STAMP DUTY

QUESTIONS AND ANSWERS

Question – Steven Stevens (Freehill Hollingdale & Page, Melbourne):

I would like to ask Harry Lakis about the Queensland position regarding the transfer or assignment of a debt which is secured by a real property mortgage and what is the position regarding conveyance duty on a declaration of trust.

Response – Harry Lakis (Speaker):

Steven – the first question – when you have a transaction which does involve a transfer of an interest in a mortgage over land then you will incur a $5 assessment on that transfer. If you separately have an instrument which transfers a loan facility agreement or a loan deed then it will pass through under the other concession which says that if you have a land mortgage transfer then ancillary and incidental securities can come across with it at the same rate. So that the catch is you must have a transfer of mortgage now solely over land. So you manoeuvre yourself to ensure that you have a mortgage over land, you then transfer that mortgage over land and then you can take across (and I would suggest in a separate instrument of conveyance) your loan deed or your loan agreement. I have obtained a ruling from the Commissioner that if your document is collateral to the land mortgage then it will be considered ancillary and incidental as well.

But in a recent problem I encountered where I had a bare mortgage debenture and the words of assignment were merely of the mortgage debenture because it was a refinance and not a transfer of the debt, the Commissioner did try to assess – received a $600,000 assessment purporting that some debt somehow went across, although there were no words of conveyance of a debt. We ultimately persuaded them that there was no debt going across.

This somewhat leads to your next question on declaration of trust, because what I was left with in that transaction was a bare mortgage debenture going across which at the point in time did not secure anything. I said to the Commissioner, "well, what is that worth?" Probably get one prepared for $400 as coming across. It had a duty endorsement which would have been available for new loans to that particular on account borrower. There were multiple issues in that transaction. The Commissioner assessed it to nil duty.

I postulate that it might at least have been worth the endorsement of duty on it and I might have been up for conveyance duty on the $60,000 endorsement of duty on it.

So you ask, what about a declaration of trust in respect of a pool of securities. I suppose the question is what is that pool of securities worth and where are they situated? That raises issues of speciality deeds and if they are situated in Queensland, where you declare your trust because I think the Queensland provisions are not so precise as to say that you only pay declaration of trust duty on Queensland property so you might properly not declare your trust in Queensland. And then the question is what is the value of the pool of securities to the lender? If you declare your

trust before the money goes out the door, then I think you would be on safer ground than if your money goes out and you are declaring a trust in respect of a pool of securities which you rely on to get that money back.

Response: Peter Green (Speaker):

I want to make two comments – one related to what Harry has just been talking about. Steve made a reference to concessions in other jurisdictions. New South Wales introduced an express exemption so that a declaration of trust in respect of a mortgage would not attract duty. It is highly controversial whether an exemption was in fact necessary because the duty imposed upon a declaration of trust is the same as upon a conveyance of the subject property. If there is an exemption that applies to a conveyance of mortgage as there is in section 97AE in New South Wales and you logically ask what is the duty that would be payable if this were a conveyance of the mortgage, the answer is zero, and you do not need a special exemption because you should get the same outcome in relation to a declaration of trust. But certain assessors at the New South Wales Office of State Revenue did not seem capable of going through that fairly simple process and convinced themselves that there could be a liability to *ad valorem* duty and that prospect led to submissions that this was outrageous, so they introduced an exemption to deal with the issue.

The second comment really goes to Glynn's thought-provoking paper and it might help those of you who are tossing and turning wondering whether you should read *Allders* or the *Wik* decision next, I would suggest to you that you should read the *Wik* decision. I saw a very small paragraph in *The Financial Review* a couple of months ago which reported that because the States were threatening to refuse to assist in collecting the superannuation surcharge that the Commonwealth was seeking to impose, the Commonwealth in a cat fight said that they would not enact retrospective Commonwealth legislation to overturn the decision in *Allders* case. I thought, that is interesting, and I followed it up. I spoke to the Commissioner of Stamp Duties in New South Wales quite recently at a public function and referred him to that article in *The Financial Review* and queried whether there was any substance to the story. He confirmed that there was, that in fact it is very close to an agreement having been reached between the Commonwealth and the States for the enactment of retrospective Commonwealth legislation with an ambit that is not completely clear which would have the effect of overturning the decision in *Allders* case. Now the Commissioner was no more specific about that, but he did at least confirm that there had been negotiations about it for a period of time and it was very close to being a done deal. So whilst Glynn's observations about *Allders* case are thought-provoking and the issues are contentious, it may prove to be the case, depending on the scope of this legislation and depending upon whether it is enacted, that the matter becomes academic.

Response – Harry Lakis (Speaker):

Peter I might add – when our Treasurer in the introduction of her talk about new directions of the OSR, she mentioned some of the challenges. One of the issues she said was that the High Court decision in *Allders* means we have to find a way of continuing to tax activities at airports and other Commonwealth places. And when looking at what the duty night have been on a bid for the Brisbane Airport, I had heard a rumour that our Office of State Revenue had issued a ruling on *Allders*. I called the person who would have been responsible and they assured me that no ruling had issued to anybody on a private basis, but that the matter had been referred to the Solicitor-General and so I suspect it was part of the process you have just described, Peter.

Response – Glynn Gill (Speaker):

I do not think I can build on what has already been built on other people building on things starting with you, Steven. Putting aside complex transactions such as securitisation, do not forget that you get a free kick out of the Conveyancing Acts and the Real Property Acts when you transfer a mortgage. It carries the mortgage debt. So you often will not need in simple transactions that follow up document. Different questions when you have got guarantees, different questions when you have got partially drawn facilities, but that free kick is available in those two pieces of legislation across Australia as far as I can recall.

The second thing – *Allders*. Look who joined in that *Allders* case. Victoria took on Allders. The Commonwealth joined in the High Court proceedings on the side of Allders. Western Australian and South Australia joined in the proceedings on the side of Victoria. Dawson, the dissenting judge, a very good solid judgment, really gets to grips with the slaughtering of State taxation which can happen on major infrastructure developments as a result of this contest. So Peter's point is absolutely essential and the subtext of his point is, if there is such legislation, read it very carefully. I would love to draft that legislation to accommodate the thoughts that will be embodied in the paper outside for you later. If it just hit *Allders*, how much will it hit? Perhaps not too much at all.

Finally, just picking up on a point that Peter raised about Central Processing Units. There is already in the New South Wales legislation special provisions dealing with centrally controlled computer systems. I once tried to run that argument using cross border exemptions in other jurisdictions, to focus a whole series of accounts where the computer was located – something which we all feel would be desirable, something which the legislation may, if we are lucky, get to in the end. The opposition from the revenue authorities was, as you would expect, immense, because it means aggregating duty into one jurisdiction where all those little bank branches are littered throughout the country. So it will be a most controversial issue to deal with Cyberspace, especially when people say "well Cyberspace is actually my place". All those other people will say, "no, it is not".