RECENT DEVELOPMENTS IN AUSTRALIAN STAMP DUTY

QUESTIONS AND ANSWERS

Question - John Field (Speaker):

Could I perhaps take the opportunity, while we are on the topic of bill facilities as Bill was speaking of, to ask a question of Bill about them. You commented, Bill, that the authorities have borne out the proposition that at the time of accepting or discounting of a bill there is no advance made. There are some interesting issues that arise at the time of a default by the borrower under a bill facility as to whether there is an advance involved there. Are there any comments that you would like to make on that please?

Response - Bill Wallace (Speaker):

The Victorian Stamp Duties Office has a practice note where it says that it accepts that the mortgage of a bill facility is not dutiable at the time the mortgage is created but would expect there to be duty at the time of a default in the bill arrangement.

Comment - John Field (Speaker):

That is so. It applies to the time of a default, but it goes further to apply only when the acceptor of the bill pays the face value of the bill out of its own funds. So it contemplates an actual payment of funds. Again, this is the same concept you were speaking of a moment ago, by the accepting bank. So that if, for example, the accepting bank had brought the bill back in the market, which under the Bills of Exchange Act of course discharges the bill, under the terms of the bill facility agreement there would normally be the provision which as between customer and bank preserves the indemnity liability. There may not at the time of the default by the borrower be any putting out of funds by the bank.

Response - Bill Wallace (Speaker):

Yes. It think there is some difficulty in saying that the event of default itself can trigger an obligation to up-stamp. If one accepts, in taking the Victorian provisions as an example, that at the time of executing the mortgage and entering the bill arrangement it is not a loan or advance and that the mortgagor has been put in funds by the arrangement, then the bill transaction has taken place. It seems to me to be stretching the up-stamping provisions to say that at a later time in the event of the default you then have a loan or advance secured by the security which is made in a sense in addition to the obligation that is secured at the earlier time. In order to have the obligation to up-stamp, you need not only a loan or advance, but you have to make sure it is that loan or that advance which is secured by the mortgage itself; it is not the provision of funds which is the dutiable activity. I think that there is some difficulty in arguing that, even with a bill

facility. Certainly with a security over a guarantee facility, as I said, the New South Wales and the Victorian Commissioners have now agreed that it is too difficult to say at the time of default that this represents a loan or advance. I agree it is less clear with a bill facility, but I still think there are difficulties in requiring an up-stamping obligation. You do not agree, I can tell by your look, John.

Response - John Field (Speaker):

If the bank has actually paid out funds it is stretching the point to say that the customer's obligations to indemnify the bank for those funds is not an obligation to repay an advance. I do not think that to have an advance, the lender needs to disburse funds to the same person who has got the obligation to pay them back. I think that is pretty clear, because you can make a loan to me by paying it to Keith at my direction. That is clearly still a loan to me if it is structured in that way. So I think that the stamp duty authorities would be on reasonably strong grounds in suggesting that there is an advance in that situation under a bill facility.

Comment from the Floor:

Just one point. In practical terms what has happened is that the customer has paid the bank when the bill matured and the bank has to create an overdraft account when it pays out on the bill. So when that occurs, from an accountants point of view, the customer has been made a loan or overdraft.

Response - John Field (Speaker):

I think that is right if the accounting entry is that the bank debits an account of the customer. I have heard it suggested that the bank can set up an account which is not an overdraft of the customer but is a general account for redemption of commercial bills - or some name like that - and can debit that account and simply rely on the contractual indemnity in the bill facility agreement for its entitlement to recover funds from the customer. I have heard it argued that that avoids there being an advance. For the reasons I was mentioning before I think there probably is still an advance even then, but more particularly if there is an overdraft account that is debited. I agree.

Comment - Keith Nathan (Chairman):

I suspect that in view of the defaults that we have seen in some of the types of facilities that are behind the major collapses, this could become a significant issue.

Comment - Peter Fox (Mallesons Stephen Jaques):

Of course, this depends on the idea that the mere debiting of an account by the bank constitutes an advance by the bank to the customer. You can imagine certain advances where there is a provisional overdraft accommodation on particular accounts and there is authority to debit that account to obtain the funds. But that would not generally be the case. I would not have thought that the mere debiting of a customer's account with an item imposed to the bank on a quite different account necessarily constitutes any advance to the customer. I do not think it is necessarily a factor which brings a fundamental change in the nature of the entitlement of the bank. I would have thought that the entitlement is still basically under the customer's indemnity. That is my understanding of it.

Response - Bill Wallace (Speaker):

So you would say the relationship is still one of the bill arrangement transaction. In the ***Brick and Pipe*** case, Mr Justice Ormiston does not go quite as far as discussing the default situation, but his comments support that view, in that he says that while you can pick out particular aspects of the whole bill arrangement at different stages which if looked at in isolation are very much akin to the provision of funds like the provision of a loan, you have still got to give weight to what the parties are involved in. They are involved in the bill arrangement. The cases say that is not a loan. It is wrong to isolate one later part of a transaction and say, therefore, this mortgage is a mortgage over a loan. So I think there is perhaps a slender thread of support between the lines there.

