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Trust property subject to Corporations Act orders

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contents

The collapse of the Westpoint group of companies has received extensive media coverage. Apart from the obvious concerns about the losses of individual investors and the publicity surrounding the search for the assets of Westpoint directors and officers, there has been a great deal of interest in the attempts by receivers appointed under the *Corporations Act 2001* (Cth) (the Act) to freeze certain assets of the directors and officers, pending investigation by the Australian Securities and Investments Commission (ASIC). Those attempts have included the consideration of whether the power to make such orders applies in relation to property held under discretionary trusts.

Relevant powers

Proceedings in *Re RichStar Enterprises Pty Ltd (ACN 099 071 968) v Carey (No 6)* [2006] FCA 814; BC200604846 were commenced by ASIC in the Federal Court in WA (French J) on 27 March 2006. Subsequent orders were sought in relation to various defendants, in the words of French J, 'to bring into the scope of receiver orders, property held by a third party as trustee for any trust in which the defendant is a beneficiary' (at [2]).

French J was prepared to vary the original orders, with one exception, by extending the scope of the definitions of 'individual property' and 'corporate property'. One reason enunciated by French J to support the variation was as follows (at [5]):

> I am prepared to make more specific orders … directed to the class of discretionary trusts in which, because the trustee is effectively the alter ego of the relevant beneficiary or otherwise subject to his or its effective control, the beneficiary has at least a contingent interest within the meaning of that term as used in the definition of 'property' in s 9 of the [the Act].

His Honour was (at [6]):

> … also prepared to make ancillary orders under s 23 of the *Federal Court of Australia Act 1976* (Cth) to authorise receivers to obtain necessary information from the defendants and from the trustee of any trust of which a defendant is a beneficiary, inclusive of discretionary trusts, so that a decision may be made whether to extend the receiver orders to the property of that trust.

Those orders were made.

A principal question was whether the court had power under the relevant statutory provisions to appoint a receiver to property held by a third party on a trust, whether discretionary or otherwise, of which a relevant person is a beneficiary.

A 'relevant person' is a person who, for the purposes of s 1323, is under investigation under the Act or under the *Australian Securities and Investments Commission Act 2001* (Cth), or is the subject of a prosecution or a civil proceeding under the Act.

Statutory framework

The relevant powers are set out in s 1323 of the Act and s 23 of the *Federal Court of Australia Act*.

Section 1323 confers the power on the court, on application by ASIC or by an aggrieved person, to appoint a receiver or trustee in the case of natural persons, and a receiver or receiver and manager in the case of bodies corporate, of the property or of part of the property of a relevant person within the meaning of the Act.

The term 'property' is defined in s 9 of the Act:

> Property means any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action.

Reasons

As noted by French J, property held on trust for a person is a particular example of the general case of third-party property in which a relevant person, for the purposes of the Act, has an equitable estate or interest. Where a trust is non-discretionary or fixed, it would appear to be clearly covered by the relevant provisions, but what of the case where the relevant person is a beneficiary of a discretionary trust? It has been noted that the term 'discretionary trust' is used to identify a type of express trust in which, unlike a fixed trust, the beneficiaries' entitlement to income or to the capital, or both, is not immediately ascertainable.

In this arcane area of the law of trusts, distinctions between the powers of particular trustees, having regard to the entitlement of beneficiaries, can include general, special or hybrid powers. This was explained by Gummow J in *Federal Commissioner of Taxation v Vegners* (1989) 90 CLR 547 (at 552), a Federal Court decision quoted by French J (at [19]):

> … a power exercisable in favour of any person including the donee of the power would be a general power and thus would be tantamount to ownership of the property concerned, whilst the objects of a special power would be limited to some class, and the objects of a hybrid power would be such that the donee might appoint to anyone except designated classes or groups.

So, by analogy, French J noted (at [19]) that:

> … a beneficiary who effectively controls the trustee of a discretionary trust may have what approaches a general power and thus a proprietary interest in the income and corpus of the trust.

There are many forms of discretionary trusts, but the nomenclature is a convenient descriptor rather than a matter of principle. What is important is the nature of the beneficiaries' interests. French J went on to consider the distinction between exhaustive and non-exhaustive trusts and the significance of that distinction to the nature of the beneficiaries' interests in them.

