

## INTERVIEW

CHARLOTTE CHRISTMAS AND LISA GALLATE ARE THE SUBJECTS OF OUR SEPTEMBER INTERVIEW. BOTH CHARLOTTE AND LISA WERE MADE ASSOCIATES OF THE FIRM IN JULY THIS YEAR.



### Which practice area do you work in and what sort of work is your practice made up of?

**Lisa:** Insolvency and Reconstruction and Commercial Litigation which has included a number of significant litigation matters, particularly in the One.Tel liquidation. I also advise and act on cases that arise in the external administration of companies, such as insolvent trading claims against directors.

**Charlotte:** I work in the banking and financial litigation area, and specifically in mortgagee recoveries.

### What attracted you to this area of work?

**Lisa:** The challenges of complex litigation, which is a strong speciality of the firm.

**Charlotte:** I have always enjoyed litigation because I find it dynamic, unpredictable and therefore challenging. Being involved in a recent major initiative for St George Bank has been particularly attractive, because of the opportunity to develop different skills and work with people that I would otherwise not have done.

### If asked 10 years ago where you would like to be now, what would you have answered?

**Lisa:** Criminal defence lawyer - but after early experiences practising criminal law, I changed my mind!

**Charlotte:** On an island drinking cocktails having just won jackpot lotto.

### What apart from work keeps your life busy?

**Lisa:** Socialising with friends at some of Sydney's many superb restaurants! Also, lots of outdoor interests, such as long distance running, netball, mountain biking, tennis, and ocean swimming - wetsuits in winter definitely required!

**Charlotte:** Putting time into my personal/family relationships keeps me busy. I also am also busy researching and compiling my family history.

Kemp Strang IN BRIEF is intended to keep readers abreast of current legal and firm developments. It is not to be used or relied upon as a substitute for professional advice. Before acting on any matter, readers should consult with their advisors.

If you do not wish to receive further mailouts please email us at [info@kempstrang.com.au](mailto:info@kempstrang.com.au) or telephone Marianne Slocombe on +61 2 9225 2578

# KEMP STRANG

MEMBER OF THE KENNEDY STRANG LEGAL GROUP

LEVEL 14 55 HUNTER STREET SYDNEY NSW 2000 PO BOX 475 SYDNEY NSW 2001 DX 605 SYDNEY

P. +61 2 225 2500 F. +61 2 225 2599

[www.kempstrang.com.au](http://www.kempstrang.com.au)

# KEMP STRANG

MEMBER OF THE KENNEDY STRANG LEGAL GROUP

## COURT OF APPEAL PROVIDES GUIDANCE TO LENDERS AND LIQUIDATORS ON RECOVERY OF CAPITAL GAINS

By John Baird and Michael Cowled

In *Robins & Ors v Incentive Dynamics Pty Limited (in Liq) & Anor* the New South Wales Court of Appeal considered the circumstances in which a remedial constructive trust may be imposed on a third party to recover monies misapplied by officers of an insolvent company. The claim was a classic "Barnes v Addy" case, where liability was sought for knowing receipt of trust property misappropriated in breach of trust.

The case arose in circumstances where the directors of the first company ("Incentive") provided funds to a second company which had the same directors, which were then used to purchase two properties. Incentive later became insolvent and a Liquidator was appointed. One aspect of the extensive litigation following liquidation concerned the Liquidator's attempt to recover the equity in the properties purchased from the funds that Incentive had provided.

The Court stated that a "third party who receives a company's money with the knowledge that the money was misapplied by the company's officers in breach of their fiduciary or statutory duty is obliged to make restitution as a constructive trustee for the company." In reaching this decision, the Court rejected the proposition that the liquidator was required, before succeeding in a claim for a remedial constructive trust, to prove that the company officers who had misapplied the money had had a dishonest or improper intent. It

was enough if, *objectively*, it was considered that the company officers had acted dishonestly or in breach of duty when causing the monies to be misapplied.

In this case, the Court considered that the second company was "complicit in and privy to the misapplication of the Incentive funds by its officers in breach of their duties" and accordingly the Court of Appeal found a remedial constructive trust for the Liquidator.

The finding of a remedial constructive trust was very important to the Liquidator in this case. The Liquidator had succeeded at first instance in obtaining a monetary judgment against the second company for the funds provided but had not been successful in his claim for all the equity in the properties. During the '90s property boom, these properties had more than doubled in value. If the decision of the lower court had not been overturned, the Liquidator would have been unable to recover the equity in the properties but would have been restricted to his monetary judgment, thereby providing a "windfall" gain to the second company. Following the Court of Appeal's decision however, the Liquidator was entitled to recover the equity in the two properties.

In reaching its decision, the Court noted that it was appropriate to impose a remedial constructive trust for a number of reasons including:



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OCCUPATIONAL HEALTH AND SAFETY DEADLINE – HAVE YOU INTRODUCED THE REQUIRED RISK MANAGEMENT AND CONSULTATION REQUIREMENTS?

