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DOUG SPENCER'S LEGAL "POTPOURRI" – JULY (2) 2010

COMPANIES – GUARANTEES – DEEMED DIVIDENDS (DIVISION 7A) PART III OF THE ITAA – Care is required to ensure that any guarantee given by a company is contingent on any default by the borrower. If this is not done, the amount of the guarantee will be deemed to be a dividend received by the shareholder/associated party. An example of the sort of situation where this can occur is where a company guarantees a loan to one or more of the shareholders or an associated party such as a family trust (which may operate a family business). If the guarantee has a clause saying that the company is primarily liable for the debt along with the actual borrower, the amount guaranteed will be deemed to be an unfranked (and unfrankable) dividend received by the borrower under Division 7A. The only way to avoid this catastrophic result is to ensure that the guarantee clearly provides that the company (guarantor) will not be liable until and unless there is a default by the borrower. Refer to section 109 UA of the ITAA. There is a useful and brief article by Brendan Cockerill on this issue in the **Law Society Journal July 2010**.

RESTRAINTS OF TRADE – there was an interesting skirmish recently in the Supreme Court of Victoria (***BDO Group Investments (NSW-VIC) Pty Limited & Ors v Ngo & Ors [2010] VSC206***) where an interim injunction was granted against two former directors/accountants of the BDO Group when they left to join a rival firm. The case is interesting because it highlighted the sort of factors taken into account in deciding whether or not an interim injunction would be granted. In this particular matter, it was of relevance that the final hearing was only a month or so away and also the plaintiff was prepared to pay the defendants the income they would have received in the meantime had they not left BDO. Consequently, the Court held that there would be “*no relevant hardship*” suffered by them. Also, of particular interest is that the Court held that, in determining whether restraint provisions are reasonable in the context of the sale of a business, “*the approach of the court is, essentially, based on commercial fairness and the need to hold parties to the bargain which they made*” and further that where the background to the agreement evidences some commercial justification on both sides “*the onus of establishing the reasonableness of the restraints should be easily discharged*”. There is a good summary of the case by Joe Catanzariti in the **Law Society Journal July 2010**.

EQUITABLE CHARGES – procedural and other questions arise in the exercise of a power of sale by an equitable chargee, such as may be contained in an unregistered mortgage or a contract whereby a charge over land is created. Enforcement of equitable charge requires the assistance of the court, which must order a “*sale in court*” of the charged property. Foreclosure of the chargor’s equitable estate is not available as a remedy. But on what terms should the “*sale in court*” be ordered?

There is a useful article by Lee Aitken on this somewhat difficult and problematic area in the **Law Society Journal July, 2010**.

CONSUMER CONTRACT - FAIR TERMS – under the provisions of the new **Australian Consumer Law** which commenced on 1 July, unfair contract terms in standard form consumer contract will be void. However, the contract will continue to bind the parties, if you can still operate without the unfair term. The new consumer law has a wider reach than perhaps realised. It is important to review the terms of standard consumer contracts. There is a useful article on the new legislation by Patrick Dwyer in the **Law Society Journal July, 2010**.

HOME BUILDING ACT AND CLAIMS AGAINST BUILDERS – the recent decision of the Court of Appeal in **Ace Woollahra Pty Limited –v- The Owners of Strata Plan 61424** has highlighted a potential problem for owners' corporations of strata plans and also owners and purchasers of units within those blocks. In this case, the NSW Court of Appeal held that the owners' corporation was not entitled to the benefit of the statutory warranty against the builder because the original registered proprietor (prior to registration of the strata plan) had not been the contracting party with the builder. The facts were that the registered proprietor had entered into a joint venture with another party (developer) which was then the party that engaged the builder. Because there was not a contractual relationship between the initial registered proprietor and the builder, the subsequent owners' corporation was held not to be entitled under s18D of the Act to enforce the statutory warranty against the builder. Because this is a potentially serious problem, I would not be surprised if the legislation is not amended. In the meantime, it is an issue that needs to be considered by owners' corporations and also owners and purchasers of units within strata developments where there is or maybe a significant claim against a builder. There is a useful article on this case by Emanuel Confos and Stewart Brady in the **Law Society Journal July, 2010**.

SUPERANNUATION COMPLAINTS TRIBUNAL – DETERMINATIONS – a number of recent decisions (D09-10/042, D09-10/050 and D09-10/048) are interesting in that they indicate how the Tribunal has considered certain issues. Two of those cases involved changes to the determinations made by the trustees of the public superannuation funds concerned. In the first case, the Tribunal held that the fiancée was a spouse who survived a deceased person in accordance with the rules and thereby was entitled to the death benefits. In that case, it was a regulated fund whereby the fiancée would be entitled if she came within the definition of a "*spouse who survived a deceased person*". In the second case, the trustee had determined to pay 75% to the de facto spouse and 25% to the minor child. The Tribunal changed the determination to 60% to the spouse and 40% to the minor child. In the last case, the trustee had determined to pay 15% to the former de facto spouse and 85% to the deceased's daughter. The Tribunal found that the former de facto spouse was no longer financially dependant on the deceased and accordingly they determined that 100% of the deceased's member's death benefits should go to the daughter – **Will & Probate Bulletin issue 60 June, 2010**.

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