In the case of an exhaustive discretionary trust with a closed class of beneficiaries, the beneficiaries' interests will amount to absolute ownership. In the case of individual beneficiaries under a non-exhaustive discretionary trust, the interest is a mere expectancy of the right to compel the trustees to consider whether or not to make a distribution in their favour. A passage from *Gartside v Inland Revenue Commissioners* [1968] AC 553 (at 617), a House of Lords decision quoted by French J (at [27]), makes that position abundantly clear:

> No doubt in a certain sense a beneficiary under a discretionary trust has an 'interest': the nature of it may, sufficiently for the purpose, be spelt out by saying that he has a right to be considered as a potential recipient of benefit by the trustees and a right to have his interest protected by a court of equity.

Another approach to the general question was found in *R & I Bank of*

Western Australia v Anchorage Investments Pty Ltd (1992) 10 WAR 59, a decision of the Full Court of the Supreme Court of WA, in which the central issue was whether beneficiaries in a particular trust had a proprietary interest in any particular 'assets' of the trust fund or in the trust fund as a whole. The conclusion reached was that the beneficiary, in that case, did not have a proprietary interest.

On the basis of his consideration of a number of authorities, and having regard to the broad definition of the term 'property' in s 9 of the Act, French J concluded (at [29]) that:

> … in the ordinary case the beneficiary of a discretionary trust, other than perhaps the sole beneficiary of an exhaustive trust, does not have an equitable interest in the trust income or property which would fall within the most generous definition of 'property' in s 9 of the Act.

But his Honour distinguished the general situation from that where a beneficiary effectively controls the trustee's power of selection. In that situation, the beneficiary's interest is analogous to a proprietary interest.

ASIC submitted that a beneficiary under a discretionary trust has a 'contingent interest', which equates to a proprietary interest falling within the meaning of 'property' in s 9 of the Act, and that the court should make the orders applied for on the basis that any of the defendants who is a beneficiary of a discretionary trust has a 'contingent interest' in the property of the trusts, which therefore constitutes 'property' as defined in s 9 of the Act. High Court authority[1] was referred to which suggested that the word 'interest' as applied to property may include a contingent interest when used in a popular sense, but where in a strict legal sense it refers to a mere prospect or possibility of a future estate contingent on the occurrence of some event.

The practical conclusion from this recourse to authority depends on the trustees' power to distribute and the scope of distribution allowable from the trust corpus. Where a discretionary trust is controlled by a trustee who is in truth the alter ego of a beneficiary, then, at the very least, a contingent interest may be identified because it is certain that the beneficiary will receive the benefits of distributions. Similarly, where a beneficiary effectively controls the trustee's power of selection because he or she is the trustee or one of them or has the power to appoint a new trustee, the beneficiary has something approaching a general power and ownership of the trust property.[2] There are cases in the family law jurisdiction dealing with similar circumstances.[3]

French J then referred to submissions by ASIC which set out details of various trusts of which individual defendants to this application were beneficiaries. In relation to one of them, he said (at [41]):

> He is the director and secretary of that trustee company. He is the original appointor under the trust and his wife … the current appointor. The trustee has a wide discretion including the power to prefer one or other beneficiary to the total exclusion of any other beneficiary. Mr Beck would appear, through his trustee company, to have effective control of the assets of the trust.

In the sense discussed above, Mr Beck had a contingent interest in the assets of the trust, which amounted to effective ownership of the trust property and was therefore amenable to control by the receivers under s 1323. French J reached similar decisions about a number of other trusts that were the subject of the application by ASIC.

His Honour was also prepared to make orders under s 23 of the *Federal Court of Australia Act* to ensure the effectiveness of the s 1323 orders by authorising the receivers to require the defendants to provide information necessary to identify any trusts in which they were beneficiaries; to require the defendants to provide, by exercising their rights as beneficiaries, information to which they were entitled relating to the trusts' documents and the management of the trusts, including their distribution history; and to authorise the receivers to obtain information from the trustees of any trust of which a defendant was a beneficiary, including the terms of the

trust, the classes of its beneficiaries and its distribution history.

