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## November 2003 Newsletter

*This newsletter deals with new appointments in Parry Carroll, ASX corporate governance on chairman/directors duties, can an informal agreement be binding and mortgages and GST.*

### NEW APPOINTMENTS

We are pleased to announce that Julie McPherson has joined the firm as a partner. Prior to joining Parry Carroll, Julie was general counsel to Goodman Fielder. Julie practises in structured finance, commercial property, general commercial and food law. She has extensive experience as a senior lawyer, investment banker and group general counsel for some of Australia's largest listed public companies.

We are also delighted to advise that Rebecca Chan was appointed a Senior Associate on 1 November. Rebecca practises extensively in commercial property.

Daniel Parry has now moved to New York and we have recruited Michelle Shek (formerly of Freehills) to our commercial section.

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### COMPANY LAW

#### ASX CORPORATE GOVERNANCE ON CHAIRMAN/DIRECTORS DUTIES

The ASX has released its guidelines for corporate governance. Principle 1 states that a company should lay solid foundations for management and oversight. Recognising and publishing the respective roles and

responsibilities of the board and management should do this.

The ASX notes that disclosing the division of responsibility assists those affected by corporate decisions to better understand the respective accountabilities and contributions of board and management of the particular company. That understanding can be further enhanced if the disclosure includes an explanation of the balance of responsibility between the chairperson, the lead independent director (if any) and the chief executive officer.

The ASX also suggests that formal letters of appointment setting out the responsibilities of the particular director will greatly assist identifying what is required. Adopting this approach could assist a chairman in understanding the special responsibilities that go with the role.

In *ASIC v Rich [2003] NSWSC 85* Mr Justice Austin came to the view that the chairman of a public company could have a greater responsibility than other directors for the performance of the board as a whole and each member of it. He noted that the chairman has the primary responsibility of selecting matters and documents to be brought to the board's attention, in formulating the policy of the board and in promoting the position of the company.

In particular, Mr Justice Austin agreed with ASIC that it was reasonable to argue that the chairman of a publicly listed company should take reasonable steps to ensure that he and the board monitored:

- management of the company;
- properly assessed the financial position and performance;
- took reasonable steps to ensure he and the other members of the board were informed of all material financial information; and
- took reasonable steps to ensure that public statements made on behalf or the company did not mislead the ASX or the investing public.

As there has been very little judicial guidance on the role of the chairman, directors could better understand the potential scope of duties by adopting a specific letter of appointment as suggested by the ASX.

**Julie McPherson**

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## CONTRACT LAW

### CAN AN "INFORMAL AGREEMENT" BE BINDING

In the NSW Supreme Court decision of *Souter v Shyamba Pty Ltd (2002) NSWSC 929*, a one page document signed by the parties was held to be a binding contract for the sale of land. The document provided that:

- the vendor agrees to sell and the purchaser agrees to buy the property for the sum of \$3 million;
- the sale will become unconditional upon the purchaser paying the amount of \$1,000 in the vendor's bank account; and

- the purchaser agrees to pay a further \$299,000 to the vendor's solicitor upon exchange of contracts, not later than 16 June 2002 and the balance at settlement on 1 July 2002.

After signing this document, the vendor received a better offer. He wrote to the purchaser advising him that "we've hit...a hurdle in the form of a huge Gazzumpt {sic}". The vendor then argued that there was no binding contract in place.

Mr Justice Palmer held that there was a properly binding contract for the following reasons:

- in NSW, there is a presumption that, when dealing with real estate, no binding contract exists until formal contracts are exchanged;
- however, if the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction;
- the parties intended the document to be binding because the course of events indicated frustration between the parties and an intention to end the negotiations with a final agreement;
- there was no "subject to contract" or "subject to finance" provision in the document; and
- the several "loose ends" raised by the defendant (vendor) were not sufficient to make the document non-binding.

Words requiring a payment on "exchange of contracts" would normally indicate that the NSW conveyancing presumption (no binding agreement until exchange of contract) had not been set aside. However, the other words in the document and the actions of the parties led Palmer J in *Souter*

to override this presumption. Therefore, if you do not wish to be bound by an informal agreement, you should insert a clear "subject to contract" provision.

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## GST

### MORTGAGEES AND GST

The exercise of a power of sale can bring the lender within the GST net even though the lender would not otherwise be liable for GST. The GST legislation does this by placing the creditor in the shoes of the debtor as if the debtor were making the supply. The GST legislation also applies to the sale by a secured lender of property that is not real property. It makes the creditor personally liable for the GST on the sale.

The GST compliance requirements present secured lenders with several obligations, which include:

- registering for GST for the purposes of the sale;
- providing a tax invoice (this is complicated [but still possible] where the entity does not have an ABN);
- making required adjustments to the net amount;

- completing a special form of return within 21 days of month end irrespective of the mortgagee's BAS/IAS reporting requirements; and
- remitting the GST due within 21 days of month end in which the transaction occurred irrespective of the mortgagee's BAS/IAS reporting and payment requirements.

Having to comply with these GST compliance requirements when exercising a power of sale will not only increase the administrative costs of a mortgagee (or similar) sale but will, in most cases, reduce the amount able to be recovered by a mortgagee where there is a shortfall upon selling the property. This is because the GST legislation effectively gives the ATO priority for the payment of GST over the mortgagee's right to recoup the amount secured by the property.

Creditors should take these complications and additional costs into account when negotiating a mortgage (or other security) over property that may result in a taxable supply if the debtor were to sell the property.

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