
AUSTRALIAN STAMP DUTY

QUESTIONS AND ANSWERS

Question - Ian Samuel (Phillips Fox):

I was fascinated, Mr Mann, by your comments and what I call the slide show. What worries me is that all that you have said has been documented by you. That we have various industry groups - the Bankers Association, Finance Conference and this particular group and I just wonder whether it is time that all of the groups got together and applied the political pressure which is obviously needed to achieve the aims that you have so ably demonstrated this afternoon? Is it not the time during the rough times of the recession that we got the thing on the rails instead of having more papers and more discussion?

Response - Jeff Mann (Speaker):

I agree entirely with you. My perception is that governments will only act if there is constant, visible, vocal criticism and lobbying. I think the more pressure, public statements, critical press releases - that is the sort of thing which has got to be done. I think that there is no other approach to it and I think that it is demonstrated econometrically, which I am not qualified to do, that all of this is costing the Australian community a lot of money. It has got to end up in its product somewhere. And if that leads to the sale of our products overseas being less competitive than they should be, then demonstrating that is the sort of thing which is going to get results.

Question - Joanne Seve (Freehill Hollingdale & Page):

I agree with all of the comments that have been made today. But just on the law as it presently stands I would like to address to Peter Green a question - it may be addressed in his paper - and that is the question of his views on the situs of units in a unit trust scheme in circumstances especially where the property the subject of the trust is in differing jurisdictions and particularly in the context of loan security duty. And perhaps another question addressed to Peter Green, whether there can be a transfer of goodwill in circumstances where there is effectively a start-up of a new business? In other words the existing business is one the assets of which can be destroyed or cancelled and the intended purchaser can start up the new business pursuant to the vendor arranging for new contracts, for example, to be entered into? Whether goodwill necessarily attaches to the transfer of an existing asset for legal as distinct from accounting purposes?

Response - Peter Green (Speaker):

In relation to the first question which is the location of units in a unit trust scheme particularly from the perspective of loan security duty, I think I should make clear the significance of that distinction. There are provisions in, for example, the stamp duties legislation in New South Wales which create a division which deals with the stamping of

units in a unit trust scheme which renders irrelevant the general law analysis of where the units would be located by attracting the operation of the New South Wales provisions in a case where the trustee or manager of the unit trust scheme were resident in New South Wales. So I think that is really what Joanne's question is seeking to avoid.

If we are looking at it from a loan security point of view where you do not have deeming provisions then I take my guide from the High Court's decision in **Charles'** case in which the High Court noted that a unit in a unit trust, unlike a share in a company, is not a separate piece of property. It is merely an index or measure of the undivided proprietary interest that a beneficiary has in the property of the trust. And on that basis I take the view that if the property of the trust concerned is located in a number of jurisdictions, to say to someone that he has ten units in a trust which has 100 units on issue is to say nothing more than that person has a 10% interest, undivided proprietary interest in each of the assets of the trust. And that interest, in my view, if the unit conferred on the holder a proprietary interest, would represent interest in property located in more than one jurisdiction.

I need to make one qualification there and that is that the terms of the unit trust do not deny the holder a proprietary interest in the underlying assets. I believe it is possible to draft a unit trust and have seen them drafted in such a way that the unit holder has nothing more than an equitable chose in action enforceable against the trustee of the kind that the Privy Council recognised that a residuary beneficiary in an unadministered estate held. And if the unit trust were of that kind, such that the unit holder had no proprietary interest in the underlying trust property, then I think the equitable chose in action enjoyed by the unit holder would be located according to the principles I described earlier in that jurisdiction in which it would be enforced. And the jurisdiction in which it would be enforced would depend on a number of factors - the residence of the trustee, if the trust were an express written trust and the terms of that trust provided for the trust to be governed by the law of a particular jurisdiction, and for disputes and any litigation to be heard by the courts of a particular forum, then those matters would be taken into account in deciding where that equitable chose in action were located.

Turning to the second question which I understood to be a purchaser using assets that the purchaser acquired from someone other than a vendor, started up what Joanne described as a new business, with assistance from the vendor, perhaps introducing the old clients of the vendor to the purchaser.

I think you need to take a couple of points into account. The first would be that in those circumstances there may not be an instrument in existence which could be characterised as a transfer or an agreement to acquire goodwill by its terms. Now that is not necessarily fatal to the potential liability for stamp duty because the Claytons Contract provisions can apply in circumstances where there is a transaction which causes a change in the ownership of an estate or interest in goodwill. And furthermore, I would note the decision of the English courts in the **Eastern National Omnibus** case where a company carried on a business of running buses on particular routes, and a new licence to run on those routes was applied for by a different party. The original proprietor of the bus business entered into a restrictive covenant with the new licence holder, where the licence had been acquired from some local government, under which the old proprietor agreed not to run in competition with the new proprietor. The English courts found that that restrictive covenant was dutiable with conveyance duty under the UK legislation as a conveyance of goodwill.

I think though that the answer to Joanne's question is really to be found in the facts that she put to me which were to the effect that the purchaser set up a new business. Now maybe this is a cute way of getting out of the problem in that it really begs the question,

but given what was said by Lord Macnaghten in **Muller's** case that goodwill is the thing which distinguishes an established business from a new business - if you can properly characterise what the party referred to in Joanne's question is doing as setting up a new business, then I would say given what Lord Macnaghten said in **Muller's** case that no goodwill has passed. If it is a new business then the activities of the "purchaser", albeit with the assistance of the previous proprietor of the business, would generate new goodwill attributable to those activities.

Comment - John Field (Chairman):

Well ladies and gentlemen, I am sure that we could go on for hours on different questions, but our time is up and in fact we are keeping you from the Annual General Meeting of The Banking Law Association Limited - which I have been asked to remind you about and which is on right now in the next room. So I would encourage you to attend there and hear all about the activities of the Association over the last year and its plans for the forthcoming year. It remains only for me now to thank on your behalf Peter and Jeff for their presentations this afternoon and in particular for their written papers which, as you will appreciate when you see them, have had very considerable time spent on them. They have done an excellent job and I congratulate them both.