



Property Newsletter

December 2008

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2008 State Mini Budget

As you would be aware, by virtue of the current financial crisis and the significant deficit in the budget of the New South Wales Government, a mini budget was brought down on 11 November 2008. This mini budget had significant changes brought in from stamp duty and land tax perspectives, as well as a further boost for the first home owners grant.

The major provisions are as follows:

- The Government has added \$3,000 to the existing \$7,000 first home savings grant for eligible applicants who are buying or building a new home. This supplement is available for 12 months only after which time it will be reviewed.

This grant is in addition to the \$14,000 announced under the Commonwealth Government's first home owners boost scheme (being \$7,000 for a first home owner and a further \$7,000 if the first home owner is buying or building a new home).

From 1 July 2009 (subject to Federal Government approval) the New South Wales scheme will only apply to properties valued up to \$750,000.

- There have been significant changes with respect to the land tax. From next year, the

rate will be 2% for land taxpayers with total taxable holdings above \$2.25M. Below this figure, the rate will remain at 1.6%.

The tax free threshold for 2009 is \$368,000.

The threshold figure of \$2.25M will be indexed from 2010 onwards.

- Nominal duty is payable on duplicate documents or certain other documents. This nominal duty is either \$2 or \$10 and, from 1 January 2009, this will be increased to \$10 and \$50 respectively.
- Stamp duty on trust documents will increase from \$200 to \$500 from 1 January 2009
- Measures to abolish various forms of duty have been deferred.

These are as follows:

- A)** abolition of duty on unquoted shares has been deferred until 1 July 2012
- B)** mortgage duty (already abolished on owner occupied and investment housing) on all other mortgages was to be abolished from 1 July 2009 and this abolition now is deferred until 1 July 2012
- C)** the transfer duty on non-land business assets has been deferred until 1 July 2012.

- At present, "land rich" duty is payable at ad valorem rates where shares are traded in a company which has more than 60% of its assets as land.

This will now be changed from 1 July 2009 to a "land holder" basis. If a significant parcel of shares or units in an entity owning land above a threshold value (which is yet to be established) is transferred, then it will be subject to ad valorem duty. The 60% of assets as property criteria will be eliminated.

These are significant matters which will have an effect on revenue raising from property transactions in New South Wales.

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[Recent Supreme Court case on recovery of economic loss in a Retail Lease Dispute](#)

A timely reminder that where the tenant (retail or otherwise) is a corporate vehicle, the losses of the shareholders are not recoverable and only the direct losses of the tenant company are recoverable.

Wallis Lake Fishermen Co-Operative Limited v ACN 079 830 596 Pty Limited was a decision

of Malpass ASJ of the New South Wales Supreme Court handed down on 12 September 2008 overturning both the earlier decisions of the President and the Administrative Decisions Tribunal Appeal Panel (3 members) who had awarded the shareholders of the retail tenant company monetary compensation of \$255,561.00 made up of \$249,561.00 in respect of a retail tenancy claim, and \$6,000.00 in respect of an unconscionable conduct claim.

ACN 079 830 596 Pty Limited, the defendant, ran a fish and chips take away business trading under the name of "Jolly Joe's Take Away". The rent was paid and it was thought that the defendant had tenure until 13 April 2009 but on the morning of 2 August 2006 the defendant was locked out. Mr Morris a director of the defendant and his wife, who were the shareholders, went to the Tribunal seeking to establish a retail tenancy claim on alleged breaches of obligations under the Retail Leases Act. The President made findings on the existence of the lease and as to unlawful repudiation by the plaintiff, Wallis Lake Fishermen Co-Operative Limited. The challenge in the Appeal Panel and Supreme Court concerned the assessment of what was then treated as a claim for economic loss for breach of contract by the plaintiff.

The economic loss claim originally was calculated by the President of the ADT by looking at the return to Mr and Mrs Morris from the business after meeting all outgoings such as rent, staff, wages and related product costs

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in the last year multiplied by the period left under the lease. Whilst the defendant was a company the return to Mr and Mrs Morris comprised drawings in the nature of remuneration, lease payments in respect of a motor vehicle owned by the applicant and funded out of the takings of the business and the amounts applied in connection with their home office. The President when looking at various reports from experts as to the amount of loss decided that the defendant company is in reality the "alter ego" of Mr and Mrs Morris. Economic loss claimed in a family business setting of this kind should be assessed by reference to the loss suffered by the owners of the company, that is Mr and Mrs Morris.

The Appeal Panel looked at the amount determined by the President in calculating damages and could not see any error in the method of assessing the damages on the retail tenancy claim.