At first sight this appears to be a groundbreaking decision, but it depends on its particular facts and circumstances, the structure of the trusts under consideration and their constituting documentation, as well as the extent of the powers conferred by the relevant statutory provisions. The orders made are to assist ongoing enquiries and investigations that may ultimately reward 'aggrieved persons'. A broad public interest in preventing statutory breaches, as alleged, and a torrent of media coverage highlighting the plight of hundreds of investors and the lifestyles of some directors and officers of Westpoint companies could also be factors in persuading the court that the application for the extension of orders requested by ASIC was well founded. ●

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Endnotes

1. *Craig v Federal Commissioner of Taxation* (1945) 70 CLR 441.
2. *Re RichStar* at [36] and [37].
3. See, for example, *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 and the discussion in *Re RichStar* at [37]–[39].

Liability in negligence of NSW councils in granting development consents and issuing s 149 certificates

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In late September 2005, the NSW Court of Appeal handed down an important decision on the liability of councils in negligence for development consents and issuing s 149 certificates. The case was *Port Stephens Shire Council v Booth* [2005] NSWCA 323; BC200507258.

The case concerned an approval by Port Stephens Shire Council (the council) for a holiday resort on land at Port Stephens, only 9 km away from the Williamstown RAF basis and only 2.5 km away from the Williamstown weapons range.

The facts were complex. Essentially, however, in late 1992 the Department of Defence sent to the council a noise exposure forecast for the next 10 years (the 2002 ANEF). The 2002 ANEF referred to Australian Standard AS2021, which provided guidelines to determine whether the extent of aircraft noise intrusion would be acceptable for particular types of development and the extent of noise reduction required. Based on these guidelines, houses were not acceptable for most of the resort, and hotels, motels and hostels were only conditionally acceptable — that is, they would only be acceptable following an analysis by an acoustic consultant if any necessary noise control features were included in the building design.

The landowners/developers intended to construct cabins and subdivide the land for the resort under community title and to sell the lots in the community subdivision to purchasers. A development consent was granted in April 1993 and building consent in

December 1993. No noise attenuation conditions were imposed and no reference was made either to ANEF forecasts or to noise exposure from aircraft. Construction of the cabins and associated work then commenced. From late 1993, a number of purchasers entered into contracts. The community plan was registered towards the end of 1994 and the purchases were then completed.

Until at least late 1996, aircraft noise was not a significant problem; however, after that time the noise increased significantly. Guests at the resort complained, and in late 1998 the operations of the resort were cut back.

A large number of the purchasers, as well as the developers, brought proceedings against the council claiming damages for negligence in the grant of development consent and building approval and, in the case of the purchasers, in the issue of s 149 certificates.

Negligence in granting approvals

The council did not dispute in the appeal that it owed the purchasers a duty to take reasonable care in the determination of the development application; however, it essentially argued that there could not be a breach of the council's duty of care, unless its decision was so unreasonable that no reasonable council could have made it. The Court of Appeal disagreed. The court quoted (at [82]) a 1957 High Court decision[1] in which it was said that:

> … when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered.

The Court of Appeal also reviewed other cases where councils had been found liable in negligence when exercising their powers, such as:

- granting approval without informing the applicant of a danger of land slippage, where the council knew of the danger (*Wollongong City Council v Fregnan* [1982] 1 NSWLR 244);
- examining and approving plans and specifications for a building, where they were inadequate (*Voli v Inglewood Shire Council* (1963) 110 CLR 74); and
- where council was aware of significant contamination and then proceeded to grant consent to subdivision of the land into residential lots (*Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378).

How extensive is the duty of care? The Court of Appeal approved an earlier High Court statement that the duty is 'only … to take those steps that a reasonable authority with the same powers and resources would have taken in the circumstances in question'.

Here the council was clearly negligent. Any exercise of reasonable care required that AS2021 be followed through, with a proper noise reduction analysis and the imposition of noise attenuation conditions. This had not been done.

The court said that this was not a casual act of negligence, but a systemic failure and the council had not shown that it provided the advice concerning aircraft noise exposure in good faith.

Negligence in issuing s 149 certificates

Section 149 certificates, or planning certificates, are certificates issued by a council under s 149(2) of the *Environmental Planning and Assessment Act 1979* (NSW) (EP&A Act), dealing with a number of specific required matters relating to land. For example, a s 149 certificate must say the purposes under the relevant environmental planning instrument for which the land can be used with development consent and the purposes for which development is prohibited.

