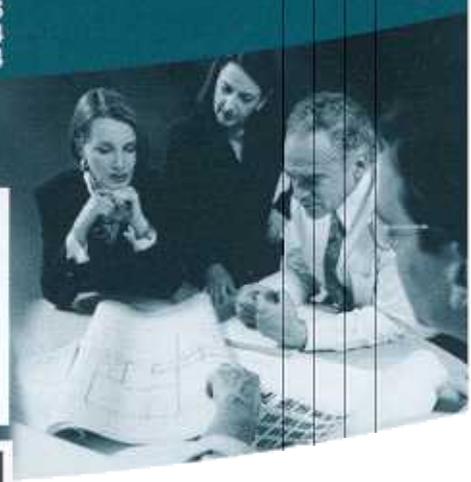


M & M

Report



Editorial



by Patrick Mullins

One of the great hallmarks of our free society is that we live under the rule of law.

Central to that is that the public has confidence in the Judges to administer the law impartially - without fear or favour.

Within the Criminal Justice System it is the Judge's role to ensure that an accused has a fair trial. After a fair trial, a conviction requires the unanimous determination of guilt beyond reasonable doubt by a jury of 12 citizens. This is not a perfect system, but provided that the defence and the prosecution compete on a level playing field, then it is a system worthy of our confidence.

However, a problem arises where there is a disparity of resources between prosecution and defence. The Queensland Criminal Justice System is beset with problems in this area. Most criminal defences are handled on legal aid.

To take one simple example where forensic expert evidence is required, then the Crown is reasonably well resourced. However, if the defence is being handled on a legal aid basis, then the Legal Aid Office must be convinced of the necessity for the forensic evidence. It is open to Legal Aid Queensland to either refuse or to approve the request for aid for an expert's report; even when aid is approved the report fee is approved on a restricted and limited basis.

This disparity of resources between the defence and the prosecution must be a serious matter of concern to all of us. Governments of whatever colour have a duty to increase funding on legal aid so that the resources open to the defence are comparable to those open to the prosecution.

Unless this serious problem is addressed, then the public has a right to question whether the system we have is fair and worthy of public confidence.



by Bob Lette

Whether you are 20 or 55, having an investment portfolio has become increasingly important for planning your future into retirement. Asset

allocation has an important role in this planning process, determining in what ratios your portfolio should be allocated between cash, fixed interest, shares and real estate.

One way of including real estate is by investing in Property Syndicates. This will give a return on your investment, security of title, the prospect of capital gain and taxation advantages on the way through.

What is a Property Syndicate?

A Property Syndicate is a scheme under which investors have legal title to real property as tenants in common and each investor holds a Certificate of Title documenting his or her interest.

Property Syndicates are not Property Trusts.

Under the *Corporations Law* any Company which makes an offer to the public to invest in the undertaking of the Company is deemed to be subject to the *Corporations Law* and in particular, to the provisions relating to prescribed interests. Genuine Property Syndicate Schemes are granted relief on application from the Prescribed Interest provisions of the *Corporations Law*. The rationale for granting such relief is the security of title provided under the various systems of land title operating in Australia. Any person who owns land has the ultimate control over the sale, transfer and mortgaging etc of that land. It is virtually impossible for clear title to land to be transferred without either the permission of the legal owner or an Order of a Court. In the view of the Australian Securities Commission (ASC) the security of title factor together with the direct control exercised by the legal owner is the

basis for such relief.

Property Syndicate "shares" are usually "sold" by promoters who may or may not be the manager but who clearly have a profit motive e.g. the sale of a property to the Syndicate of Investors.

Essential Elements

A Property Syndicate is governed by a Syndicate Deed entered into between the Investors in the Syndicate, the Manager and a Representative (i.e an Independent Trustee) whereby:-



- The Manager agrees to manage the Syndicate for the Investors, is responsible for issuing the Prospectus inviting subscriptions and holds a Dealer's Licence issued by the ASC. The Manager for a fee assumes the role of "Landlord" of the property and operates subject to the Deed and the *Corporations Law*.
 - The Representative is approved by the ASC and acts as the Representative of the Syndicate for the Investors. The Representative for a fee acts as
- Continued page 2.*

Preparing for the uncertain

by Elizabeth Sheehan

Powers of Attorney Act (Qld) 1998

There may come a time for us all when, for a variety of reasons we are unable to make decisions for ourselves. It is wise to be prepared and to have appointed someone to make decisions for you in that event. That person should understand your wishes and be legally bound to accept them. This can be achieved by a Power of Attorney which is a formal instrument by which one person appoints another to make decisions on their behalf generally or for certain limited purposes. On June 1 1998 the *Powers of Attorney Act (Qld)* commenced. This Act clarifies and reforms the existing law and introduces new concepts. It changes the focus of Powers of Attorneys from just financial matters to also include personal matters.

