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Refinancing blues

This article appeared in this month's edition of the Law Society Journal (NSW).

Annabelle and George have substantial assets in their names and conduct their business through a family discretionary trust, the Annageorge Family Trust, of which they are the trustees. The trust also owns the business premises. There is a mortgage securing debts of \$1 million to their bank.

They discuss asset protection with you. You explain that trustees are personally liable for trust debts subject only to their right of indemnity against trust assets. They don't like this and ask what can be done. You suggest appointing a shelf company as trustee of the trust on the basis that if there is a claim against the business it will stop with the shelf company.

You mention the importance of the new trustee disclaiming any entitlement as a beneficiary to avoid stamp duty being paid on the value of dutiable assets when they are transferred to the new trustee (s.54(3) Duties Act 1997).

Subject to taking care about this, you say, there are no stamp duty or CGT consequences on making the change. In saying this you are aware of the exemption from mortgage duty on refinancing loans.

They ask you to go ahead.

For the purpose you acquire a shelf company which at Annabelle and George's request is called Georganna Pty Limited.

You contact Annabelle and George's bank. They tell you the mortgage will have to be redocumented. No surprise there.

The sting

Sometime later you receive a phone call from Annabelle and George's bank telling you that mortgage duty of \$3,941 is payable on the replacement mortgage. You say this cannot be true and head off to draft your argument.

You re-read the definition of "refinancing mortgage" in s.220 of the Duties Act 1997 and confirm your understanding that it is, in brief, a mortgage that secures the same amount to the same borrower over the same property. You scratch your head and say, well, the amount is exactly the same as before, it is the same borrower, and it is over the same property, so what's the issue?

You speak to a contact in the OSR who explains to you that s.220 does not deal with beneficial interests. The borrower before was Annabelle and George personally: the borrower afterwards is Georganna Pty Limited. You argue that this is all semantics and that the borrower is the Annageorge Family Trust.

It doesn't help that the mortgage makes no mention, as it cannot, of the Annageorge Family Trust. Your contact points out that the borrower on the old mortgage is Annabelle and George whereas the borrower on the new mortgage is Georganna Pty Limited. End of story.

Subsection (2) looks sort of like it should be able to help. It states that a mortgage secures an advance to the same borrower if "either directly by the mortgages themselves or indirectly through one or collateral arrangements" the same person obtains the advance.

Unfortunately, for stamp duty purposes, a trust is not a person. The Duties Act does not define "person". Section 21 of the Interpretation Act 1987 (NSW) states that in any Act or instrument "person" includes an individual, a corporation and a body corporate or politic".

Contacts

Jim Main Brendan Cockerill	www.jmalegal.com.au Call 1800 618 869	Cootamundra 46 Cooper St Cootamundra NSW 2590 T 02 6942 1655 F 02 6942 3692	Canberra 11/60 Marcus Clarke St Canberra ACT 2601 T 02 6243 3610 T 02 6243 4848	Gundagai 195 Sheridan St Gundagai NSW 2590 T 02 6944 1755 F 02 6944 1850	Sydney 3 Spring St Sydney NSW 2000 T 02 8249 4028 T 02 8249 4872
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It is interesting, but not helpful, that for most purposes the *Income Tax Assessment Act 1997* has the concept of "entity" which includes, amongst other things, not only individuals but also trusts.

After dealing with a somewhat unhappy and disillusioned client, you take the perfectly logical step of writing to your local state member of Parliament pointing out the utter absurdity of the situation.

Author: Jim Main, JMA Legal November 2010.
For further information on this issue, please see the contacts below.

Contacts

Jim Main
Brendan Cockerill

www.jmalegal.com.au
Call 1800 618 869

Cootamundra
46 Cooper St
Cootamundra
NSW 2590
T 02 6942 1655
F 02 6942 3692

Canberra
11/60 Marcus Clarke St
Canberra
ACT 2601
T 02 6243 3610
T 02 6243 4848

Gundagai
195 Sheridan St
Gundagai
NSW 2590
T 02 6944 1755
F 02 6944 1850

Sydney
3 Spring St
Sydney
NSW 2000
T 02 8249 4028
T 02 8249 4872

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