STAMP DUTY UPDATE

QUESTIONS AND ANSWERS

Question - Philippa Colman (Blake Dawson Waldron):

I have a question for Peter relating to section 29(1) of the New South Wales *Stamp Duties Act* and the corresponding provision in Western Australia. If these provisions apply generally and not just to admissibility in evidence, is there really a terrific likelihood of that having a practical effect? I mean for instance, if a receiver were appointed before a document was stamped it is surely very unlikely that the point would be taken; the document could subsequently be stamped with retrospective effect, I would have thought, and that would validate the exercise of the right to appoint the receiver. But even before then is it terribly likely that anybody would challenge on the basis of non-stamping?

Response - Peter Green (Speaker):

I think the answer to that again is - you have raised the practical implications - I think it turns on practicalities. The evidence is, if you look at the rash of cases that have raised this issue in the last couple of years, that the point is being taken and we have seen companies desperate to have set aside the appointment of receivers where receivers have been appointed. This is a point that could well be taken. Now in the Rothwells and Connell case, the amount of duty concerned is enormous. And it is possible to say very quickly, well why would anyone bother taking the point if it can be cured simply by paying the stamp duty. Well simply paying the stamp duty might involve someone dipping into pockets to find funds that are not readily available. And if we are looking at it from a banker's point of view, why would a banker, at the time the security is being taken and maximum leverage is available because the borrower is quite keen to get hold of the funds, not insist on the instrument being duly stamped to avoid the possibility that the banker will have to tip its own hard-earned funds into the coffers in order to be able to rely on its security at a later time, because even though a properly drawn security would make the definition of money secured extend to any stamp duty that was paid by a financier on account of the other party? At the very time at which you are seeking to enforce the security, you do not really want to be topping up the amount of the liability. So I guess my answer to you is, the evidence is that people who are desperate will take this point, and it may not be just a short term hiccup if the amount of duty is significant.

Comment - Jeff Mann (Speaker):

Just in relation to section 56 Peter, I understand that an assessment was issued recently and one of the Offices of State Revenue in Queensland assessing to conveyance duty marina berth licences. So that may be some indication that the impact of this section is very difficult to define.

Response - Peter Green (Speaker):

It might seem a very abstruse provision that we do not need to worry about, but I think if you think about it next time you sit down and look at a document that just comes across your desk or you are asked to draft a document, you run that through the mill, section 56 or 71(1) or 70 in Queensland, New South Wales and Western Australia? And then ask the question, well why is it not caught? I think the area

requires some pretty careful consideration if, as Jeff has just suggested, the stamp duty authorities have suddenly had the curtains drawn from their eyes and recognise the potential. I mean it would be very ironic if, having just removed relatively recently the catch-all duty in Queensland on agreements or deeds not otherwise charged with duty that were liable to a fixed nominal duty of a small amount, we suddenly now have a catch-all provision that clobbered a large number of commercial agreements with ad valorem conveyance duty. You explain that to a client, you will get that sort of look that says you are crazy.