By Peter Frazer



EMPLOYEE SHARE SCHEME ALERT – NEW LICENSING AND DISCLOSURE REQUIREMENTS

By Justine Nangle

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# IN BRIEF

## COURT OF APPEAL PROVIDES GUIDANCE TO LENDERS AND LIQUIDATORS ON RECOVERY OF CAPITAL GAINS Continued from page 1

- Incentive had not sought to affirm the agreement under which the funds had been provided;
  - The finding of a constructive trust did not affect the rights of any unrelated parties;
  - The property was able to be traced into identifiable property into the hands of the third party as the defaulting beneficiary.
  - Importantly, "equity would be abrogating its role of vindicating and protecting fiduciary relationships and deterring improper profit-making conduct if it looked just at the capital sums advanced ... If only the loans were repaid, the defaulting officers would be unjustly enriched in consequence of their own wrongdoing."
- The decision is of interest to lenders and liquidators as it provides guidance as to the circumstances in which they may be able to recover capital gains in these circumstances, not just the loan or funds advanced.
- John Baird of the Kemp Strang acted for the Liquidator in this matter.
- For further information, contact  
**JOHN BAIRD** +61 2 9225 2534  
email: bairdj@kempstrang.com.au

## OCCUPATIONAL HEALTH AND SAFETY DEADLINE – HAVE YOU INTRODUCED THE REQUIRED RISK MANAGEMENT AND CONSULTATION REQUIREMENTS? By Peter Frazer

**Any remaining exceptions to compliance with the detailed initiatives ("the Initiatives") introduced by the Occupational Health and Safety Act 2000 (NSW) ("the Act") will cease on 1 September 2003. These are in respect of businesses of 20 or less employees. Similar requirements for businesses of more than 20 employees have already been phased in.**

The Act and the *Occupational Health and Safety Regulation 2001* ("the Regulations") came into effect on 1 September 2001.

A feature of the Act and Regulations was to introduce proactive risk management. The Initiatives introduced require employers to:

- establish set consultation mechanisms between the employer and its employees, to enable employees to contribute to decision making on matters affecting health and safety;
- establish occupational health and safety committees to facilitate consultation;
- have a risk assessment of the workplace in which the business operates conducted;

- identify hazards, assess risk and eliminate the risk (or if not reasonably practicable to eliminate the risk, control the risk).

The Act and Regulations set out in significant detail what is required to comply with each of these individual Initiatives.

If the mandatory deadline of 1 September 2003 is not met, employers of 20 or less employees may be prosecuted by WorkCover and significant financial penalties imposed.

For further information, contact  
**GINO PIGNONE** +61 2 9225 2517  
email: pignoneg@kempstrang.com.au

## EMPLOYEE SHARE SCHEME ALERT - NEW LICENSING AND DISCLOSURE REQUIREMENTS

By Justine Nangle

**An important issue that has arisen out of the introduction of the *Financial Services Reform Act 2001* (Cth) is its impact on employee share schemes.**

Most people are already aware that the *Financial Services Reform Act* has amended Chapter 7 of the *Corporations Act 2001* relating to financial services and markets and introduced a new Australian Financial Services Licensing regime. The new licensing regime came into effect on 11 March 2002. For existing financial service providers, ie - those that hold a licence under the old *Corporations Act* regime or those that were exempt under the old regime but whose activities will now be subject to the new regime - there is a two year transitional period until 10 March 2004 within which to comply. However, for newly established financial service providers who engage in new activities after 11 March 2002, there is no transitional period and they will need to obtain an Australian Financial Services Licence for those new activities before they undertake them.

Employee share schemes (especially those that involve a trustee) are caught by the provisions of the new regime as both the company and the trustee may be deemed to be providing a 'financial service' in relation to the scheme. A company may be providing a 'financial service' if it provides advice in relation to the purchase of shares in the company under the scheme. A trustee may be found to be providing a 'financial service' if it applies for, holds and sells shares on behalf of any employee under the scheme. Accordingly,

both the company and the trustee may be required to hold an Australian Financial Services Licence for the provision of those 'financial services', unless an exemption or relief from the licensing requirements is available.

To address such issues and provide assistance to employers offering employee share schemes, ASIC has recently released an amended Policy Statement directly relating to employee share schemes. It has also issued a new Class Order relief document which sets out ASIC's policy on granting conditional relief from the disclosure and licensing provisions of the *Corporations Act 2001* in relation to employee share schemes.

Stringent requirements must be satisfied for a company to be eligible for the ASIC Class Order relief. Licensing relief in respect of the financial services provided as part of the employee share scheme will only be available if the company is eligible for disclosure relief so that a prospectus for the offer of shares under the scheme is not required and if specific conditions are also met.

For further information, contact  
**TANIA ZORDAN** +61 2 9225 2551  
email: zordant@kempstrang.com.au

### BEHIND THE SCENES ...

Congratulations to Charlotte Christmas and Lisa Gallate who became Kemp Strang Associates on 1 July this year. Charlotte is a member of the Banking and Commercial Litigation practice group and Lisa works in the Insolvency & Reconstruction and Commercial Litigation team.

Welcome to new solicitors Sam Pandya, Michael Shortall, Katrina Warden, David Paabo, Matthew Kelly, Mindy Bonomelli, Sarina Sefton, Kate Santamaria, Brooke Pendlebury, Mark Lydon and Graeme Switzer.

Kemp Strang were proud sponsors of this year's University of New South Wales Law Revue. We were also major sponsors of the recent Insolvency Practitioners of Australia conference held at the Westin Hotel, Sydney and the Australian Property Institute Excellence in Property Awards.

Congratulations to the Green Building Council of Australia, a Kemp Strang client, on their recent launch of the pilot Green Star Environmental Rating System for commercial office buildings.