Under s 149(5) of the EP&A Act, the council can in a planning certificate include advice on such other relevant matters affecting the land of which it may be aware. Section 149(6) essentially says that the council shall not incur any liability in respect of advice provided in good faith pursuant to subs (5).

It was not in dispute in the case that the council owed the purchasers a duty to take reasonable care in the issue of s 149 certificates. The court considered (at [113]) that the s 149 certificates issued did not provide 'meaningful advice concerning the potential impact of aircraft noise on the use and enjoyment of the land or of the potential restrictions on the use of the land by reason of that impact' and that the information in the certificates was misleading. In the court's view, the information on the certificates would not provoke the applicants to enquire further.

The court said that this was not a casual act of negligence, but a systemic failure and the council had not shown that it provided the advice concerning aircraft noise exposure in good faith. There appeared to have been a conscious decision to refer to the contours in a particular way, in a way that was misleading. No cost inhibitions on more accurately describing the effect of the NEF contours was demonstrated. The lack of good faith found by the court was highlighted by the existence of an additional report which the council had obtained relating to noise impact, but which the mayor had, for unknown reasons, withheld from the planning staff. ●

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Endnote

1. *Caledonian Colleries Ltd v Speirs* (1957) 97 CLR 202 at 220.

australian property law bulletin

Improving conveyancing standards in Queensland — a new protocol

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On 2 July 2006, the Queensland Law Society introduced a conveyancing protocol for residential and commercial conveyancing. The protocol was developed in response to the increased level of complexity in completing a conveyance and the increasing cost of insurance and reinsurance for Queensland practitioners. While the protocol is not mandatory, practitioners who fail to make a bona fide attempt to comply with it face an increased penalty deductible if the claim arises in respect of a matter addressed in the protocol. The onus will rest with the practitioner to prove compliance. Although the protocol only has a direct impact on practitioners insured through the Law Society insurers, there is a significant likelihood that over time courts will also use the protocol to inform their decision about the expected standard of care of a practitioner in conveyancing transactions.

This article outlines the objectives of the protocol; how practitioners should use the protocol; and some of the high-risk areas of liability and how they are addressed in the protocol.

Objects of the protocol

The objects of the protocol are to:

- guide and assist lawyers as to the standard of care and skill expected of a reasonably competent and diligent solicitor in a conveyance;
- encourage and foster good conveyancing practices and standards;
- enhance the protection of clients in the conveyancing process; and
- encourage improved confidence of the public in the legal profession providing conveyancing through transparency in the process.

These objects underlie the way in which the protocol is drafted and should be used by practitioners.

Content of the protocol

The protocol has several component parts, as discussed below.

Introduction and standards of conduct

This part outlines for users the background to the introduction of the protocol and the objects and the standards of conduct expected of practitioners in all conveyances, whether residential or commercial. The standards of conduct are intended to form part of each protocol.

Residential house and land

This protocol sets out separately the responsibilities of a practitioner acting for a buyer or a seller. In addition, the obligations of a practitioner before the contract is signed and after the contract is signed are dealt with separately. The protocol applies only to transactions where the contract is the REIQ Houses and Land Contract (5th edn) (REIQ is the Real Estate Institute of Queensland).

Residential community title

This protocol sets out separately the responsibilities of a practitioner acting for a buyer or seller. In addition, the obligations of a practitioner before the contract is signed and after the contract is signed are dealt with separately. The protocol applies only to transactions where the contract is the REIQ Lots in a Community Title Scheme Contract (1st edn).

Commercial

The commercial conveyancing protocol also deals separately with the

responsibilities of practitioners acting for buyer or seller. The protocol is based on the REIQ/Queensland Law Society Contract for Commercial Land, Buildings and Units (2nd edn, GST reprint), but is drafted more generally so as to direct practitioners to matters that may, depending upon the nature of the property, require consideration.

Options

The final protocol deals with the responsibility of practitioners when preparing and advising on put and call options for the sale of residential property. The protocol attempts to provide a conservative approach for practitioners to comply with the requirements of the *Property Agents and Motor Dealers Act 2000* (Qld) in relation to options.

Checklists

Checklists for residential conveyancing and buyer's inquiries are also available to assist practitioners in complying with the protocol.

How was the protocol developed?

