

LOOKING FOR TROUBLE

Simple searches are an easy way for practitioners to avoid trouble later.

Three recent claims have highlighted the benefits of practitioners obtaining up-to-date company or title searches at various critical moments.

Company searches before issuing proceedings

Remember the value in doing company searches of your clients, particularly in litigation.

In the first case, a practitioner issued three separate proceedings on behalf of their client company for the recovery of various debts. Unbeknownst to the practitioner, the client company had been de-registered by ASIC for non-payment of fees prior to the proceedings being issued. As a result, each of the proceedings was a nullity.

While the company was later reinstated, the three proceedings had to be discontinued and fresh proceedings issued. A claim was made against the practitioner for costs thrown away. The experience highlights the value of obtaining an up-to-date company search of all corporate parties (including your own client) before issuing proceedings.

ABN search before paying GST

Do not forget to check if someone is registered for GST.

In the second example, a practitioner was acting for the purchaser of a factory. The purchase price was \$700,000 plus GST. The vendor provided a tax invoice and a statutory declaration that stated that the vendor was registered for GST. The practitioner relied on these documents and did not perform a simple, free ABN search over the internet to check that the vendor was indeed registered for GST.

At settlement, the purchaser paid \$770,000 including \$70,000 GST and then

claimed an input tax credit. However, the ATO subsequently advised the purchaser that the vendor was not registered for GST, and so the purchaser could not claim the input tax credit.

By that stage the vendor company had been de-registered and its directors could not be located. Therefore it was possible that the purchaser would be left out of pocket for the extra \$70,000 paid on account of a non-existent GST liability. A claim was made against the practitioner for failing to check that the vendor was registered for GST.

Fortunately, the vendor later re-emerged and the matter was quickly resolved without payment by us. Nevertheless, it would be prudent for practitioners to conduct the simple, free online ABN search (see www.abr.business.gov.au) whenever their client is paying a significant amount of GST. This will ensure that the client will indeed be able to claim an input tax credit.

With ABN searches, click on "ABN History" to check if the entity is registered for GST.

Final title search before settlement

Remember to do a check search before settlement.

In the third recent claim, the practitioner was acting for the purchaser of a residential property. The practitioner prudently lodged a caveat to protect the purchaser's interest pending completion. However, a week later another caveat was lodged by a creditor of the vendor pursuant to a guarantee and charge granted by the vendor prior to the contract of sale.

The practitioner did not do a final "check" title search before settlement, and therefore did not discover this second caveat until after

the transfer and mortgage were lodged for registration. The creditor (that is, the subsequent caveator) took proceedings against the vendor, the purchaser, the mortgagee and the Registrar of Titles seeking a declaration that the creditor's interest pursuant to the charge had priority over the transfer and mortgage.

The purchaser also threatened to join the practitioner as a party to the proceedings. Fortunately the matter was settled at an early mediation.

Practitioners should lodge a caveat to protect a purchaser's interest, but also do a final title search before settlement to ensure there is nothing to prevent the registration of the transfer and mortgage.

Title search when drafting a will

Another good time to do a title search is when preparing a will and the client owns property.

We see many claims where the client tells the practitioner they hold property as tenants in common but in fact the property is held as joint tenants (or vice versa). The will is drafted assuming the half share of the property will pass into the estate, which of course it doesn't.

When drafting a will, do a title search to check the client's assertions unless they can provide a recent copy of the title.

Conclusion

As title searches and company searches are readily available online, and are quick and relatively cheap to do, it is a small price to pay for making sure the matter goes as planned. ●

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