

BEWARE OF THE TRAPS!

GUARANTEED RETURNS FOR INVESTMENT PROPERTIES

REBECCA CASTLEY



In the wake of a number of unsuccessful developments which were the subject of legal proceedings and negative media attention about a decade ago, developers providing guaranteed rental returns to attract

investors in property has certainly become less common in recent years.

Even so, if you are looking to buy an investment property, you should know that there are developments available in the market which do offer fixed rental guarantees, particularly within the context of hotels and short term/holiday accommodation complexes. Whilst reputable and financially sound operators run many of these developments, you also need to be aware of the potential legal and commercial risks.

A common example of a guaranteed rental arrangement is where the sale contract provides that the purchaser must enter into a lease for a fixed term with the on-site letting operator. In exchange for the grant of the lease, a company associated with the developer guarantees to the purchaser a fixed percentage return on the purchase price for the unit for an agreed period of time (say 7.5% of the purchase price of the unit for the first 2 years of the lease).

Such an arrangement does give some apparent certainty to a purchaser for those first couple of years, especially when the development is new and "untested". However, you need to be mindful of the following:

- The golden rule when it comes to a guarantee is "it is only as good as the person who gives it".



Check out who is giving the guarantee for the rental return and what their financial standing is. If the guarantee is from a \$2 company with no substantial assets, then there is a real risk that you will be left without being able to recover the money you are owed if the operator fails to pay.

- Is another form of security available to back up the provision of the guaranteed return? This

could be in the form of a personal guarantee by the directors of the company.

- Preferably, a bank guarantee may be able to be obtained for the total fixed return, to be held pending satisfaction of the guarantee obligations. If the guarantor defaulted, recovery of the rental guarantee owed would simply be a matter of cashing in the bank guarantee with the relevant bank or financial institution.
- Usually, the guaranteed return is provided on the basis that where the actual rental return is higher than the fixed guarantee, the developer receives that excess during the guaranteed period. Just like the potential for interest rate reductions when using a fixed interest mortgage, there is the risk that you will not enjoy the benefit of higher returns if the development performs beyond expectations.

In short, don't be taken in by marketing promises but rather, make sure you take the time to scratch below the surface to satisfy yourself that any guarantees being provided really do offer protection for your investment. If you are considering purchasing an investment property with a rental guarantee arrangement, remember that independent legal and financial advice should always be obtained.



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Duty Implications for Unit Trusts

JONATHAN BROUGHTON & MICHAEL KLATT



Unit trusts are a popular tax effective vehicle through which to conduct a business, hold equity interests in business enterprises or conduct an investment portfolio. A unit trust allows investors to pool resources to make investments. In simple terms, investors can acquire a beneficial interest in the trust property through the issue of units at a price.

In considering whether to use a unit trust it is important to note that a trust acquisition (or surrender) is a dutiable transaction under the Duties Act 2001 (the Act) for which the unit holders will be liable to pay duty. Duty payable for a trust acquisition or surrender, other than a public unit trust, is paid at ad valorem rates (according to their value).

Liability for transfer duty arises on the earlier of when the interest is acquired (or surrendered), when the instrument effecting or recording the acquisition (or surrender) is signed by the parties or if there is a written agreement when the agreement is made.

It is important for investors to structure a transaction to minimise the amount of duty paid on the issue of units. Using the above example, if the unit trust already held the property worth \$1million and 10 units were issued to 10 unit holders, each unit holder would be liable to pay duty on their beneficial interest in the unit trust i.e. \$100,000, which is approximately \$2,350.00.

Alternatively, if the units in the unit trust were issued to the investors prior to the unit trust acquiring the property (and

It is important for investors to structure a transaction to minimise the amount of duty paid on the issue of units.

According to the Act, a person acquires a trust interest when they receive a beneficial interest in a unit trust that holds dutiable property. A person's beneficial interest is the percentage of, or proportion of, the unencumbered value of the dutiable property held by the unit trust.