A significant driver for the introduction of a protocol was the significant increases in claims arising from conveyancing and the increasing cost of those claims. In drafting the protocol, careful consideration was therefore given to recognised areas of risk and the court decisions that establish the standard of care of a practitioner in a conveyance. These requirements were then balanced with reasonable, accepted practices and feedback from members.

How should the protocol be used by practitioners?

At a general level, the protocol should be used as a guide by practitioners to the standard of conduct expected in residential and commercial conveyancing. It is not intended for the protocol to form a set of absolute rules and practitioners should continue to use their professional judgment, particularly where departures from the protocol and common practice are necessary. For example, in residential conveyancing practitioners may need to depart from the terms of the protocol where a contract other than the standard contract is used; where a client instructs a practitioner to take a particular course of action; or where the interests of the client require a different course of action. Where departures are necessary, practitioners should still refer to the protocol as a risk management tool for the purpose of reducing the risk of liability. For example, the protocol recommends that where a client instructs a practitioner not to undertake standard searches, a practitioner should before acceding to this request explain to the client the risk of not undertaking the particular searches and confirm this advice in writing.

The protocol for commercial conveyancing is drafted in a different manner to the residential protocols. The diverse nature of commercial transactions means that a detailed set of procedures and matters to consider is not possible. The protocol attempts to raise for consideration by practitioners common issues in commercial transactions where the standard contract for commercial land, building and units is used. Clearly, where the transaction involves larger commercial properties, such as shopping centres or commercial office buildings, additional matters may need to be considered.

In addition to the protocol, several checklists have been developed to support the protocol. It is important to note that the checklists are not a replacement for the protocol and were prepared to assist practitioners with compliance.

Areas of high risk

There are several high-risk areas addressed in the protocols and for which guidance is given.

Retainers

The general scope of a retainer to undertake a conveyance is explained in *Fox v Everingham* (1983) 50 ALR 337. In that decision, the court reviewed the minimum expected of such a retainer, which was held to include an obligation to go through the salient features of the contract and explain the client's principal rights and obligations and further to explain any unusual provisions and how they may affect the client's interests. Several claims against practitioners in the past have arisen as a result of the practitioner failing to understand and settle their retainer with the client. Each of the protocols recommends that a practitioner in the first instance clarify their retainer with the client in writing and then requires a practitioner to explain relevant terms of the contract, including unusual terms, to the client.

The second area of significant risk in the area of retainers has been the failure of practitioners to recognise the limits of expertise and/or whether commercial advice may be necessary and to limit the retainer accordingly (for example, *Vulic v Bilinsky* [1983] 2 NSWLR 472). Practitioners are advised to consider if they have the necessary expertise and, where appropriate, recommend that the client obtain additional advice from another practitioner. A common example where practitioners fail to recognise the dangers is in the area of commercial advice. In one sense, it is clear that lawyers are not generally engaged to give commercial advice, but the issue in each of the recent cases has come down to what the exact retainer of the lawyer is and what obligations the lawyer has assumed. In *Littler v Price* [2005] 1 Qd R 275, the Queensland Court of Appeal held that while a solicitor is not qualified to give financial advice, a solicitor who has been engaged to complete a conveyance and who has knowledge of the circumstances of the purchase should properly explain the effect of all documents in the transaction to a client and, in particular, should draw to the client's attention matters that may impact on the client's financial position, such as the viability of rental guarantees, and suggest further investigation. See also *Banks v Copas Newnham Pty Ltd* [2002] QCA 217; BC200203447 and *Burke v LFOT Pty Ltd* (2002) 209 CLR 282.

The final significant area in relation to retainers comprises the interrelated matters of failing to obtain instructions

direct from every client and failing to confirm the identity of the client. Each protocol requires a practitioner to have contact with and obtain instructions directly from each client. The simple step of asking a husband to bring his wife to the initial interview, where property is owned jointly, will assist in reducing the risk of a situation such as *Eade v Vogiazopoulos* [1993] 3 VR 889. In that case, a solicitor only took instructions from the husband and never met the wife. The solicitor was successfully sued by the mortgagee after the husband forged the wife's signature on a mortgage due to the solicitor's certification he acted for and advised both parties about the transaction. The protocol also suggests that a prudent practitioner will take reasonable steps to confirm the identity of his or her client, particularly where the client is not known to the practitioner. In Queensland, mortgagees are already required by the *Land Title Act 1994* (Qld) to certify to the registrar that they have taken reasonable steps to ascertain the identity of the mortgagor. The protocol recognises that this is a prudent step in the case of sellers, and also acknowledges that legislation requiring identity checks is likely in the near future.