An appeal was brought in the Supreme Court with the primary attack being on the basis that the wrong measure of damages was applied by allowing a sum that represented loss suffered by Mr and Mrs Morris as shareholders or in some other capacity rather than the loss of the defendant company.

The Supreme Court, in finding a clear error of law by the Appeal Panel and the approach taken by the President of the ADT, decided that the Tribunal was required to assess losses suffered by the defendant caused by the plaintiff's breach of contract. The defendant was a company and it was not a question of assessing whatever

loss may have been suffered by Mr and Mrs Morris, whether as shareholders or in some other capacity. The fact that Mr and Mrs Morris chose to conduct a business through a corporate vehicle means that the loss suffered by the defendant corporate vehicle by reason of the breach of contract had to be calculated and that was recoverable. It is erroneous to proceed to assess damages on the basis that the existence of the corporate vehicle could be disregarded.

The Supreme Court allowed the appeal and the orders of both the Appeal Panel and the President were set aside. The defendant was ordered to pay the costs of this appeal. The proceedings were remitted back to the Tribunal for determination of damages in accordance with the law.

This case reminds us of the uncertainty and risks in litigation in that, after 3 rounds of litigation, the retail tenant, who had been clearly wronged by the Landlord lost on the appeal and so the earlier victories leading to an award of damages of \$255,561 was cancelled and the tenant was ordered to pay the Landlord's legal costs of the appeal.

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No HBA Certificate - So What?

In late October 2008, the New South Wales Court of Appeal handed down a decision in *Tudor Developments Pty Limited v Makeig*.

Simply put, this case related to a matter where a developer sold a contract off the plan for \$935,000, collected a 5% deposit but failed to annex the appropriate certificate of insurance in accordance with *Home Building Act*.

The evidence from the appellant (developer) was that the purchaser was aware of the failure to annex the *Home Building Act* insurance, and that the *Home Building Act* insurance had been taken out, and that the purchaser had, after becoming aware of these matters, affirmed the contract.

At first instance, Young J held that the purchaser still had the right, notwithstanding any affirmation on her part of the contract, to rescind the contract up to completion and claim back the deposit in accordance with section 96A(3) of the *Home Building Act*.

The majority of the Court of Appeal agreed with this decision and upheld that the purchaser had validly rescinded the contract and was entitled to refund of her deposit.

The majority held that general law principles relating to estoppel and election do not apply universally with respect to statutory provisions. Common law principles

can be overwritten by statutory provisions and the court held that this was what had happened under the appropriate provisions of the *Home Building Act* being considered by the court in this matter.

This statute made no reference to election or affirmation. All it did was confer a power on the purchaser to avoid the contract up to completion but not after completion.

The majority took a very strict interpretation of the statutory provision and indicated that, as it did not indicate that the right to rescind could be lost at an earlier point in time (ie it could only be lost by the purchaser actually completing), there could be no loss of the purchaser's right to rescind by affirmation or estoppel.

The court acknowledged that if the statute prohibits the form of conduct without describing the consequences, then common law principles apply. However, in the case of the *Home Building Act*, the consequence of non-compliance, namely that the contract could be voided at the option of the purchaser, was provided for. In other words, by specifically prescribing the consequences of failure to comply, section 96A(3) of the Act excluded general law principles.

Handley AJA disagreed. In his dissenting judgment, he stated that as the purchaser had a right of election, and this right could be lost by affirmation prior to completion if she was aware of her rights and chose between them. He was of the view that the statute gave the purchase the right

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to either avoid the contract (by exercising her rights under section 96A(3) of the Act) or affirming the contract. He said that this was the nature of a voidable contract. As the contract was not void but voidable (ie the purchaser could elect to avoid the contract, but otherwise it remains on foot), it was essential that the purchaser could make an election and by conduct (with knowledge of the choices before her) forego her right to avoid the contract.

With respect, the minority decision makes more practice sense but, for now, the decision of the majority stands. As the provisions of the Act require evidence of insurance to be annexed to a contract, the consequences of not doing it is that the purchaser can (whatever the purchaser's conduct between exchange and settlement may be) elect to rescind at any time right up until the point of completion.

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CBP services

During the current economic downturn, there has been a marked increase in particular services provided by other areas of CBP, including:

- Insolvency
- Workplace relations
- Restructuring
- Asset protection
- Directors' and officers' liabilities

Through CBP's insolvency team, led by Peter Harkin, we are occasionally made aware of various opportunities in the marketplace.

If you are interested in being made aware of properties or projects to acquire eg residential, industrial, retail, commercial, warehouse or other sites, please contact Chris Rumore.

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