Comment - Tony Browne (Arthur Robinson & Hedderwicks):

I just have a query in relation to Victoria where duty can be imposed on foreign securities and nobody quite knows what a foreign security is. There is a provision which refers to a security "transferred, assigned or negotiated" in Victoria. I do not know whether John has any view or if he has had one of these foreign securities. You should really be wary of this and make sure that whatever you do, you do not sign in Victoria, otherwise you will eventually attract duty at mortgage rates on the security itself.

Response - John Field (Speaker):

I think that is a genuine concern Tony. The foreign securities provisions in the Victorian Act are often overlooked, almost always not understood, and as far as the Comptroller is concerned, for the most part ignored, as I understand it, although she refuses to give any acknowledgement of the fact that she will not be assessing documents under the foreign security provisions. I am not aware of any document ever that has been assessed as a foreign security in Victoria. I do not know if anyone else is aware of one. I agree, on an assignment of the sort that Bill has been talking about, I would think it well worth the price of flying to Canberra (not that one needs to go to Canberra for that) or at least signing it outside Victoria.

Response - Bill Wallace (Speaker):

It is a very good point Tony, it is one that I did not mention. We have had one situation fairly recently where the Comptroller has raised the issue of the question about whether the foreign security provision (definition in s137D of the Victorian Stamps Act) would apply and the words are that it covers a security which:

(a) is made or issued in Victoria;

(b) upon which any interest is payable in Victoria; or

(c) which is assigned, transferred or in any manner negotiated in Victoria.

I think the Stamp Duties Office view is that latter part that covers either a case where you actually sign the assignment agreement in Victoria, which is simply what it says, and it may also apply where you transfer outside Victoria where the underlying security that is being transferred is located in Victoria. Now that seems to me to be even wider than the words of that wide definition, but it does make it very necessary to be conscious of that in a Victorian transaction.

Question from the Floor:

I have a question for John in relation to the very simplified securitisation structure as to whether he had any concerns about the declaration of trust where you have got pre-existing mortgages and identification?

Response - John Field (Speaker):

I assume that your question relates to a declaration of trust where the mortgage is conferred on the trustee for the note holders? [Yes.] Certainly, in a typical security trust deed, there would not be a declaration of trust by the trustee. There would simply be a mortgaging of whatever the mortgaged property is, whether it is the underlying mortgages or the lease receivables or whatever, in favour of the trustee, and I do not think, certainly in the way that a typical trust deed is drafted, that would involve a declaration of trust.

Question - Bill Chapman (Phillips Fox, Sydney):

A question for John Field on a corporate reconstruction. If there was a pre-existing approval given for a corporate reconstruction, but with the reconstruction being of an on-going nature so that there were continuing things to do and instruments to be signed under that reconstruction, are those further steps going to be affected by the new rules or by the change in requirements and criteria set out in the new rules?

Response - John Field (Speaker):

I do not believe it is. But Bill may have some other comments on that as well. As far as I am aware the new ruling does not change the position on that point, once an existing exemption has been given.

Response - Bill Wallace (Speaker):

No, that is right. Once the approval is obtained under the old ruling, there is a reference number and that stays for a number of years as and when parts of the reconstruction are being carried. There is no need to comply with the new ruling unless of course it is varied and it has changed in nature.

Question from the floor:

My question concerns a collateral security being given some years later. How would the various stamp duty authorities look at the documents in terms of the pro-rata calculations?

Response - Bill Wallace (Speaker):

Provided the new security is for the same moneys, then under the collateral provisions (or what used to be called the collateral provisions in some places) there should be no problem. It is still for the same moneys, it is exempt, there should not be duty. A problem arises when you have an up-stamping situation on the primary security and the question is then, at that new time, do you have to apply new pro-rata amounts if some of the property has changed? The answer seems to be that you do not have to, except in Western Australia. The provisions on an up-stamping that deem the up-stamping to be done pursuant to a new instrument only apply for the purposes of the time limits, and the

authorities seem to suggest that therefore you do not have to re-apply a new pro-rata rate, you still up-stamp on the basis of the original pro-rata rate. The Western Australian provision is different. But on your basic question, it should not matter for the collateral security, and there is no time limit for getting the exemption.

Conclusion - Keith Nathan (Chairman):

Ladies and gentlemen, on behalf of the Association I would again like to express our appreciation to both Bill and to John. We are indebted, and if you can excuse the pun without stamp duty, for the work they have undertaken for us and the Association on the stamp duty issues over the years. The law is becoming more and more complex and they have both put in a lot of work and effort in making the presentations today. Please express your appreciation in the usual manner. Thank you.