Property

Newsletter

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Caution needed for caveat wording

The most recent decisions of the Supreme Court of New South Wales with regards to caveats and whether the form of caveats can be maintained due to the wording of the interest claimed by the caveator is a decision of *Morkaya v Parkinson*, a decision handed down on 17 June 2010.

This related to an application by a proprietor of a property at Homebush Bay to have two caveats removed.

Effectively, even though the Court held that each party had, on the strength of the supporting documents, a caveatable interest, the form of each caveat was defective and the Court ordered that each caveat be removed.

The first caveat in favour of Fairfax Media claimed an interest pursuant to a deed of guarantee. This caveat was struck down as it did not state the nature of the interest or estate claimed.

The caveat failed to state whether the caveator's interest was as a beneficial owner, as a beneficiary pursuant to a trust, or as a chargee or mortgagee.

The Court held that the caveat was defective because it did not describe, in a way which enable a reader of the caveat or the registered proprietor to ascertain, what interest the caveator was actually claiming in the land and whether any proposed dealing would be inconsistent with that interest.

The caveat to Mr Parkinson (whilst it was acknowledged by the Court that he certainly had a caveatable interest under various documents) was held to be defective as to its form.

It claimed what was described as an equitable interest pursuant to a loan instrument. The Court held that describing an estate or interest as legal or equitable does not comply with the requirements of the regulations as to the description of the estate or interest claimed in the caveat.

What has to be shown is whether the interest claimed by the caveator is an interest as a beneficial owner, beneficiary, chargee, mortgagee or other interest.

As the form of caveat failed to do this (notwithstanding Mr Parkinson's legitimate caveatable interest in the property), the caveat could not be sustained.

It is therefore essential, when preparing caveats, that you clearly set out what interest is being claimed in accordance with the regulations, as otherwise you risk having the caveat struck down if it is challenged by the caveator or any other party.

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Changes to the Duties Act from 1 July 2010

Transfers to self managed superannuation funds

Changes to the *Duties Act* now provide that duty of $50 is payable on a transfer or an agreement to transfer dutiable property from a person to the trustee of a self managed superannuation fund, if:

- the seller is the only member of the superannuation fund or the property is to be held by the trustee of the superannuation fund solely for the benefit of the seller, and
- the property is to be used solely for the purpose of providing a retirement benefit to the seller.

This new concession applies in relation to all forms of dutiable property including land.

Mortgage duty

Changes clarify the method for determining the value of property secured by a mortgage when the property relates to property that is partly within and partly outside New South Wales.

It is now clear that more than one relevant document can be used for the purpose of determining the value of the property affected by the mortgage. The documents used must provide a value of all the property affected by the mortgage.

Further, for a mortgagor who is a member of a group, the consolidated accounts of the group (if available and relevant) are to be used for the purpose of calculating the dutiable proportion for the mortgage. In that case, the only debt or equity to be taken into account is the debt or equity as disclosed in the consolidated accounts. This requirement

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prevents a practice of double counting which reduces the dutiable proportion of the mortgage.

Also, a method of calculating the value of the goodwill of a business or intellectual property in New South Wales is introduced, using a test similar to the test for business assets in chapter 2 of the *Duties Act*.

Transfers between custodians

The Act now provides for nominal duty on certain transfers of dutiable property that are made between custodians of different trusts where there is no change in the beneficial ownership of the dutiable property and certain other requirements are met.

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Retirement villages

New draft GST public ruling

In a new draft public ruling, the ATO has given particular focus on how GST applies to the development and subsequent sale of retirement villages that will:

- decrease the level of GST credits that can be claimed when developing retirement villages, and
- significantly increase the GST cost of selling retirement villages.

If the draft position is finally adopted, it will certainly make development of and investment in retirement villages more financially challenging.

More GST on development

The draft ruling sets out a GST methodology that is likely to significantly reduce the amount of credits developers can claim during the development phase.

In particular, the apportionment methodology that is generally adopted by developers (to apportion taxable and input taxed supplies and to determine the entitlement to credits), must now include the benefit derived from the "interest free component of loans provided by incoming residents". A developer must now recognise the benefit of not having to pay interest to residents on loans from residents.

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This results in the developer receiving additional input taxed consideration and reduces the amount of credits that can be claimed.

More GST on sales

Under the draft ruling, when a developer sells a retirement village and a purchaser becomes liable to repay outstanding loans owed to residents, the assumption of that liability (the obligation to repay the loans) is included as consideration for the acquisition of the village. This is likely to significantly increase GST liability on the supply of many retirement villages.

If you have sold a village in the last four years, the ATO may require you consider whether you have an additional liability. The ATO may impose interest or penalties. To the extent that the sale contract provides for it, buyers may be called on by sellers to reimburse those amounts.

Buyers will be entitled to a credit only to the extent that the apportionment methodology allows it, taking into account the worsened situation described above.

Transitional provisions

The draft ruling does include a number of transitional provisions that limit the impact of the draft ruling on some taxpayers. However, specific limitations mean that it is likely that a large number of taxpayers will still pay significant additional GST liabilities if the draft approach is upheld.

