Esplins SOLICITORS

Esplins Law Report

DECEMBER 2011

VALE

PHILLIP ESPLIN

2 JANUARY 1946 – 28 OCTOBER 2011

Phillip was one of the founding partners of Esplins Solicitors in 1989 following partnerships at Robert Burge & Co and Moray & Agnew. His dedication to and fascination with legal principles was legendary. He applied his innate understanding of the law for the benefit of his numerous clients, many of whom have been loyal to Esplins Solicitors since its inception.

For 40 years, and up until the time of his death, Phillip's insight and enthusiasm for the law remained as strong as ever and will be sorely missed. At Esplins Solicitors the continuing partners, Stephen and Hamish, and all of our staff will strive to honour his legacy by continuing our unique service to our many loyal clients.

Stephen Rush & Hamish Esplin

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The Partners and Staff of Esplins wish all our clients a joyous Christmas and a happy and prosperous New Year.

Taxation Crackdown Share Traders/ Investors Beware!!!

As a consequence of the GFC and the reduced profitability of businesses, tax collections are down resulting in the Commissioner of Taxation having a closer look at tax returns, and more frequently challenging deductions claimed.

One area where there has been a noticeable crackdown is with share investors/traders.

When the share market was booming taxpayers who were buying and selling shares nearly always claimed the shares were held on capital account so that any profits made were subject to capital gains tax and if the shares were held for more than 12 months were subject to discount capital gains tax where only 50% of the gains were subject to tax. However, when the sharemarket fell dramatically as a consequence of the GFC and taxpayers suffered significant losses, many taxpayers endeavoured to argue that they were a share trader and not a share investor and accordingly their losses were on trading account and not on capital account. If this argument is successful share traders can offset their trading losses against other income. Capital losses can only be offset against capital gains and not against other income.

In a recent case which came before the Administrative Appeal Tribunal in August 2011, the taxpayer argued he was a share trader.

The Commissioner of Taxation disagreed.

The AAT referred to recent cases which decided that it was a question of fact whether someone was engaged in business and important factors included the existence of repetition and a profit-making objective. Other matters may also be relevant.

In relation to taxpayers who claim to be share traders, the AAT indicated that the following matters were relevant:-

"(a) repetition and regularity in the buying and selling of shares;

(b) turnover;

(c) whether the taxpayer is operating to a plan, setting budgets and targets, keeping records;

(d) maintenance of an office;

(e) accounting for the share transactions on a gross receipts basis;

(f) whether the taxpayer is engaged in another full-time profession."

After considering all of the facts the AAT decided that on balance the taxpayer was in the business of trading shares during the year ended 30 June 2008 and stated:-

"The fact he did not end up selling many of the shares during that period was an accident of history that can be explained in particular by the impact of the GFC. He was an opportunist who bought and sold when opportunities arose. As it happened, the unexpected events of 2007-2008 meant there were more opportunities to buy than there were to sell."

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LEGAL UPDATE
Stamp Duty Changes

From 1 January 2012 the First Home Plus stamp duty exemptions and concessions will be replaced by the First Home – New Home Scheme. The amendments provide that a sale contract will only be eligible for the concession or exemption (which does not apply at sale prices above $600,000) if it relates to the acquisition of a new home or vacant land intended to be used as the site for a new home.

A first home owner will no longer be eligible if the sale contract relates to an existing home.
Stamp duty will continue to be payable on the earlier of three (3) months from the date of the sale contract or on the completion date. Stamp duty in respect of 'off the plan' sale contracts will also continue to be payable on the earlier of twelve (12) months from the date of the sale contract or on the completion date.

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Trustee's gain may be your loss

In August of this year the Tax Commissioner issued Tax Determination 2011/21 entitled "Income tax: does it follow merely from the fact that an investment has been made by a trustee that any gain or loss from the investment will be on capital account for tax purposes?" In short, the ruling answers the question with a no – the fact that a trustee makes a loss or a gain on an investment is not conclusive as to whether that gain or loss is on the revenue or capital account for tax purposes.

What is relevant is the characterisation of the gain or loss which is to be determined having regard to a range of facts and circumstances such as the nature of the trust and the terms and content of the trustee's duties, nature and scale of the trustee's investment and other activities, the investment style employed, the nature of the trust assets, whether the trust is carrying on a business, percentage of total income which any gains represent, and the nature of any connection between the trustee and other parties to the dealings. It is important to remember when analysing the character of any gain or loss to weigh up those criteria (which is not an exhaustive list) with any other relevant factors.

One possible effect of this tax ruling is that if any gain is characterised as being on revenue account then any previously envisaged CGT concessions would not be available to the beneficiaries under the trust.

This may particularly have relevance where family trusts own a range of securities, such as shares in listed companies.

Depending upon the nature and size of the holding, the turnover of any assets or facts surrounding any disposal of those securities, could mean that any concessional CGT discounts may not be available to any beneficiaries of the trust thereby possibly increasing any tax exposure.

