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Dangers with notices to complete

The Supreme Court of New South Wales decision in *Proctor v Chahl*, handed down in November 2008, concerned a contract for a sale of property which was unusual, but not unheard of. The case highlights the potential dangers with issuing a notice to complete.

Factual circumstances

The contract stated that the purchaser would buy lot 1411 if a subdivision plan was registered by completion. If it was not, the purchaser had to buy the whole of the property and pay an additional \$200,000.

The vendor was not required to register the subdivision plan and the plan was not approved and registered by the time set out for completion.

The vendor was required to do certain works prior to completion including the installation of downpipes to discharge rainwater to stormwater pipes. The downpipes were installed but they were not connected because there were no stormwater pipes.

The contract was exchanged on 20 June 2006. Completion was "12 months after the date of this contract". On 21 June 2007, the vendor issued a notice to complete

and purported to terminate the contract when the purchaser did not complete. (The purchaser did not have finance in place at the time the notice to complete was issued.)

Issues and findings

The first issue for the Court was what the actual completion date was. The Court held that the wording of the contract set completion at the first day after the expiry of the 12 month period, ie 21 June 2007.

The consequence of this was that the vendor had issued the notice to complete too early. The notice was invalid and the vendor had effectively repudiated the contract by seeking to terminate the contract by the notice.

Although not strictly required of it, the Court found:

- a) Equity would not allow the vendor to rely upon a notice to complete because the vendor had not given the purchaser notice in advance as to whether it was required to acquire the whole of the property or only Lot 1411.
- b) The purchaser had not repudiated the contract at common law. The Court said it would be very difficult to establish a common law repudiation for a contract for the sale of land.

- c) The vendor was not ready, willing and able to complete because at the time the notice to complete was issued the vendor had not paid the land tax or made arrangements to pay it on settlement. An undertaking by the vendor to pay the tax would not be sufficient. As the vendor was not ready, willing and able to complete, it could not issue a notice to complete.

By issuing the notice to complete the vendor wrongfully terminated the contract. This was effectively a repudiation which the purchaser was entitled to accept and did accept. The vendor's claim was dismissed with costs and the deposit was refunded (with interest) to the purchaser.

Guidance from *Proctor v Chahl*

Proctor v Chahl emphasises the essentiality in this uncertain economic climate of carefully considering your position before issuing a notice to complete (whether as a vendor or as a purchaser). The Court placed a heavy burden on the issuing party to prove it was ready, willing and able to settle at the time of the issue of that notice.

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Changes to the Margin Scheme: don't get caught out!

On 9 December 2009 critical changes to the GST Margin Scheme were introduced. These changes fundamentally alter the availability and application of the margin scheme to developers and purchasers alike.

The changes to the margin scheme will affect developers who enter into a contract to acquire property GST-free after 9 December 2008, the contract being GST-free because it is:

- a GST-free supply of a going concern;
- a GST-free supply of farmland; or
- a supply to a registered associate that is non-taxable because no consideration is provided.

The effect of the changes is that where a purchase is made through one of the above types of supplies, the purchaser, at the time they come to ultimately sell the property, needs to use the original sellers acquisition price rather than their own. For example:

- ABC Pty Ltd sells property X (which it acquired for \$50,000) to New Corp Pty Ltd for \$100,000 under a GST-free supply as a going

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concern. Some time later, New Corp Pty Ltd sells X to Big Co Pty Ltd for \$300,000.

- Previously, New Corp Pty Ltd would apply the margin scheme using its own acquisition and selling cost (margin calculation: \$300,000 - \$100,000 = \$200,000). With the introduction of these amendments New Corp needs to use ABC Pty Ltd's acquisition cost (or a valuation at the date ABC Pty Ltd acquired it) (margin calculation: \$300,000 - \$50,000 = \$250,000). GST is then paid on the margin.

This change has been made so that the real added value of the property is caught by the GST rules.

Importantly, the amendments do not apply retrospectively. Property owners selling under the margin scheme who acquired the property under a contract entered into prior to 9 December 2008, or under a contract entered into pursuant to an option or some other right entered into prior to 9 December 2008, can calculate the margin using the standard rules.