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Mandatory commercial building disclosures

The Australian Federal Government has introduced a scheme which commences on 1 November 2010 whereby owners and lessors of commercial space with a lettable area of 2,000 square metres or more are required to make certain disclosures as to the energy efficiency of buildings.

During the first 12 months of operation (ie from 1 November 2010 to 30 June 2011), a valid National Australian Built Environment Rating Systems (**NABERS**) Energy base must be disclosed. If, by virtue of

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the inadequate metering, a base building rating cannot be effected, a whole building rating will need to be disclosed.

From 1 November 2011, the NABERS Energy star rating will need to be disclosed in any advertisement about the sale, lease or sublease of offices having an area of 2,000 square metres or more.

From this date, a Building Energy Efficiency Certificate (**BEEC**) must also be disclosed which will include the NABERS Energy base building rating, tenancy lighting information and generic energy efficiency guidance.

The BEEC (which is valid for 12 months) must, at the time of disclosure, still be current and must be registered on a public register.

There are limited exceptions as follows:

- strata title offices
- newly constructed offices for which the certificate of occupancy issued less than 2 years beforehand
- the sale of a building through sale of shares or units
- the sale of a partial interest in a building
- short term leases and subleases of 12 months or less.

Building owners need to now be preparing for the disclosure requirements under this new regime and tenants and purchasers should ensure that this information is provided. Tenants and purchasers should require that the contracts or leases contain appropriate disclosures and warranties with regards to these energy matters.

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Holding over or a new lease?

The usual situation you have is a lessor secures a lessee in premises for a fixed term, the lessee complies with their obligations under the lease and both parties become comfortable with the other during the term of the lease. Sometimes, the intention of each party with respect to the use of the premises after the expiration date of the lease may not be communicated to the other. The lessor may be comfortable with the lessee being in the premises but has an "end date" in mind, that being the expiration date of the lease. The lessor may have another preferred lessee in mind or have redevelopment or demolition

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plans for the premises but has not communicated this properly to the lessee. On the other hand, you have the lessee who is comfortable with being in the premises. It has not heard from the lessor as the end date of the lease draws near and assumes that it will be there for longer than intended. Unfortunately, this is not always the case.

This issue arose in a recent decision in the Administrative Decisions Tribunal of New South Wales (**Tribunal**). In the case of *Davis -v- Sydney Harbour Foreshore Authority* (**Davis**) it was held that parties must clearly agree on the basis on which a lessee remains in occupation after the end of a lease with an end date. The lessee leased premises from the lessor for five years with the lease commencing on 1 November 2000 and expiring on 31 October 2005. The lease was a retail lease and contained the usual holding over provisions, where if the lessee was holding over after the expiration date of the lease with the consent of the lessor, the lessee would be a monthly lessee. The tenancy would be terminated by either party providing one month's written notice to the other.

On 21 March 2005, which was approximately seven months prior to the expiration date of the lease, the lessor sent a letter to the lessee outlining that there were redevelopment proposals, including demolition plans in place for the premises and that a new lease would not be offered to the lessee. The works to the premises were not anticipated to commence until some time in September 2006 and the lessor advised the lessee that it could remain in the premises pursuant to the holding over provisions in the lease.

On 3 July 2006, the lessor served a notice to vacate on the lessee and the lessee was required to vacate by 30 September 2006. The lessee had been holding over under the lease from 1 November 2005 to 30 September 2006.

The lessee made an application to the Tribunal claiming they had a lease for five years by reason of extension of the lease because the extension for in excess of six months had that legal effect under the *Retail Leases Act* 1994 (**Act**). The lessee claimed that the holding over provisions in the lease did not apply to their occupation during that time after the expiration date of the lease. Its reasoning was that the rent was the same rent and was different to the rent that was determined under the holding over provisions in that lease.

Subsequently, the application was dismissed on the basis that the lessee's occupancy of the premises from 1 November 2005 to 30 September 2006 did not create a tenancy for a term exceeding six months but was a holding over under the lease. There was written evidence to show that there was a clear statement that the lessee's

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occupation of those premises after the expiration date of the lease would be on the basis of the holding over of the existing lease.

In particular, a lessor needs to be aware of the provisions of Section 44 of the Act which provides that not less than 6 months and not more than 12 months before the expiration date of a lease, the lessor must by written notification to the lessee either:

- offer the lessee a renewal or extension of the lease on terms specified in that notification (including terms as to rent), or
- inform the lessee that the lessor does not propose the lessee a renewal or extension of the lease.

Section 44(3) provides that if the lessor fails to provide this notification to the lessee, then the term of the lease is extended until the end of six months after the lessor gives the appropriate notification required by section 44. This will only occur if the lessee requests that extension by notice in writing to the lessor before the lease would have otherwise expired.

Each lessor needs to be diligent in ensuring that their intentions are clearly communicated to the lessee well before the terminating date of the lease. All communications should be recorded and be in writing and the lessor should request an acknowledgement of receipt from the lessee. If a lessor does not do this, then the lessor may bear the risk of the lease being extended which may be detrimental to the lessor, particularly if there are development plans for the premises to commence on a stipulated date. As a result, the lessor may also incur additional expense and become involved in litigation to seek to have the lessee vacate.

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