PAMDA compliance

The next area giving rise to significant claims and difficulties in practice is compliance with the requirements of the *Property Agents and Motor Dealers Act 2000* (Qld). Following amendments to the legislation in December 2005, the steps necessary to comply with the requirements of ss 365, 366, 366A and 366B have become overly complex. The strict interpretation given to these provisions by the courts in cases such as *Celik Developments Pty Ltd v Mayes* [2005] QSC 224; BC200506019 has driven the inclusion in the protocol of detailed provisions that aim to assist practitioners, first in complying with the Act and, second, in recognising where compliance has not occurred.

Advice to client post-contract

There are a number of areas where claims against practitioners who fail to give proper advice to clients post-execution of the contract have increased.

- *Failing to draw foreseeable risks and unusual clauses to clients' attention.* As part of a retainer to complete a conveyance, practitioners are obliged to draw risks to the attention of the client. It will not be a defence to such a claim that the client did not request advice on the issue. See, for example, *Macindoe v Parbery* (1994) Aust Torts Reports 81-290.
- *Failing to advise clients of the results of searches and errors in contracts in a timely way and failing to provide copies of search results prior to settlement.* A common practice that has developed is to keep copies of searches until the end of the transaction and send them to the client at that time. In several cases, the client has received the search

As part of a retainer to complete a conveyance, practitioners are obliged to draw risks to the attention of the client. It will not be a defence to such a claim that the client did not request advice on the issue.

after settlement and, after reading the search, discovers an aspect of the property that was not explained to them by the practitioner. See, for example, *Micos v Diamond* [1970] 3 NSWR 407, where a solicitor left a plan showing a sewer main crossing the property on his file and did not warn the client of it or the restrictions on construction; the solicitor was found negligent.

- *Failing to recognise an instalment contract and advise the client of the steps required for compliance with s 72 of the* Property Law Act 1974 *(Qld) if the seller wants to terminate for failure of the buyer to complete.* Refer to *Nesseler & Nesseler v Lennon* (unreported, QCA, No 86 of 1992; BC9303219), where a solicitor was found to be negligent because they did not advise the client of an instalment contract or the necessary steps for compliance with s 72. The protocols draw the attention of practitioners to the situations in which an instalment contract may exist and the obligation to advise a client.

Contract to settlement

The final area in which claims are grouped is the conduct of lawyers in the period between contract and settlement. Common claims have included the following.

- *Failing to attend settlement prior to 5 pm as required by the contract.* See *Re Ronim Pty Ltd* [1999] Qd R 172; *Jeppesons Road Pty Ltd v Di Domenico* [2005] QCA 391; BC200507896; *Moor v BHW Projects Pty Ltd* [2004] QSC 60; BC200401344.
- *Failing to send transfer documents at a reasonable time prior to settlement.* See *Le v Quereshi* [2003] QDC 442. The protocol obliges practitioners to send transfer documents at least two days prior to settlement.
- In relation to the finance clause, failings include the following.
  - *Failing on behalf of a buyer to give appropriate notice to the seller under cl 3.2 of the standard contract, due to a failure to check when finance was approved and on what conditions.* For example, where finance is approved subject to conditions, finance approval in accordance with cl 3.2 has not been obtained. If the buyer wishes to proceed, notice of waiver of the condition should be given as opposed to notification of satisfaction. See *Smith v Leanders* (unreported, Cairns District Court, 2000).
  - *Failing to confirm finance approval prior to the finance approval date.*
  - *Failing to obtain instructions directly from the client.* See, for example, *Cowley v Butler* (unreported, District Court of Queensland, 2000), where the solicitor notified of finance to the seller after receiving instructions from the purchaser's finance broker. The solicitor was found to be negligent.

  The protocol deals in detail with the requirements for giving notice and recommends that a practitioner obtain instructions only from their client, as well as obtaining a copy of the finance approval letter.
- *Failing to adopt appropriate procedures for requesting and confirming extensions of time for settlement.* See *Inness v Waterson as trustee for Cobok Family Trust* [2006] QCA 155; BC200603193. The protocol provides detailed guidance on the appropriate steps for requesting extensions of time.
- *Failing to undertake searches appropriate for protecting the client's interests.* See, for example, *Micos v Diamond* [1970] 3 NSWR 407. There is a particular failure in making inquiries relating to unit purchases from the body corporate.
- *Failing to deliver attornment notices at settlement.* See *Jeppesons Road Pty Ltd v Di Domenico* [2005] QCA 391; BC200507896.