For example, if a unit trust held a property worth \$1million and there were 10 equal unit holders, each unit holder's beneficial interest in the unit trust would be \$100,000. Any debt is disregarded so that duty is not calculated on equity.

the unit trust did not hold any other dutiable property), no duty would be payable because the unit holders would not obtain a beneficial interest in any dutiable property.

It is important to note that pursuant to section 52 of the Act, contracted property is taken to be dutiable property held by a trust. Therefore, if units are issued to investors after a contract to acquire dutiable property is executed, duty will be payable on the issue of units as if settlement had occurred and the trust held the property.

Reverse Mortgages Spending The Kid's Inheritance

MICHAEL KLATT



Reverse mortgages have been available for many years but they are not commonly understood. Under a reverse mortgage the borrower makes no repayments generally until the borrower dies or sells the secured property. Accordingly, interest and other fees and charges are added to the

amount borrowed.

Interestingly, most of the major banks are offering this product along with other financial institutions. The interest rates can be variable, fixed or a combination of both and the interest rates are generally higher than most residential lending rates. Currently rates are around 8% to 9%.

In most cases the borrower must be at least 60 years of age and be able to provide first mortgage security. The amount that can be borrowed depends on the age of the borrower. The older the borrower the higher the percentage of equity on the home can be borrowed. On average, 15% only of the equity can be borrowed at age 60 and 50% at age 95 and potentially further advances can be sought as the borrower gets older. The minimum loan is usually \$10,000.00 and the maximum loan depends on the institution.

The problem with reverse mortgages is that no one knows how long they will live and potentially the effect of compounding interest and possible depreciation in the value of the home can cause a total loss of equity in the home. The amount owed could even be higher than the equity in the home although some institutions offer a no negative equity guarantee so that the borrower or their estate does not have to pay any shortfall on the loan balance on the sale of the home, provided the borrower is not in default.

No doubt these products could be attractive to people who do not wish to sell their home but wish to borrow for home improvements, medical expenses or even a bond for a retirement home. It is important however that anyone considering these products obtains financial planning advice as well as legal advice concerning the documentation.



Bouncer Gives Employer a Headache

CAMERON SEYMOUR



Violence always steals the headlines and we have all heard recent stories of serious injury and even death caused

by bouncers. Brisbane has had its fair share of such indiscretions.

When the facts are reported the reader normally perceives the article from the point of view of the assaulted patron, as it is not an uncommon experience to attend establishments where bouncers are present. Maybe some of us wonder what could happen if we were in the wrong place at the wrong time.

But what of the employer's point of view? Surely a bouncer's employer could not be held liable for a bouncer's unprovoked and vicious attack on a patron? Think again. In the case of *Ryan v Ann St Holdings Pty Ltd*, the Queensland Court of Appeal made it quite clear that a bouncer's employer can be liable in the civil courts for violent and unprovoked actions.

In that case, a patron had just left a Fortitude Valley establishment where he had not been misbehaving. He was part of a small group of people congregating on the footpath after leaving the nightclub at closing time. He was approached by a bouncer who asked for assistance in helping someone out of the club. Little did the victim know this was merely a ruse to lure him into the club where the bouncer assaulted him without any apparent reason.

The unfortunate victim sued the establishment which employed the bouncer and won his case. Ordinarily, the employer would be vicariously liable for the conduct of its employees whilst conducting their employment. However, that liability does not ordinarily apply if the employee is on a "frolic" of their own.

Bouncers are routinely called upon to use physical force in carrying out their lawful duties, protecting people and property. Violence is often necessary to control violence. Proper instructions must be given as to the appropriate use of physical force. On this occasion there was no doubt the bouncer had acted improperly and had not been instructed to assault the patron.

The Court of Appeal's point was that owners of nightclubs owe duties of care to their patrons. Their bouncers are required on occasion to use force and be involved in physical confrontations. In such a dangerous situation, a higher degree of care must be exercised. It is not only necessary to provide instructions for the use of force; those instructions must then be supervised. In the absence of proper instruction and supervision an employer will be liable for the violent acts of a bouncer performed in the course of employment.