The Old Law

Previously, Powers of Attorney were regulated by the *Property Law Act (Qld) 1974*. There were two types of Powers of Attorney. The first was the *General Power of Attorney* which was only valid while you were capable of managing your own affairs. The second was the *Enduring Power of Attorney* which did not cease if you became incapable of managing your own affairs. Both applied to financial matters only.



Also, they were fairly inflexible; for example they did not provide for different Attorneys for different purposes, or allow you to give specific instructions.

More general problems with the law were a lack of supervisory and investigatory powers to deal with suspected cases of abuse. Also, there was no legislative direction for the guidance of an Attorney when making decisions. Further, there has been uncertainty in Queensland for some time as to who has authority to consent to health care or treatment for a family member who lacks the capacity to decide for themselves. The new Act appears to overcome many of these problems.

New Powers of Attorney provisions

General Powers of Attorney relating only to financial matters are still available. However, the new legislation extends the scope of the Enduring Power of Attorney so that it:

- covers both personal and financial matters;
- allows you to appoint more than one Attorney;
- allows you to specify when the power will begin and exactly what areas it will cover; and
- gives clear guidance to your Attorney if you are unable to supervise the decisions yourself.

Personal matters include matters such as where and with whom a person is to live,

Property Syndication

Continued from page 1.

“Trustee” and has all the powers and rights as if it was the absolute owner of the property.

- A Prospectus compiled by the Manager is lodged, approved and registered under the *Corporations Law* by the ASC. It must contain a statement in a prominent position advising potential investors that:
 - Investments in the Syndicate should be viewed as long term;
 - Interests are likely to be illiquid because there is unlikely to be a secondary market; and
 - Investors have no right to require their interest to be bought by the Manager or any other person, or to have their interests redeemed.

Purpose

Most Syndicates are usually sole purpose (i.e. single property) Syndicates with a minimum investment. The Manager usually enters into an option to purchase an income producing property. The more attractive the rate of return, the more easily “saleable” the investment. A prudent manager will offer a property with definite capital growth opportunities.

Syndicates are for a fixed term agreed in

the Prospectus and will not exceed 12 years. Syndicates terminate at the completion of the term or the earlier sale of the property.

Liability

The Syndicate Property would normally be unencumbered. The Prospectus may, however, provide for the Syndicate to borrow money to complete the purchase of the property. Borrowings are on a non-recourse basis. Under the Syndicate Deed, borrowings in excess of an agreed percentage (usually 65% to 70%) of valuation are prohibited. The lender to the Syndicate takes security over the Syndicate Property, has recourse to the property and the Syndicate Fund but does not have any right of recourse to individual investors. If the lender sells the property at a value less than the outstanding loan, individual investors have no liability to make up any short fall but will have a capital loss.

Who can invest in a Syndicate?

Anyone can invest in a Syndicate. The Manager usually reserves the right to only accept a certain number of applications in the Syndicate or to reduce the amount applied for as well as close the Prospectus at any time. In practice, the Manager is likely to allocate interests to investors on a first-come first-served basis.

The one exception may be an investment by regulated superannuation funds which are not allowed to borrow by law. A superannuation fund investment in a non-borrowing Property Syndicate would not breach this rule. Investment in a Property Syndicate which does borrow may breach the rule. A superannuation fund trustee should seek professional advice on any investment proposals where the superannuation fund might risk breaching the SIS legislation.

How to invest?

An investor should consult a financial advisor and his lawyer before investment in a Syndicate. An investor completes the application to invest and returns the form to the promoter of the Syndicate together with a cheque made out to the Representative. These monies must be deposited into a designated trust account upon receipt and kept there until the purchase of the property.

The ongoing costs of operating the Syndicate, paying any interest on loans etc



of the future

normal day-to-day issues and also health matters such as obtaining or consenting to health care or treatment. An Attorney has no power in relation to special personal matters, such as making a Will or marriage, nor special health matters, such as the removal of organs for donation, sterilisation, or the withdrawal of life-sustaining treatment. An Enduring Power of Attorney for financial matters may come into effect on a specified date or event, or otherwise on the date it is made. An Enduring Power of Attorney for personal matters only comes into effect when the principal has lost the capacity to make decisions. An Attorney's responsibilities are clearly set out in the legislation. The law ensures that the principal's interests will be paramount and his/her wishes respected.

Advanced Health Directive

A new concept introduced by the Act is the "Advanced Health Directive". This is a document in which an individual gives general direction about their future health care if at some future time they do not have decision making capacity. It can include directions consenting in certain circumstances to particular health care or requiring particular life-sustaining measures to be withheld. The Act expressly states that it does not authorise euthanasia.

