

MILLER NOYCE

LAWYERS

MILLER NOYCE HOUSE, THIRD FLOOR, 45-47 HUNTER STREET, HORNSBY 2077
Tel: (02)9987 4855 Facsimile: (02) 477 7107 Email: auslaw@millernoyce.com.au

DDS LEGAL POTPOURRI –DECEMBER 2005

CONTRACTS – PENALTIES – In a recent High Court decision in *Ringrow Pty Limited v BP Australia* a buyback clause in a contract was upheld. The Court unanimously dismissed the appeal and held that the option clause did not amount to a penalty. The law of penalties is attracted, for example, where a contract stipulates that if a breach occurs, the contract breaker will pay an agreed sum which exceeds what can be regarded as genuine pre-estimate of the damage likely to be caused by the breach. The service station operators argued that the clause was a penalty because, amongst other things, goodwill was disregarded in the price. The Court rejected all arguments. It held that the difference between the original price and the buyback price must be extravagant and unconscionable or disproportionate to the point of oppressiveness to amount to a penalty. The Court further held that parties to a contract are normally free to agree upon its terms, and exceptions from that freedom of contract require good reason to attract judicial intervention to set aside the bargains upon which parties of full capacity have agreed. – *High Court of Australia – President of Law Society’s updates.*

CAPITAL GAINS TAX – LOSS OF “ACTIVE ASSET” CONCESSION – Jim Main makes a point in a recent article in the Law Society Journal which can be easily overlooked. The short (*hypothetical*) facts were that a taxpayer owned and operated a hotel (*an “active asset”*) which was sold and rolled into another hotel which they operated for a number of years. No capital gains tax was payable on the sale of the first hotel as it was rolled into the acquisition of the second hotel, which similarly was part of a small business operated by the taxpayer. However, the taxpayer finally sold the hotel business but retained and leased back the hotel (*property*) to the new licensee. As the hotel was no longer an “active asset” the taxpayer was not able to continue claiming the deferment of CGT on the sale of the first hotel. Consequently, upon sale of the hotel business, the taxpayer was then liable to the capital gain payable in respect of the sale of the first hotel. – *Law Society Journal November 2005.*

SUPREME COURT – Affidavits are no longer filed unless there is an order to do so, and they must be numbered on every page – *See Part 35 Rule 9*

BANKRUPTCY – VOID TRANSFERS – SEVERANCE OF JOINT TENANCY – In *Anderson v Peldan [2005] FCA 1179* the Federal Court of Australia held that the transfer between a husband and wife to sever their joint tenancy by mutual agreement (so that it left them holding the property as tenants in common) was not a void transfer under the Bankruptcy Act. www.finlaw.com.au/cases

CORPORATIONS – SEC. 588F – FLOATING CHARGE CREATED WITHIN 6 MONTHS BEFORE RELATION BACK DAY – Sometimes charges created over company assets are not enforceable. The Corporations Act includes a number of sections that deal with charges and when they are and are not void. There are, of course, the registration provisions and the usual preference provisions. A further section that is not so commonly known is Section 588FJ, which deals with charges that can also be classified as preferences.

There are two important pre-conditions before the section can apply. Firstly, the company must be wound up by the Court in insolvency. This section will not apply to any form of voluntary liquidation or winding up other than “*in insolvency*”. The second is that it only applies to floating charges (*charges over floating assets*). The section relates to charges created during the six months ending on the relation back day. There are a number of exclusions. The first relates to when moneys are advanced at the time of or after the charge is given, as long as the advance was “*in consideration*” of the charge. The second exclusion is where the company was solvent when it gave the charge. This is a very common thread in insolvency law. In most circumstances, the transaction occurring when a company is solvent, cannot be overturned.

Creditors, particularly related creditors, will always try to get around these types of provisions. To help prevent this, the legislation contains the provision that deal with entities advancing secured moneys which are to be used to satisfy an unsecured debt, ie. effectively replacing an unsecured debt for a secured one. These advances do not fall under the first exclusion and can be struck down.

Creditors holding a floating charge should always be aware that a Court winding up of the company may void floating charges created within the six months before the relation back date, if a charge attempts to secure past debts. – ***Worrells Newsletter, November 2005.***

CORPORATIONS – INSOLVENT TRADING – DIRECTOR’S LIABILITY – Mr Anthony McInerney, who is a Barrister we have used on a number of occasions, recently sent us a copy of ***ASIC v Edwards [2005] NSWSC 831*** which dealt with various important issues concerning insolvent trading and director’s liability. I have put a copy in the library under Corporations.

EMPLOYEES – GENERAL EMPLOYEE ENTITLEMENTS AND REDUNDANCY SCHEME (GEERS) – The Government introduced GEERS in 2001 to assist employees of insolvent employers, where those employees had outstanding entitlements and little or no likelihood of getting paid. The scheme has generally worked well and has proved to be of benefit to many thousands of wage earners who otherwise would not have been paid. There is a useful summary (copy attached) from a recent newsletter by Worrells. – newsletter@worrells.net.au – ***December 2005.***

BANKRUPTCY AND FAMILY LAW – There was a recent article by David Ash which examines the practical implications of recent case law and family law amendments by reference to a situation where creditors are unaware of a debtor’s family law obligations. Many couples consent to making Sec. 79 orders under the Family Law

Act in relation to the division of their property. It is an important element in bringing a relationship to an end with as little acrimony and expense possible. But the parties must bear in mind that they, or their immediate families, may not be the only persons with a legitimate interest in the outcome. If property interests are altered in a way that may affect one or other of the party's ability to repay their debts, and if the creditors to whom those debts are owed have not been informed, the creditor may be able to apply to set aside the orders. And if the debtor subsequently goes bankrupt, a trustee may be able to slip into the creditor's shoes. – ***Law Society Journal October 2005.***