

## BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

### ISSUE 4: WINTER 2007

#### THE CHARACTERISTICS OF A JOINT VENTURE

By *John Graves SC*

In *Thompson v White & Ors* [2006] NSWCA 350 Tobias JA (with whom Ipp and McColl JJA agreed) discussed the characteristics and meaning of a joint venture.

Although the term "joint venture" has no settled common law meaning, it is conventionally and commonly used to refer to an association between persons for the purpose of a single undertaking for mutual commercial gain. The common characteristics of joint ventures cannot be said to be either severally or jointly both necessary and sufficient to constitute a joint venture agreement, it being a question of fact whether any particular undertaking constitutes a joint undertaking for mutual commercial gain. The question is whether the facts establish an association of persons for the purpose of a particular commercial undertaking with a view to mutual profit with each participant usually, but not necessarily, contributing money, property or skill.

Subject to there being sufficient certainty with respect to the essential terms upon which the particular undertaking is to be pursued, the ordinary rules of contract relating to whether the parties intend to enter into a contractual relationship apply.

There is no necessary legal requirement that each participant must contribute capital: there is no reason why, for instance, it should not be agreed between the parties that if a particular participant cannot or does not wish to contribute capital, then that participant shall contribute his labour or monies by way of loans.

See also *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1 at 10; *Gibson Motor Sport Merchandise Pty Ltd v Forbes* [2005] FCA 749 at [77] to [81].

In the latter case, Crennan J, in addition to discussing the characteristics of a joint venture, also said (by reference to various authorities):

- While joint venture agreements are generally governed by the principles applicable to contract and property, equity, through the mechanism of a constructive trust, may be called in aid in circumstances of incomplete agreement, or called in aid because of a breach of a fiduciary duty.
- Agreed contractual duties of joint venturers are not necessarily or routinely subject to any implied duty to act in good faith.

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## **INJUNCTIONS - CONTEMPT OF COURT**

### ***Thompson v White* [2007] NSWSC 733**

A solicitor advised that entry into a Torrens mortgage did not contravene an injunction restraining "disposing of any interest" in land. Young CJ in Eq held that advice was wrong.

For disobedience of an injunction by a non-party to constitute contempt there must be an intentional interference with the judicial process. The solicitor argued that because he believed his advice to be correct he could not commit contempt.

His Honour held that it was sufficient that the solicitor knew what the case was all about, and assisted the plaintiff to mortgage the property in order to pay his own costs.

Had it been used, the form of injunction in the Practice Notes on Asset Preservation Orders would have avoided the problem that arose in this case.

***By Tom Brennan***

## **INSOLVENCY - Disciplinary Proceedings against Company Auditors and Liquidators - *Application of Vouris; Re E-Promotions Pty Ltd & Anor* (2003) 47 ACSR 155**

The functions of the Companies Auditors and Liquidators Disciplinary Board ("Board") were clarified in three cases determined together recently in the High Court (Gould, Albarran and Visnic). The function of the Board is not to find whether any offence had been committed, and to inflict a punishment in respect of it. Rather it is to assess whether someone should continue to occupy a statutory position involving skill and probity, in circumstances in which the person has failed in the performance of his or her professional duties.

The decisions leave open for further consideration the issue of enforceability of the Board's determinations.

***By Kerry Eassie***

## **CORPORATIONS – Directors' Penalties Notices and s 1318 - *Deputy Commissioner of Taxation v Dick* [2006] NSWDC 17**

The court of appeal will shortly decide whether the power to excuse a breach applies to personal liability for PAYG obligations of a company. In the decision appealed from Johnstone DCJ held that section 1318 of the Corporations Act is applicable to section 222AOB of the Income Tax Assessment Act 1936 (ITAA).

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Section 1318 gives the court a discretion to excuse a defendant, wholly or partly, from liability otherwise incurred in civil proceedings for negligence, default, breach of trust or breach of duty. The provision was applied to the directors penalty provisions of the ITAA for the first time in this case. If the decision is upheld on appeal, it will open up a new ground of defence for directors.

***By Andrew Bouris***

## **RESTITUTION – *Deutsche Morgan Grenfell Group plc v IRC* [2006] 3 WLR 781; *Kingstreet Investments Ltd v New Brunswick (Department of Finance)* [2007] SCC 1**

Two recent overseas decisions highlight continuing conceptual difficulties with the law of unjust enrichment. In *Deutsche Morgan Grenfell Group plc* the House of Lords allowed claims in restitution for the recovery of taxes paid pursuant to legislation later declared by the European Court of Justice to infringe the European Union Treaty.

Of considerable interest, the leading speeches of the House unequivocally convey a future willingness to abandon and rebase the whole of the law on the overarching civilian *condictio indebiti* or 'absence of basis' theory propounded by the late Professor Peter Birks.

Meanwhile, the Supreme Court of Canada in *Kingstreet Investments Ltd* unanimously jettisoned unjust enrichment altogether as a basis for the recovery of unlawful taxes in favour of a framework of newly fashioned constitutional principles and remedies.

***By Benjamin Kasep***

## **PRACTICE POINTS**

### **WINDING UP – Statutory demands**

*Practical tips to keep in mind when acting for a party who has been served with a statutory demand:*

- The 21 days time limit is a strict 21 days. Public holidays and court vacations count.
- The deadline is to file and serve both the originating process and the supporting affidavit. It is prudent to allow time for service of the documents.
- Ensure that your affidavit squarely puts the other side on notice of all of the arguments your client can raise. The evidence can be supplemented so long as The defendant is fairly on notice of the argument and evidence.

***By Christopher Wood***