Statutory Health Attorney

The Act also introduces the concept of the "Statutory Health Attorney". This is a person

will be expenses payable from rental income received from the tenants of the Syndicate Property. Any money subscribed by unsuccessful applicants must be refunded.

Taxation

A Syndicate is regarded as a partnership for taxation purposes. A Property Syndicate Tax Return, (similar to a Partnership Return) will be lodged with the Taxation Office each year disclosing any assessable income or losses, capital gains or losses or allowable deductions (certain depreciation and building allowances and the write-off of borrowing costs over the loan term of the Syndicate borrowings). Each individual investor is required to include in assessable income, their proportional share of the Syndicate's net income. If the Syndicate incurs a tax loss in any year, each investor can claim a share of the loss as an allowable deduction against their other assessable income in that year. Capital gains and losses are treated similarly as each investor will be acquiring their

selected from a group of people nominated by the legislation such as spouses (including de factos), parents, children and close friends who are able to assume the role of a Health Attorney in the absence of an Advanced Health Directive or an Attorney appointed under an Enduring Power. Such person is able to authorise medical treatment for the person who has lost capacity.

Adult guardian

Finally, the Act establishes the *Adult Guardian* who is an independent officer appointed by the Government to protect the interests of the people with decision making disabilities. The Adult Guardian has been given appropriate powers to properly investigate and deal with inappropriate behaviour by an Attorney.

Conclusion

This Act has made some positive advances to the structure of Powers of Attorney. They have always performed a valuable function and have become even more valuable under the new scheme. If you have a Power of Attorney made prior to 1 June, 1998 it still has legal force. However, it will be limited to financial matters only. It may be worth considering making a new Power of Attorney, as the new regime gives you new options. You could then appoint an Attorney (or Attorneys) for personal matters, and you could be more specific about the decisions you would like your Attorney/s to make.

interest in the Syndicate Property as a long term investment not as part of a profit making undertaking or venture.

Tax deductions may be available to Syndicate investors for travelling costs for inspection visits and attendance at AGMs

Risks

- Failure of tenants to pay rent and/or outgoings thus affecting the return on the investment.
- Failure of tenants to renew Leases and a delay in finding new tenants.
- Increase in interest rate charges thus diminishing the rate of return.
- Inability to withdraw from a Syndicate.
- Inability to redeem your interest - An Investor is involved in the Syndicate for the Syndicate's life.
- Economic or government legislative or policy changes may cause detrimental economic impacts on the Syndicate Property, the tenants or the taxation treatment of returns.

Conclusion

An investment in Property Syndicates has an element of risk and no guarantee of return of capital. However, if the property has excellent tenants etc, the risk of the return not being achieved is minimal. No guarantees are given on return of all capital. It is an excellent investment for small investors to "test the water" in real estate investment.

Superannuation

'Property' in Family Law?



by Doris Chan

There have been recent press releases from the Federal Government about proposals to revamp the Family Law Act 1975 in relation to superannuation policies.

Under the current law superannuation entitlements are considered to be a financial resource, not "property", as the funds cannot just simply be accessed.

Accordingly when a marriage breaks down any superannuation entitlement is not included in the asset pool. The dilemma for the Family Court, is how to deal with the entitlement in the ultimate financial division.

This becomes even more problematic when there is no other significant property in existence for division. If a lengthy marriage breaks down and the wife seeks a property settlement payout, the husband's superannuation interest is not available for easy access, and the money represents savings accumulated over the period of the marriage.

In such a scenario, the property application may be adjourned until such time as the superannuation interest matures, when it becomes property in the hands of the husband and is available for division.

If there exists other assets such as the matrimonial home which is subject to a mortgage, the superannuation interest is still relevant, particularly if it is worth a lot of money and was accumulated during the marriage.

Presently there is no specific formula as to how the superannuation interest is to be factored into the asset pool for division. Various methods may be applied by the Court in making notional adjustments to the property to take into account the existence on behalf of one party, of substantial superannuation interests.

The Federal Government is proposing to establish a regime by which superannuation interests are to be divided. One proposition is that if the parties cannot agree between themselves as to how it is to be apportioned, then the presumption to be applied by the Family Court is that the superannuation interest held by one party relating to the period of cohabitation, is to be equally divided between the husband and wife.

Discretionary Trusts



by John Mullins

There has been a great deal spoken about in political forums in relation to Discretionary Trusts. Discretionary Trusts have been spoken about by the

Federal Opposition as a tool used by fat cats to avoid tax.

Discretionary Trusts are in fact a commonly used legal structure, which can own property and businesses, and earn income.