As always, every case turns on its facts. When it comes to the liability of an employer for the violence perpetrated by a worker, the general principle is the higher the likelihood of the requirement for the worker to use force, the higher the duty of care.



PAT MULLINS
EDITORIAL

It is to be hoped that nightclub owners will take careful note of the relevant Court of Appeal decision in *Ryan -v- Ann Street Holdings*, which Cameron Seymour writes about in this issue. The issue of nightclub violence and the involvement of bouncers is an emerging social issue of some significance. We are all concerned about the safety of our young people at these venues.

Mullins Lawyers enjoys a close relationship with many clients in the liquor and hospitality industry. This is an industry that does take its responsibilities seriously. Most venues are properly run and have security staff that are already properly supervised and well trained.

That the Court has now clearly established that the owners of these venues have very onerous duties of supervision and training of security personnel is welcome. It will serve to clarify for some operators something that may not have been so clear before. It is to be hoped that this clarification will encourage owners who have not been as vigilant as they should to invest more in training and supervision.

As Cameron notes there have been some very unfortunate (and tragic) incidents of this kind in Brisbane recently. We can only hope that proper supervision and better training of security staff in future will be the result.

Michael Klatt's article on these mortgages will engender interest amongst those who have relatives approaching their senior years. Such arrangements may free up capital to apply to home improvements that may allow relatives to remain in their own homes, rather than seek nursing home places (which are becoming more and more difficult to secure). This idea might well provide a welcome solution.

Kirstie Colls' article provides some useful information about changes to the Child Support System. This more efficient system replaced the quite cumbersome and ancient arrangements in relation to child maintenance. It is to be hoped the changes will make the system even more efficient.



Changes to Child Support

what does it mean for you?

KIRSTIE COLLS



The federal government is currently overhauling the Australian Child Support legislation with changes being rolled out over a three-year period. Some of the reforms were implemented from

1 July 2006, others from 1 January 2007 and the rest will be rolled out on 1 July 2008.

So what does it mean for you?

Some of the big-ticket changes already implemented are as follows:

- The cap for high income earners has reduced from \$139,347 to \$104,702.
- The minimum payment will now be indexed for CPI and has increased from \$5 per week to just over \$6 per week
- The percentage of non-prescribed agency payments able to be deducted from ongoing child support liabilities has increased from 25% to 30%
- In most cases, after parents go through the objection process in relation to CSA decisions, they now appeal to the Social Security Appeals Tribunal, which will have the power to vary, affirm or set aside the decision of the CSA. Following this hearing, if parents are still unhappy with the outcome they will only be able to appeal to a court if the Tribunal has made an error of law.
- The time frame in which parents must take action to obtain child support payments before their FTB payments are affected has been extended from 28 days to 13 weeks.

What will we see from the 1 July 2008?

The biggest change yet to be rolled out will be a new formula for the calculation of a parent's child support liability. Currently, the formula takes into account the paying parent's taxable income

and percentage, depending on the number of children, as the basis for the calculation. The non-paying parent is currently allowed to earn just over \$41,000 without affecting that calculation.

As from 1 July 2008, the new formula will treat both parents' incomes more equally and will take into account new research on the costs of children including the higher costs of older children.

Another interesting change will be that as from 1 July 2008, parents

liable parents will also be able to have additional income from a second job or overtime payments ignored for the purposes of the calculation of their child support liability for the first three years following separation. This is a new provision and will give separating non-carer parents some grace financially, in order to re-establish themselves.

The CSA will also be implementing new processes in order to simplify the current rules regarding changes

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having the financial responsibility for a step child will be able to have that step child treated as a dependent for the purposes of the calculation of their child support liability, without first having to obtain an order from the court.

of assessment, suspension of child support when parents reconcile and making short term child support agreements.

The changes will hopefully see a simplified yet more effective child support agency for families in Australia.



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