
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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INSOLVENCY UPDATE

Retention of title

A landscaping sub-contractor submitted a tender accompanied by standard terms and conditions which included a retention of title clause ("RoT"). When the head contractor went into liquidation, the landscaper lodged two caveats on the title to land on which the work was performed, relying on the RoT clause to establish a claim.

At first instance, a Master of the Supreme Court of Western Australia extended the caveats, finding that it was arguable that the architect had accepted the RoT clause, as agent for the owner.

The owner appealed, claiming that it had not, through its architect or otherwise, agreed to the RoT clause. The owner also argued that the RoT clause did not create an equitable interest that was capable of surviving the termination of the building contract, which followed the winding up of the head contractor.

In *Perron Investments Pty Ltd v Tim Davies Landscaping Pty Ltd* the Court of Appeal of the Supreme Court of Western Australia ruled that:

- neither party was able to refer to any authority about whether a RoT

clause could give rise to an equitable interest in land;

- however, in the circumstances, that was not relevant because there was simply no evidence that the architect knew that the head contractor and sub-contractor were likely to enter a contract, in the terms of quotation, which included the RoT clause;
- there was an insuperable difficulty with an argument that the landscaper was entitled to an equitable lien as unpaid vendor in that there was no evidence of any actual or potential debt owed by the owner to the landscaper; and,
- even if that were not the case, there was a substantial body of authority that the expenditure of work and materials under a construction contract, does not of itself confer on an unpaid contractor any interest in the land on which the work is done.

The owner was successful in resisting the extension of the caveats.

Enforcement of bank guarantee

In *Board Solutions Australia Pty Ltd v Westpac Banking Corporation* the Supreme Court of Victoria was asked to

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grant injunctions to prevent the enforcement of a bank guarantee.

The guarantor had authorised its bank to provide a banker's undertaking to a major supplier's bank, which secured the supplier's bank debt. When the supplier's bank made a demand on the guarantor's bank for an amount in excess of \$1 million, the guarantor successfully obtained an interim injunction restraining enforcement of the banker's undertaking.

The guarantor argued that the supplier's bank had acted unconscionably or fraudulently in seeking to enforce the undertaking, because the intended purpose of the guarantee was only to provide security for initial stock orders for goods to be supplied. The supplier's bank said that the wording of the undertaking was clear beyond dispute and the unconditional undertaking should be enforced.

The Court held that:

- courts rarely interfere with bankers' undertakings, especially those that are, on their face, unconditional;
- the guarantor had been careful to communicate its concern about an unrestricted bank guarantee. The supplier had advised that the bank guarantee would only be utilised on active purchase orders, and the supplier's bank was also aware of the guarantor's concerns;
- the guarantor's concerns led to the undertaking being redrawn, notwithstanding that in its revised form it remained unconditional; and,
- the evidence did not support a conclusion that the supplier's bank

had acted fraudulently. However, given that the supplier's bank was aware of the guarantor's concern about the unconditional guarantee, there was a case to be made out on the basis of unconscionable conduct.

Noting that an undertaking as to damages was given to the Court by the guarantor company with assets of more than \$5 million, the Court agreed to restrain the enforcement of the guarantee, until the issues were addressed at trial.

Loss from incompetent valuation

In *St George Bank Limited v Quinerts Pty Ltd* the Court of Appeal of the Supreme Court of Victoria considered the damages arising from an incompetent valuation.

A property valued at \$800,000 had been sold by the Bank, as mortgagee, for \$495,000. The Bank claimed that if the property had been valued at its true worth of not more than \$500,000, it would have declined the loan transaction.

The Bank claimed it was entitled to damages to put it in the position in which it would have been had it not made the loan.

The valuer admitted that the valuation was incompetent and that the true value of the property was no more than \$500,000, at the time of valuation. However, the valuer argued that even if the property had been competently valued at \$500,000, the Bank would still have lent the borrower \$450,000 ("the alternative transaction") and said that the Bank's claim should be limited to the difference between its actual loss and the loss which it would have incurred, if it had lent \$450,000.

At first instance, the County Court of Victoria held that it was more likely than not that the Bank would have entered into the alternative transaction and that the borrower would have financed the remaining \$60,000 from his own resources.

The Bank Appealed against the judgment that it would have entered into the alternative transaction. The valuer Cross-Appealed on the grounds that the judge erred in refusing to reduce the damages payable to the Bank in order to allow for contributory negligence.

The Court held that:

- the documentary evidence did not sustain the conclusion that the Bank would have entered into the alternative transaction;
- the borrower's evidence at trial to actually complete the alternative transaction was that he was pretty sure that he could have financed the shortfall from one of his companies. Alternatively, he could have obtained a loan of 95% of valuation from the Bank for the whole of the purchase price of \$495,000, plus the costs of the mortgage insurance. This Court held this was plainly misconceived;
- the Court was correct to reject the Bank's claim for an amount of damages to compensate it for interest forgone by entering into the transaction. It was not enough for the Bank simply to assert that it had suffered a loss; it had to prove that loss. It was difficult to conceive a litigant better equipped or qualified to quantify such a loss at very short notice and with relative ease and economy; and,
- there was no evidence to support a

contention that the Bank had been guilty of contributory negligence in failing to enquire about the borrower's ability to service the loan or by shutting its eyes to the unsatisfactory characteristics of the borrower.

The Bank's Appeal was successful. The valuer's Cross-Appeal was unsuccessful. Costs were awarded against the valuer.

Director's penalty notice

In *Charitopoulos v Deputy Commissioner of Taxation* the District Court of South Australia was asked to consider whether legal proceedings concerning a director's liability under a director's penalty notice was frozen by the *Bankruptcy Act*.

The Australian Taxation Office had commenced legal proceedings to recover penalties representing \$24,700 of unpaid PAYG withholding tax under Section 222AOC of the *Income Tax Assessment Act*.

A Master of the Court had refused the director leave to withdraw various purported admissions contained in his defence. The director appealed that decision. However, before the judgment was delivered, the director had become bankrupt, triggering a bar to legal proceedings under Section 58(3)(b) of the *Bankruptcy Act*. This prevents a creditor from taking fresh steps in proceedings, except with the leave of the Federal Court of Australia or the Federal Magistrates Court of Australia.

The Court held that:

- the Trustee in Bankruptcy was operating on the basis that the proceedings had been stayed;

- the Court was dealing simply with an interlocutory step and finalisation of the Interlocutory Appeal would have no practical significance; and,

- the delivery of a judgment would be a step in the proceedings, which meant the Court was precluded from completing and delivering the judgment.
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