A Trust typically has a Settlor which creates the Trust, a Trustee which can be a corporate entity and a range of beneficiaries. Discretionary Trusts are so titled because the Trustee, unlike with Unit Trusts or Fixed Trusts, has discretion as to which beneficiaries it distributes income and capital. Trusts unlike companies however, do not pay tax in their own right (except in the case of undistributed income). Each of

the beneficiaries pays all of the tax on the income they receive from the Trust in accordance with their marginal tax rates.

Except in the case of Testamentary Trusts, minors (under 18) are only entitled to receive a

small amount of income tax free and above this very small amount, all of the income earned by minors from Trusts is taxed at the full marginal rate.

Because Trusts are perceived as having a fat cat tax avoidance flavour, which is being highlighted for political advantage, it is possible that Trusts will be under increased scrutiny, particularly if we were to have a change in Federal Government. The creation of Trusts is a matter for serious consideration, which effects not only tax, but also raises liability and control issues. It also needs to be taken into account in estate planning as assets held by the Trust are no longer held by the individual and are not then subject to the individual's Will. Any consideration of using Trusts should be referred to us for our advice as to the appropriateness of the structure for you after due consideration of the issues.

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Postscript: The information contained herein whilst accurate is of a general nature. If you have any queries in relation to the information contained herein we ask that you consult the partners or solicitors of Mullins & Mullins with whom you usually deal. If you have any comments regarding our newsletter we would like to hear from you.

New REIQ Contract for Lots in a Community Titles Scheme



by Rebecca Gray

While the Body Corporate and Community Management Act 1997 ("the BCCMA") has been in force for almost a year, new developments in property law continue as a result of its introduction.

One such development is the new REIQ Contract for Lots in a Community Title Scheme. The Contract is still with the REIQ printers but it is anticipated that it will be in circulation with real estate agents by the end of June 1998.

The new contract replaces the existing REIQ Contract for Home Units and Town Houses and incorporates the following key changes:-

1. The new contract is to be used for residential or commercial property in a community title scheme. This is logical since the BCCMA applies to both residential and commercial property;

2. The new contract remedies some inconsistencies of the old contract with the BCCMA revealed during the last 11 months of its operation.

New commercial provisions

The commercial provisions of the new contract will operate only when the "Present Use" nominated in the Schedule is other than "Residential".

Leases and service agreements

If the property is commercial, any leases or service agreements to be transferred must be detailed in the Commercial Tenancy Schedule and the Service Agreement Schedule respectively.

The new Contract assigns not only the benefits of any tenancy agreement but also the burdens. This means that a tenant will be able to enforce any obligations of the landlord against the new owner. The right to sue for rent arrears for a period before settlement remains with the seller.

The seller must produce to the buyer within seven days of the contract copies of all tenancy and service agreements. The contract is subject to the buyer being satisfied with the terms of the documents within seven days after receipt. If the seller fails to produce the documents or the buyer is not satisfied with the terms, the buyer can terminate by notice in writing within seven days after the documents are (or should have been) delivered.

Seller's warranties

A seller should be aware of warranties included in the standard terms of the contract. For example, the seller warrants that as at the date of the contract:-

- the details in the tenancy schedule are correct and the tenancies are valid;
- there is no breach of the tenancy;
- the seller has no knowledge of correspondence relating to a review or an option;
- the tenant has not received an incentive or inducement to enter into the lease.

If any of these warranties are inaccurate and the buyer is materially prejudiced, the buyer may terminate the contract.

Additional seller's statements

The terms of the new contract have clarified and extended the seller's warranties. For example, the seller warrants that:-

- at settlement, there will be no valid notices or orders requiring work to be done or money to be spent in relation to the lot or the common property for the scheme (previously, this warranty also related to the building of which the lot formed part);



- at the contract date, there is no proposal to record a new community management statement ("CMS"), there is no notice of a meeting to consent to the recording of a new CMS and the CMS recorded for the scheme contains details of all allocations effecting the lot or the registered owner. [So, if there is an allocation of common property not recorded in the CMS, it must be separately disclosed.]

The buyer's rights in the event that any of the seller's statements are not correct will be termination of the contract, compensation or both, depending on which statement is inaccurate. In some cases, the right of termination must be exercised within a specified time.

Some of the Seller's Statements which previously were included in the old contract have been deleted because the implied warranties in the BCCMA already covered them. The deletion of these statements does not remove the obligation of the seller to comply with the warranties in the BCCMA.

Conclusion

It is important to be aware of the ability of the buyer to terminate where the seller has not fully or accurately disclosed matters or has provided inaccurate warranties. Before signing a contract, it is essential that you consult a solicitor to ensure that the standard warranties contained in the contract are amended to suit the particular circumstances.