In the Loop - Autumn 2016

The Hicks Oakley Chessell Williams Newsletter

HICKS OAKLEY CHESSELL WILLIAMS
Lawyers & Notary

If you would prefer to receive our newsletter by email, please email sarah.hicks@hocw.com.au.

Can my SMSF buy a beach house for family use?

Sounds tempting? There are many rules to consider including:

Sole purpose rule:

The Fund must be run for the sole purpose of providing superannuation benefits to members when they retire. Current benefits to members and others fail the sole purpose test.

Inhouse asset rule:

An inhouse asset is an investment to a related party of the Fund which might include members, trustees, relatives and other related entities.

A beach house for family use is clearly an inhouse asset. The inhouse asset rule states that inhouse assets cannot be more than 5% of the total market value of fund assets. If the beach house is less than 5% of the fund it might not be in breach of the inhouse asset rule, but it could still face other issues such as failing the Sole Purpose Test and not meeting the requirements for arm's length commercial terms of rental etc.

Limited recourse borrowing:

SMSF's are not allowed to borrow money. One exception is by Limited Recourse Borrowing. If an auditor finds that an SMSF has borrowed money without complying with Limited Recourse requirements the Fund could be deemed non-complying. This could result in very substantial penalties and fines.

Business real property:

SMSFs are restricted in dealing with related parties such as members. An exception is when buying business real property at market value. Business Real Property is defined as land or buildings used exclusively in one or more businesses. An SMSF can buy Business Real Property but failure to meet all of the requirements to qualify as Business Real Property may result in the Fund being non-complying.

Conclusion:

On the above basis any proposal to buy a beach house for a members' family use would be non-complying and would not be recommended by competent advisors under any circumstances.

Tony Oakley, Principal
Accredited Specialist - Business Law

Accessories to underpaying staff face legal action

Accountants are often called on to provide advice on wage related issues, and to provide payroll services to their clients. In doing so it is important that accountants are aware of their potential liability under the Fair Work Act 2009. The consequences of underpaying staff are serious. Being involved in a contravention can lead to legal action and huge penalties against the accountant.

The Fair Work Ombudsman has recently commenced legal action against EZY Accounting 123 Pty Ltd in the Federal Circuit Court in Melbourne.

It is alleged that the accounting firm was knowingly involved in contraventions of Workplace Law, by processing the pay of two Taiwanese backpackers working for one of its clients. EZY Accounting 123 provided payroll services for the client. According to the Fair Work Ombudsman Press Release – available at www.fairwork.gov.au – this action followed an audit in 2014 in which EZY Accounting 123 was involved. The Release states that EZY Accounting 123 was apprised of minimum award rates at the time of the audit.

The *Fair Work Act 2009* (section 550) provides that a person will be **involved in** a contravention of a civil remedy provision if, and only if, the person:

- has aided, abetted, counselled or procured the contravention; or
- has induced the contravention, whether by threats or promises or otherwise; or
- has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- has conspired with others to effect the contravention.

According to the Press Release, the Fair Work Ombudsman has been looking closely at the involvement of third parties in contraventions of Workplace Law.

If accountants are involved in calculating and processing wage entitlements, they are clearly susceptible to a claim by the Fair Work Ombudsman if employees are being underpaid. The liability of "accessories" arises in many areas of law, including in breaches of the Australian Consumer Law, OHS and the Corporations Act. Various decisions require the accessory to have a close involvement in the contravention, if they are to be liable as an accessory.

Matthew Hicks - Principal
Accredited Specialist - Commercial Litigation

Law Institute of Victoria Accredited Specialists in
Business Law;
Commercial Litigation;
Commercial Tenancy Law;
Family Law; and
Wills & Estates.

Melbourne
Postal address
PO Box 16067
Collins Street West
Melbourne VIC 8007

Level 14
114 William Street
Melbourne VIC 3000

tel 03 9629 7411
fax 03 9629 7422

Mount Waverley
Postal address
PO Box 2165
Mount Waverley VIC 3149

Central 1, Level 2, Suite 17
1 Ricketts Road
Mount Waverley VIC 3149

tel 03 9550 4600
fax 03 9544 8711

enquiries@hocw.com.au
www.hocw.com.au

Should I insure the property I have just purchased or should I wait until settlement?

Once you sign a Contract of Sale to purchase a property, you should take out building replacement insurance to protect your interest. If the property is strata titled, this insurance should have been put in place by the owner's corporation prior to the sale of the property.

Contents and public liability insurance should be taken out at settlement.

If the property is damaged prior to settlement, section 35 of the *Sale of Land Act 1962* ("the Act") enables you to rely on any insurance policy held by the vendor. However, even though the vendor is obliged to hand over the property to you in the same state and condition as at the day of sale and carries the risk of the property and chattels until settlement, the vendor is not obliged to take out insurance. Even if the vendor does take out building replacement insurance, the vendor may act so as to nullify or compromise any insurance policy (e.g. non-payment of insurance premium or wilful damage to or destruction of the property).

In the event that the property is destroyed, or is unfit for habitation, you would have a right to cancel the contract under Section 34 of the Act, exercisable within 14 days. However, this right cannot be exercised if the vendor chooses to reinstate the property or where the property is only partially (even if significantly) damaged.

It is unwise to rely on the vendor having insurance in place. It is far more prudent for you as purchaser to take out the relevant insurance from the outset, as soon as the Contract of Sale is signed. You will then have the greatest range of options available if the property is damaged or destroyed prior to the scheduled settlement date. This is particularly relevant if you have plans to demolish the building and rebuild, and could take the unexpected windfall benefit of an insurance payout to contribute to construction.

Sarah Lindsey - Principal
Property Lawyer

First Ruling under New Will Legislation

Part IV of the *Administration and Probate Act 1958* (**APA**) gives the Court power to effectively vary the bequests in a deceased person's Will. This power can be exercised where the deceased failed to make adequate provision for those people for whom they had a moral obligation to provide.

Previously, the APA provided that **any person** could apply to the Court for provision (or further provision) out of a deceased's estate, **provided** he or she could show that the deceased person had a responsibility to provide for their proper maintenance and support.

However, in late 2014 the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014*, varied the APA to restrict the class of people who could make a claim under Part IV of the APA.

The amendment was aimed at addressing the concern that having no fixed category of eligible claimants encouraged opportunistic or non-genuine claims being made.

The APA now provides that only an 'eligible person' can bring a Testator's Family Maintenance (**TFM**) claim. Eligibility is category based, in that the Act now states the specific classes of people who are eligible to make a TFM claim.

The new provisions apply to claims where the deceased died on or after 1 January 2015.

On 8 April 2016 the Victorian Supreme Court handed down the first ruling in which the new legislation has been applied.

In that case, the applicant was a daughter of the deceased and was therefore among the categories of people eligible to make a claim.

So, unfortunately, the Court did not need to consider the more restrictive eligibility requirements in any detail.

It will be interesting to see how the Court applies the new legislation to a case which is not as clear cut as to whether the applicant is eligible to make a claim.

Lachlan Vallance - Principal
Accredited Specialist - Wills & Estates

HICKS OAKLEY CHESSELL WILLIAMS
Lawyers & Notary