The protocols endeavour to deal with each of these situations and provide guidance to practitioners on the necessary steps for reducing the risk of liability. ●

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Damages and injunctions for breach of a 'keep open' obligation

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The recent Victorian Supreme Court decision of *G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd* [2005] VSC 336; BC200506154 considered the damages available where a tenant has breached a 'keep open' obligation in its lease.

The defendant in this case was a supermarket operator who was the anchor tenant in the Mildura City Plaza, a small shopping centre comprising the supermarket, eight specialty shops and an upstairs nightclub area. Some two-and-a-half years before the expiry of its lease, the defendant advised the landlord that it intended to vacate the centre but continue to pay rent and outgoings for the remainder of the lease term. The landlord chose not to terminate the lease, but sued for damages for a breach of the tenant's covenant requiring it to operate the supermarket for the duration of the lease.

In determining the quantum of the landlord's loss, the court heard evidence from various valuers as to the difference between the value of the shopping centre with the tenant continuing to trade and the value of the shopping centre with the tenant's premises vacant.

Some of the most compelling evidence was led by the defendant's valuer, who believed that the value of the freehold might actually increase as a result of the defendant vacating, but agreeing to pay rent, as it opened up opportunities for investors. Further evidence was presented which indicated that the centre had a troubled trading history; that rental growth was likely to be low; and that a prospective purchaser for the centre would not be likely to be affected by whether or not the anchor tenant was trading.

The court held that the plaintiff had failed to satisfy the court that the value of the centre had diminished as a result of the defendant vacating and that, accordingly, the plaintiff was not entitled to damages.

A breach of a 'keep open' covenant was also the subject of litigation in the English House of Lords case of *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297.

In that case, Argyll closed down its Safeway supermarket at the Hillsborough Shopping Centre, which was running at a loss, some 19 years before the lease was due to expire. The supermarket was the anchor tenant at the shopping centre, which consisted of about 25 shops. The issue before the court was whether a mandatory injunction or specific performance should be ordered, requiring the lessee to keep the supermarket open.

The House of Lords held that a mandatory injunction was not available. It held that a covenant in a retail lease to keep a premises open for trade was not, other than in exceptional circumstances, specifically enforceable, since it was settled practice of the court never to grant a mandatory injunction requiring persons to carry on business. An order requiring a tenant to continue trading was not in the public interest where the business was running at a loss and the landlord could be adequately compensated by an award of damages. In this case, the interests of both parties were purely financial and could be compensated by a monetary order.

A different result occurred in the Victorian case of *Diagnostic X-Ray Services Pty Ltd v Jewel Food Stores Pty Ltd* [2001] VSC 9; BC200100127, where the court found that the necessary 'exceptional circumstances' arose. In this case, the defendant leased a supermarket

and an adjacent petrol station at the Werribee Village Shopping Centre. The defendant entered into negotiations to sell the supermarket and petrol station business to another person, who eventually agreed to purchase the supermarket but not the petrol station. The purchaser was prepared also to buy the petrol station, but not for the price the defendant wanted. The defendant subsequently closed the petrol station approximately eight years before the expiry of the lease.

The court distinguished the facts from those in *Argyll* and held that there were exceptional circumstances justifying the granting of the injunction against the closing of the petrol station, including the following.

- The petrol station was run as an adjunct to the supermarket with customers receiving discounted petrol when they spent certain amounts at the supermarket.
- There was no pressing need to dispose of the supermarket and the petrol station; it was simply a management decision to restructure operations (in *Argyll,* the lessee's supermarket business had been running at a loss).
- Significant detriment had been caused to other tenants in the centre as a consequence of the petrol station shutting down. ●

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Assignees of retail shop leases: compensation against lessors denied

Stephen Lumb
BARRISTER

In *Logan City Shopping Centre Pty Ltd v Retail Shop Leases Tribunal* [2006] QSC 172; BC200605373, the respondent, who was the assignee of a lessee that had entered into a lease with the applicant/lessor, claimed compensation against the lessor on the ground that it became the lessee because of what it alleged were false and misleading statements by or on behalf of the lessor.