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High Court affirms fundamental duty of a trustee

In March 2011 the High Court handed down the decision in *Byrnes v Kendle* (2011) 279 ALR 212 restating a fundamental duty of a trustee of any trust to ensure that trust assets receive income.

During the marriage of Mr Kendle and Mrs Byrnes, the former bought the property (in which both spouses later resided) in his own name. Several years after the purchase of the property both spouses executed a deed by which Mr Kendle held a half-interest in the property as tenant in common on trust for Mrs Byrnes. After several more years living together in the property both spouses moved out of the property and Mr Kendle rented the property out to his son for $125 per week. Mr Kendle's son was living in the property for over five years but only paid the rent for the first two weeks of his tenancy. Mr Kendle never approached his son with a request to pay the outstanding rent which was never paid.

After 27 years of marriage Mr Kendle and Mrs Byrnes separated and Mr Kendle sold the property. Mrs Byrnes together with her son, to whom she assigned her interest in the property, commenced a lawsuit for a breach of the trustee's duties by Mr Kendle for failure to recover the rent and let the property to a suitable tenant.

The High Court found that Mr Kendle breached his duties as the trustee and ordered him, after deducting the outgoings paid by Mr Kendle for the property, to compensate Mrs Byrnes for one-half of the rent that should have been paid by Mr Kendle's son.

The decision restated the law that a trust, apart from capable of being created by a trust instrument or a will, may also come into existence through conduct of the parties. To infer a trust by conduct the court will look for intention of the parties to create the trust and will examine the language of the parties, the nature and the circumstances of the transaction and the relationship between the parties to ascertain such intention.

Importantly the decision emphasises that trust legislation and general law impose an active duty on a trustee to invest and obtain income from any trust property even if there is no direction in any trust document that the property should be invested/yielded for income. However, the duty to invest is subject to any limits stated in legislation and the trust document.

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Home/workplace divide - beware of social media websites

It is important for employers to have in place relevant, comprehensive policies that deal with workplace matters including workplace harassment and the use of offensive language.

A recent decision of the Fair Work Authority ("FWA") highlights that employers business can dismiss employees for their conduct out of business hours. However, this is can only be done if there is a sufficient connection between the conduct complained of and the employment relationship.

On 20 May 2010, an employee had a pay dispute with his manager. When he returned home, he made the following post on Facebook:

*"[The employee] wonders how the f*ck work can be so f**king useless and mess up my pay again. C**ts are going down tomorrow."*

His employers subsequently terminated his employment for serious misconduct, and the employee brought an unfair dismissal claim.

When assessing whether an employee's conduct (or misconduct) warrants dismissal, employers need to consider a number of factors. For example, whether the employee's conduct (i) is likely to cause serious damage to the employer-employee relationship when viewed objectively, (ii) damages the employer's interests, or (iii) is incompatible with the employee's duties.

The employee's comments were posted on Facebook out of business hours on his personal computer and did not explicitly refer to his employer by name. However, eleven work colleagues on his contact list were able to view the comment and knew exactly to whom he was referring. As his misconduct was serious and threatened the safety of another employee, FWA held that it was a valid reason for his dismissal.

Lessons to note

1. It is important for employers to have in place relevant, comprehensive policies that deal with workplace matters including workplace harassment and the use of offensive language. The existence of such a policy, which the employee in this case had signed assisted the employer's case.

2. As a legal precaution, employees should regularly be reminded of workplace policies and their effect.

3. Act on workplace issues promptly when they occur, but beware of making decisions to terminate employment before all the relevant information has been considered.

4. Beware of social media websites and their far-reaching consequences.

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Personal Property Securities Act 2009 (Cth)

The commencement of the oft-delayed Personal Property Securities Act 2009 (Cth) ("PPSA") is slated for 30 January 2012. The PPSA regulates security interests over personal property and will have a significant impact on secured lending in Australia. Personal property is any form of property other than land, buildings or fixtures which form part of the land.

The purpose of the PPSA is to introduce a unified national register of encumbrances over personal property (the PPS Register) that can be searched to ascertain the state of encumbrances of a grantor's assets. The grantor is the person or entity that grants a security interest.

Registration on the PPS Register will be the main way in which secured parties make their security interests visible to other interested parties. The PPSA describes the registration process as 'perfection'.

Obtaining "perfection" is important under the PPSA as most unperfected security interests that secure obligations will likely be lost when a grantor enters administration or liquidation as immediately prior to that time title to any personal property will vest in the grantor. In effect this means that any holder of an 'unperfected' security interest, such as a finance lease, a hire-purchase agreement or retention of title arrangement, may lose any priority it purportedly had and with it the ability to achieve a satisfactory return in a liquidation or administration of the grantor.

Esplins can assist you in regards to whether the PPSA will affect your business.

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