

BRIEF NOTE

Recent Developments and Practical Tips for Lawyers

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CONSTRUCTIVE TRUSTS: JOHN ALEXANDER'S CLUBS v WHITE CITY TENNIS CLUB [2010] HCA 19

By Christopher Wood

The John Alexander Tennis Club ("JA") and the White City Tennis Club ("WC") both operated tennis activities at a set of courts on land owned by Tennis NSW. Tennis NSW proposed to sell the land. John Alexander's and White City entered into a memorandum of understanding, part of the effect of which was to attempt to preserve the position of both clubs when the land was sold. It did so, to some extent, by contemplating that JA would exercise an option for purchase of part of the land from the incoming purchaser on certain conditions, and that if it did not do so, an option for WC to purchase that land would spring into existence. The MOU was affected by other contractual arrangements to which JA and WC and others were parties.

JA and WC had a falling out, and JA purported to terminate the MOU and exercise the option purely for its own benefit, and not subject to the conditions in the MOU which would have conferred a benefit, albeit indirectly, on WC. JA borrowed the funds for the purchase from Walker Corporation, and granted it a mortgage, which was not registered. WC claimed a constructive trust over the interest JA had acquired, subject only to handing over the purchase price that JA had paid. It did not press any claim for damages for breach of contract or equitable compensation. The constructive trust was said to flow from a fiduciary duty that emerged from the contractual relationship recorded in particular the MOU. Young CJ in Eq held that there was no fiduciary duty and declined to order a constructive trust. The Court of Appeal overturned that order and declared the trust to exist. The High Court reversed that decision, and restored the trial Judge's orders.

The case provides an important reminder about a number of procedural aspects of cases involving constructive trusts:

- (a) The Court will be slow to convert a contractual relationship into a fiduciary one.
- (b) In the ordinary case, the Court will not grant a constructive trust that interferes with the proprietary rights of third parties.
- (c) It is up to the plaintiff to ensure that all parties affected by the orders are joined to the action. In this case, Walker Corporation, whose mortgage was effectively wiped out by the constructive trust, should have been a party.
- (d) In an equity suit, it is not sufficient to simply make out the case on liability, and then ask for the assessment of damages to be referred to the Associate Justice. The plaintiff must either prove damages at trial, or obtain an order that the trial be split in advance.
- (e) Taking into account the extreme nature of the constructive trust remedy, the Court will search for a less onerous remedy, or grant the remedy on terms that the plaintiff do equity.

Clerk: Paul Walker

**Barristers
(alphabetically):**

Jennifer Beck
Sean Bogan
Andrew Bouris
Tom Brennan
Kim Burke
Therese Cataranziti
Despina Christofis
Justin Conomy
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Sydney Jacobs
Ramena Kako
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Stuart Kettle
Izaz Khan
Christina King
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Richard Lee
David Liebhold
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Michael Meek SC
Nicholas Newton
David Parish
Andrew Reoch

Andrew Robins
Patrick Rooney
Geoffrey Rundle
James Thomson
Martin Watts
Julie Wilcsek
Craig Wilson
Michael Windsor SC
Christopher Wood
Steven Woods

CORPORATIONS – Deeds of Company Arrangement: *Lehman Brothers Holdings Inc v City of Swan* [2010] HCA 11

Attempts to exclude or extinguish claims creditors may have against third parties (other than with the creditor's consent) are not authorised under Pt 5.3A. The subject matter for compromise or composition under a DOCA (other than with the consent of the affected creditor) is confined by the provisions of s. 444D (1) which provides that the Deed binds "all creditors of the company," but only "so far as concerns claims arising on or before the day specified in the Deed." The High Court confirmed that the claims available to be compromised by force of this section were claims against the company in administration.

The majority noted that in this respect, Pt 5.3A "stands in sharp contrast with Part 5.1 of Chapter 5," regulating arrangements and reconstructions. In particular, s.411(4) "does not qualify the extent to which creditors are bound." The court cautioned that it should not be seen as endorsing the criticisms made below of the decision of the (differently constituted) Full Federal Court decision in *Fowler v Lindholm* [2009] FCAFC 125; 178 FCR 563 (the Opes Prime case). It was "neither necessary nor appropriate" to consider whether what was invalidly sought to be effected through the DOCA could have been effected under Pt 5.1.

By Jim Thomson

COMMERCIAL ARBITRATION – Opting out of Model Law: *Cargill International SA v Peabody Australia Mining Ltd* [2010] NSWSC 887

It is a rare event to find a first instance judge decide that a decision of an intermediate appellate court is 'plainly wrong'. However, this is what occurred in this case decided by Ward J. Her Honour held that the Queensland Court of Appeal decision in *Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH v Australian Granites Ltd* [2001] 1 Qd R 461 was plainly wrong and should not be followed. *Eisenwerk* stood for the proposition that, by expressly adopting a different form of arbitration (being the ICC Rules), parties are taken to have intended not to adopt the UNCITRAL Model Law. *Eisenwerk* had been trenchantly criticised both in terms of the damaging effect it has had on the willingness of parties to hold commercial arbitrations in Australia, and at an academic level for failing to distinguish between the *lex arbitri* (or the laws of the seat relating to arbitration) and the procedural rules governing arbitration.

Her Honour held that an agreement by parties to refer any disputes to international arbitration under a particular set of procedural rules does not

constitute an implied agreement to opt out of the Model Law for the purposes of s 21 of the *International Arbitration Act 1974* (Cth) (the 'IAA').

Cargill is in line with the recent amendment to the IAA, passed on 6 July 2010 (though not yet proclaimed). The current s 21 is replaced with a new s 21, which makes it clear that the Model Law covers the field for the purposes of international commercial arbitration.

By Jennifer Beck

EQUITY & SUCCESSION – Proprietary Estoppel: *Delaforce v Simpson-Cook* [2010] NSWCA 84.

In this case the Court of Appeal upheld a proprietary estoppel claim against the executor of a deceased estate by the deceased's former spouse.

During his life the deceased promised to bequeath in his will a property to his former wife during Family Law negotiations. She agreed to forego a payment of \$50,000 from him provided he built a garage on the property. The Family Court made consent orders and noted this agreement.

The deceased later changed his Will and left her with nothing. She sued the executor in the Supreme Court. Bergin J and the Court of Appeal upheld her claim to the Property on the basis of proprietary estoppel by encouragement and ordered the transfer of the Property to her.

By Ramena Kako

PRACTICE POINTS

Federal Magistrates Court - Robes

From 6 September 2010 counsel are required to robe for final hearings, and for hearings where oral evidence is adduced, in the Federal Magistrates Court. Wigs are not worn. Full details are set out in Practice Direction No. 1 of 2010.

By Edmund Finnane

ANNOUNCEMENTS

Appointment

Associate Justice Philip Hallen was appointed to the Supreme Court of New South Wales on 5 July 2010.

New members and licensees

Clifford Ireland is the floor's newest member, and takes up his room on 20 September 2010.

Justin Conomy has joined the floor as a licensee.

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