The amendments also introduce new restrictions on the eligibility for the margin scheme such that where an original supply of land does not have the margin scheme applied, any later supply of that land cannot become "re-eligible" through the interposition of a GST-free supply.

Any person acquiring property after 9 December 2008 needs to consider these changes. Developers of residential property should be particularly aware of the new provisions as residential developers are persons most likely to seek to apply the margin scheme on a later sale of the property. Purchasers should consider contractual provisions such as warranties regarding the GST treatment when the vendor acquired the property, and the vendor's date and cost of acquisition.

Should you require any further information in relation to these amendments please contact a member of CBP's taxation team.

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Stamp duty aggregation

A new review ruling, DUT36, issued from the Office of State Revenue on 5 February 2009.

This ruling relates to section 25 of the *Duties Act* with respect to aggregation of dutiable transactions for the purposes of calculating stamp duty.

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Section 25(1) of the Act provides that transactions are to be aggregated for stamp duty purposes if:

- they occur within 12 months
 - the transferor is the same or the transferors are associated persons
 - the transferee is the same or the transferees are associated persons
 - the dutiable transactions together constitute one arrangement.
- agreements relating to freehold property and the business conducted from that property
 - where agreements are pursuant to previously existing options
 - where the properties are sold subject to a development application or approval
 - where completion is conditional upon obtaining development approval in relation to the properties.

The ruling relates predominantly to real estate transactions but will include other types of dutiable property (for example, business asset sales).

The 12 month period commences from the first of the dutiable transactions.

The transferors must be the same or associated persons. The situation is the same for the transferees. If there are more than two transferors or transferees all of them must be associated persons (as this term is defined).

The Office of State Revenue has set out a series of indicia where it believes there would be deemed to be "one arrangement" as required by section 25(1) of *The Duties Act*. These include:

- interdependency clauses
- agreements relating to fractional interest in the one property

There is a general exemption under section 25(2) for home builders who are acquiring vacant land where the transferee is a person authorised to contract to do residential building works and the transferee intends to construct residential premises on the allotments for the purposes of sale to the public.

The aggregation provisions of the *Duties Act* are not well understood. The OSR has sophisticated software which tracks transactions and regularly "catches out" parties who have separate contracts where the transactions pursuant to those separate contracts need to be aggregated in accordance with section 25 of the *Duties Act*. Penalties and interest will be imposed in such cases.

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GST Updates:

ATO Draft Ruling confirms good GST news for property developers

The ATO has issued a draft ruling (GSTR 2008/D5) to confirm its new opinion in relation to credible purpose and adjustments as was originally set out in the ATO Interpretative Decision (ID) 2008/114.

CBP's article "ATO Draft Ruling confirms good GST news for developers" sets out the details of the draft ruling and its importance to developers.

The draft ruling has called for submissions with regard to the operation of the new interpretation and it is expected that sometime in the following months the decision will be finalised in a GST ruling. Until that time, the draft ruling does not operate as law and, as a result, any considerations or application of this ruling should be done on a tentative basis.

Keep a look out for further CBP GST updates as to the progress of the final ruling.

Sale of subdivided residential land

The Tax Commissioner has issued an addendum to a GST Ruling (2003/3) to assist in clarifying when a sale of real property is a sale of new residential premises.

The addendum clarifies the Commissioner's view in relation to the application of the input taxed provisions of *The GST Act* (s9-30) to the supply of subdivided vacant land. The ruling now states that, where the owner of rented residential premises later subdivides the land into two blocks, one with a residential building and the other a vacant block, *The GST Act* (and in particular s9-30(4)) does not apply to make the supply of the vacant block input taxed. The subdivision of the land is considered to be a use of the land that is not in connection with input taxed supplies.

Sale of vacant land subject to GST

Touram Pty Ltd v FCT 2008 ATC

In a recent decision of *Touram Pty Ltd v Federal Commissioner of Taxation* the AAT has held that a sale of vacant land was subject to GST and that the purchaser was therefore entitled to an input tax credit for its acquisition.

