

### Q & S CONVEYANCING UPDATE

ISSUE 13, 23 SEPTEMBER 2008

#### THE DANGERS OF BUYING PROPERTY IN THE NAME OF AN ENTITY TO BE FORMED

We were recently approached by a client who intended to purchase a property for his Family Trust. His problem was that the Trust (which his accountant was organising for him) had not been set up at the time he wanted to make his offer to purchase and he was unsure what name or entity he should describe the Buyer as in the Contract.

It is common for property to be bought by a Trustee as trustee of a family or discretionary trust particularly when the property being bought is an investment property or cash flow positive or for estate planning and asset protection purposes.

A Trust, as such, is not a legal entity in itself and accordingly the Trustee of the Trust will be the one who holds legal title to the property.

A Trustee can be an individual or a company and the terms of the Trust deed usually authorise the Trustee to enter into legal obligations on behalf of the Trust.

If a Trust Deed has not been signed and a Trust established at the time the Buyer wants to sign a contract and submit his offer for whatever reason then it may be possible for the Buyer (e.g. Mr Smith) to enter into the Contract as:

- “(a) *Mr Smith as Trustee of The Smith Family Trust; or*
- “(b) *Mr Smith and/or nominee.*”

Care must be taken to avoid the imposition of double duty in both circumstances. Obviously the safest way to avoid this is to have the legal entity set up before entering into the Contract, but this is not always possible. Where the Office of State Revenue deems that there are two transactions for whatever reason they will seek to recover two lots of duty.

A Nominee Contract may be utilised where for extraordinary reasons the Buyer is a company that is not yet incorporated is to be the Trustee of a Trust not yet formed.

Section 22(3) of the *Duties Act 2000* sets out the requirements needed to satisfy the Commissioner that no double stamp duty would be imposed on a Nominee Contract.

This includes the requirement that the agent (i.e. Mr Smith in the example above) has written authority to enter into the Nominee Contract on behalf of the Nominee (e.g. the unincorporated company Trustee).

Section 131 of the *Corporations Act 2001* permits a person to enter into a contract on behalf of a company before it is registered.

We recommend against this risky manoeuvre and counsel Buyers to set up their company and/or trust and finalise their documentation prior to entering into any contract. In these days of computerisation a Company or a Trust can be set up relatively easily and within a couple of



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hours.

The cost of a company is @ \$800 and a family trust will cost @ \$350 to \$550 depending on its complexity.

Another alternative for the Buyer is to enter into a put and call option agreement with the Seller. What this means is that in exchange for a call option fee (e.g. \$100), the Seller grants the Buyer an option to purchase the property within a determinable timeframe. If the Buyer does not exercise the option, then the Seller can exercise its put option and require the Buyer to purchase the property.

An option agreement usually has a nomination or assignment clause which means the Buyer can assign its option to a third party or nominate another related entity to be the Buyer once it has been set up. Duty is payable on the call option fee, which would be nil in the example above.

The disadvantages of option agreements are that many Sellers will not be familiar with this type of agreement and may be reticent to enter into them. They may also take more time to negotiate and must be prepared by a solicitor. Setting up an option agreement will cost from \$660 to \$1100 depending on its complexity.

Seeking to enter a contract on behalf of either a company or trust yet to be formed is dangerous with double duty as the penalty for getting the paperwork wrong it should be avoided where and when possible. Only in very unusual circumstances would a Buyer choose to enter a contract for an entity yet to be formed.

No Buyer should do so before seeking legal advice before executing a Contract as mistakes of this kind can be costly.

**Richie Muir,  
Solicitor  
Quinn & Scattini**

If you would like to ask any question about this or any other similar issue Richie may be contacted on 38212766 between 8.30am to 5pm Monday to Friday.

*Quinn & Scattini Lawyers has offices in Brisbane, Beenleigh, Caboolture, Southport, Ipswich and Cleveland. In addition to residential and commercial Conveyancing services, our team of experienced lawyers practice in Business Law, Commercial Litigation, Property Law, Wills & Estates, Criminal Law and Family Law.*

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