result of his action or omission, and in determining the reasonableness of that decision the Court would have to consider public and legal policy in accordance with Constitutional norms.

Since public policy regards the game of rugby as socially acceptable, despite the likelihood of serious injury, conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game, regardless of whether that conduct was negligent or intentional. The converse, however, is not necessarily true. The mere fact that the conduct causing serious injury was in contravention of the rules of the game will not automatically result in the imposition of legal liability. The late tackle of an opponent after he has passed the ball, or a tackle from an off-side position, or running into an opponent in a dangerous way, may break the rules of the game and lead to a penalty but may not lead to delictual liability, even if the conduct was intentional. This is because public and legal policy will accept this as a normal incident inherent to the game.

At the other end of the scale, conduct which constitutes a flagrant contravention of the rules of rugby and which is aimed at causing serious injury, or which is accompanied by full awareness that serious injury may ensue, will be regarded as wrongful and attract legal liability for the resulting harm. The Judge cited two examples of such a situation: one in which a scrumhalf who hit his counterpart with a fist in an off-the-ball incident and broke his jaw was liable for resulting damages, and another case where a player bit his opponent.

The Court went on to state that the element of wrongfulness introduces a measure of control. It serves as a 'long stop' to exclude liability in situations where most right-minded people, including judges, will regard the imposition of liability as untenable, despite the presence of the other elements for delictual action.

The usual ground of justification raised by participants in a rugby game whose conduct led to physical injury is the maxim *volenti non fit iniuria* (he who consents cannot be injured). This argument maintains that, by consenting to participate in a particular sport, the player accepts the risk of injury that may occur in that sport. However, injury caused by unreasonable conduct falls outside the ambit of the consent to risk of injury because participants are taken to consent only to the normal and reasonable risks of the sport concerned.

The moral of the story is play hard but play within the spirit and rules of the game – and do not conjure up strategies which may injure your opponents!

Contributed by Gordon Pentecost, director in LLI's litigation department.

Two new Associates

NALINI RAMDAYAL

Nalini Ramdayal joined the staff of LLI in 1989 and, while employed as a legal secretary, completed her LLB through UNISA. After graduating in 2006 she entered into Articles of Clerkship with LLI. Nalini was admitted as an Attorney and Conveyancer in April 2009 and as a Notary later that year. On completion of her articles, Nalini left LLI to broaden her experience by taking a position as a professional assistant with another legal firm. On 17 September 2012, Nalini rejoined LLI as an Associate in the litigation department. Out of the office, Nalini is a keen reader who loves animals and is always ready for a challenge, be it physical or mental.

NELISHA MAHADEO

Nelisha Mahadeo has been appointed as an Associate in LLI's litigation department. After graduating with LLB and Masters in Business Law degrees from the University of KwaZulu-Natal, Nelisha served her Articles of Clerkship with LLI. In her spare time Nelisha enjoys reading and is actively involved in community service.

Outreach

As a community outreach initiative, LLI's staff members volunteered to donate Christmas Boxes for some of the children who live at the Salvation Army Joseph Baynes Children's Home in Pietermaritzburg. The home is a registered NPO which provides residential care for 82 orphans and vulnerable children ranging in age from birth to 18 years, including children living with HIV and AIDS. LLI also provided refreshments for the children's Christmas Party. Above from left are Molly Bell, Lesego Mainama and Leanne Ross.

Sale of business - Section 34 notices

A recent SCA judgment in the matter of *Gavin Cecil Gainsford NO vs Tiffski Property Investments* highlighted the consequences of failing to comply with the provisions of Section 34 of the Insolvency Act.

Section 34 requires a trader, who in terms of a contract transfers any business, goodwill, or property forming part of the business (except in the ordinary course of that business) to publish notices, advising of such disposal, in the Government Gazette and two issues each of an English and Afrikaans newspaper.

Failure to do so will result in the disposal being void against creditors for a period of six months after transfer.

In a subsequent High Court judgment, the Court adopted a fairly broad interpretation as to what constitutes a trader, including in its definition entities that are in fact non-trading at the time of disposal of the business or assets as a result of a lack of working capital.

The consequences of non-compliance with the requirements of Section 34 are far reaching and not only will the sale and transfer of assets of a business which is subsequently liquidated be void, but so also will any mortgage bonds registered over such transferred assets.

Submitted by George Yarker, director in LLI's property department.

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