The case involved property owners who had acquired and owned vacant land for an extended period of time with a view to selling it in due course for a profit. Although the owners did not intend to develop the land themselves, they did the groundwork for a development in a business-like way. Accordingly, the AAT concluded that the vendors were conducting a property investment enterprise. It followed that the

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vendors made a taxable supply of the land to the taxpayer within the meaning of s9-5 of *The GST Act* and were therefore eligible for input tax credits.

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Is a second-hand car yard a second-hand goods shop?

The Administrative Decisions Tribunal found that initially, it was.

Lifestyle Vehicles Pty Limited wanted to bring an action in the ADT for breach of its sub-lease from Car City Minchinbury Pty Limited. To do so it needed to prove the lease was for a "retail shop".

In schedule 1 to *The Retail Leases Act 1994* (NSW) there is a list of 164 types of activities deemed to be "retail shops".

Lifestyle argued its second-hand car yard was a "second-hand goods shop". It said the description should be interpreted broadly because Parliament intended the Act cover a broad variety of retail activities. Second-hand goods, it claimed, would include second-hand cars because cars are goods.

Deputy President Olsson SC of the ADT accepted this argument. He

said that the argument was also in accordance with the purpose of the Act, protecting the operators of retail businesses.

Car City appealed to the Appeal Panel of the ADT (*Car City Minchinbury Pty Limited v Lifestyle Vehicles Pty Limited* [2008] NSWADTAP 76).

The Panel – Deputy President Chesterman and Judicial Member Molloy – scathingly overturned Olsson's decision.

First, the Act did not seek to protect the operators of retail businesses. It sought to alter the existing law to benefit both lessors and lessees.

Secondly, the list in schedule 1 was not intended to be inclusive. It is exhaustive. Activities not appearing in the list are not "retail shops" as far as the Act is concerned.

Thirdly, a second-hand car yard does sell second-hand goods but to divide it up like that goes against its meaning in common speech. A second hand goods shop is not a second-hand car yard. It is a junk shop, pawn shop or op shop, etc.

The Appeal Panel's guidance can apply more generally to all 164 items in schedule 1. The items mean what they say. They should not be contorted to include things which would not ordinarily be included.

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Amendments to Succession Act

Succession Amendment (Family Provision) Act 2008

The Family Provision Act 1982 allows an eligible applicant to claim for provision from a deceased estate on the grounds that the deceased testator did not adequately provide for the claimant under the deceased's will. With more divorces, re-marriages and same-sex relationships these days, and the increasing value of estates with the rise in property prices, there has been a rise in the number of these claims, even in estates which are relatively small in value. In some matters, the legal costs can almost deplete the estate.

Partly as a result of the alarm with respect to the increasing number of family provision claims and partly due to the Council of Australian Government's commitment to uniform succession laws, a new *Succession Amendment (Family Provision) Act 2008* commenced on 1 March 2009. The new Act will replace the existing *Family Provision Act 1982* and will affect a person's right to claim against an estate or challenge the provisions of a will.

The new Act applies to estates of all persons dying after the commencement of the Act. The main changes are:

- the time period in which a person may bring a claim under the Act is reduced from 18 months to 12 months from the date of death of the testator
- the executor or administrator of a deceased estate is protected against personal liability from claims against the estate if he distributes after six months from the date of death and has advertised, in the required form, his intention to distribute the estate
- the Supreme Court may make rules for proceedings in small estates (defined as an estate having a value of less than \$750,000) and these rules may include rules regarding;
 - how proceedings are to be carried out, including proceedings for dealing with the claim in the absence of the parties
 - informal evidence on property values or medical conditions of the deceased
 - the quantum of legal costs which can be awarded.

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Although the application of the new law is limited to estates of persons dying after the commencement of the Act, the shortening of the time period in which a person may bring a claim, and the power granted to the Supreme Court to make rules affecting the proceedings of estates worth less than \$750,000 (including the quantum of legal costs that may be recovered), is aimed at persuading disputing family members to settle their disputes rather than bringing them to Court.

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