Compensation was claimed in proceedings brought before the Retail Shop Leases Tribunal (the Tribunal) pursuant to s 43(2) of the *Retail Shop Leases Act 1994* (Qld) (RSLA). The lessor sought to strike out that part of the assignee's claim which related to compensation under s 43(2). The Tribunal ruled that s 43(2) did apply and that the assignee's claim should stand. In overturning the Tribunal's decision, McMurdo J held that s 43(2) did not confer upon a lessee's permitted assignee a right to claim compensation against the original lessor. Section 43(2) then provided, inter alia:

> The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because —
> (a) the lessee entered into the lease, or a renewal of it, on the basis of a false or misleading statement or misrepresentation made by the lessor or any person acting under the lessor's authority …

Right of review

The lessor sought to review the Tribunal's decision pursuant to s 43 of the *Judicial Review Act 1991* (Qld). While s 88 of the RSLA restricts the questioning of the Tribunal's hearing of a retail tenancy dispute and the orders made, the application for review in this case fell within one of the exceptions, namely a want of jurisdiction (at [3]).

Basis for decision

The decision involved a consideration of the RSLA as in force immediately before amendments were made to that Act by the *Retail Shop Leases Amendment Act 2006* (Qld) (the 2006 amendments). The relevant 2006 amendments commenced on 3 April 2006. After a careful consideration of various provisions of the RSLA, McMurdo J concluded that s 43(2)(a), in its reference to the entry into a lease, refers only to the creation of the lease and not to any subsequent assignment of such lease (at [18]). His Honour found that such conclusion was required by the distinction, which was clearly and consistently employed within the statute, between the notion of an entry into the lease and that of the acquisition of an existing leasehold interest by what is described as an entry into the assignment of a lease (at [18]). His Honour found that the distinction was employed not only within s 43 itself, but also in ss 22, 22A, 22B, 22C, 22D and 22E of the RSLA.

In arriving at his conclusion, McMurdo J distinguished the decision of Thomas J in *Re Malsons Pty Ltd* [1991] 2 Qd R 61 (at 66), which heavily influenced the Tribunal's decision. McMurdo J said that *Re Malsons* was concerned with the specific question of whether the legislation had a retrospective operation by interference with existing rights. Thomas J was not interpreting any relevant expression in a provision equivalent to the present s 43 (at [15]).

2006 amendments

The 2006 amendments included the insertion of s 43A, which provides for the payment of compensation for a false or misleading statement or misrepresentation in a disclosure statement given to someone else by the lessee or the assignor or assignee of a

retail shop lease. There were no significant amendments to s 43. McMurdo J considered whether the 2006 amendments affected the interpretation of s 43(2) (at [20]). His Honour noted that the RSLA now provides for liability of an assignee to the lessor, 'raising the question of why there would not be a corresponding liability of a lessor to the assignee, for which the source could only be s 43(2)' (at [20]). McMurdo J concluded that it was not sufficiently clear that the legislature had assumed, in the 2006 amendments, that s 43 should be interpreted such that the Tribunal had jurisdiction to award compensation in favour of an assignee against a lessor. Consequently, his Honour was not persuaded that the content of the 2006 amendments 'displaced' his interpretation of s 43 (at [21]). His Honour suggested that the legislature's intention may have been that the assignee would be entitled to pursue the assignor (rather than the lessor) for compensation and that there would be a clearer purpose for a right of statutory compensation arising out of the negotiations between the lessor and the lessee (at [21]).

Conclusion

A lessee's permitted assignee is not entitled to compensation under the RSLA (in its form immediately prior to the commencement of the 2006 amendments) in respect of misleading statements or misrepresentations made by the original lessor. This conclusion has not been affected by the 2006 amendments to the RSLA. And, it applies with greater force in relation to prospective claims by a lessee's assignee against the lessor's assignee.

However, under the RSLA (as amended by the 2006 amendments), an assignee has a potential claim for compensation against the *assignor* pursuant to s 43A. The focus of a compensation claim by an assignee of a retail shop lease should now centre on the content of the disclosure statement given by the assignor to the assignee pursuant to s 22B of the RSLA. ●

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