RECENT CASES

Building Approvals

Hornsby Shire Council v Porter, New South Wales Court of Appeal, CA No. 40650/90, 15 June 1990.

In *Porter v Hornsby Shire Council* (1989) 69 LGRA 101, a building approval was declared invalid, because the Council had failed to notify adjoining property owners before granting approval.

In consequence of this decision, under sections 312A and 313(1) of the Local Government Act 1919 (NSW), as amended, Local Authorities must now notify adjoining owners of every building application to enable those property owners to make submissions to Council. This process will increase the administrative burden on Local Authorities and is likely to further delay the building approval process.

The decision in *Porter* has been confirmed on appeal.

- **John Tyrril**

Insolvency - Set Off

Ken Strukt Pty Ltd (In Liq.) v Storage Developments Pty Ltd (1989) 96 FLR 43.

This case arose out of a building contract. The contractor owed moneys to suppliers and subcontractors. The principal paid the suppliers and subcontractors and each assigned to the principal the debt due from the contractor. The principal paid out a total of $98,605.

Prior to the dates upon which the principal paid the suppliers and subcontractors, an application was filed in the court seeking an order to wind up the contractor. There is nothing in the decision to show that at the time the principal paid the suppliers and subcontractors, the principal was aware of the application. After the principal had paid the suppliers and subcontractors, an order for winding up the contractor was made.

S. 365 of the Companies (Queensland) Code provides that the winding up is deemed to have commenced at the time of filing of the application for winding up. The contractor sued the principal for $78,720 on a cheque which the principal had given the contractor but stopped payment on prior to the winding up order.

The principal argued that the $98,605 being debts assigned by suppliers and subcontractors to the principal could be set off against the $78,720 due on the cheque which was for a progress payment.

The case turned on the meaning of S.86 of the Bankruptcy Act which provides that (with certain qualifications) where there have been "mutual credits, mutual debts or other mutual dealings" between a person who has become bankrupt and another person, the sum due from one party should be set off against the sum due from the other party.

The contractor argued that since the assignment by the suppliers and subcontractors to the principal took place after the filing of the petition to wind up the contractor, there could be no set off. The Court found that the date of the winding up order, not the deemed date of commencement of the winding up, is the relevant date for determining whether the principal had acquired by assignment claims against the contractor.

It was then argued that a claim acquired by assignment does not fall within the description of "mutual credits, mutual debts or other mutual dealings". With surprising absence of reservations, Senior Master McLauchlan QC in the Supreme Court of Queensland rejected the argument and said:

> "I consider that authority is clearly to the contrary. It is only where an assignment of a liability of a company in liquidation is taken after the date of the liquidation, that a debtor will not be able to set off such a claim against the company in the liquidation, and then only if the claim against the company is acquired does not arise out of rights which existed prior to the date of the liquidation ..."

The principal was therefore entitled to raise a set off under S86 as a defence. The case only concerned an application by the contractor to strike out the defence of set off. The application did not touch on the question of whether at the time of paying the suppliers and subcontractors, the principal had knowledge of an "available act of bankruptcy" committed by the contractor. S.86(2) of the Bankruptcy Act provides that if the principal had such knowledge, the principal could not claim the benefit of a set off under S.86.

In other words, if a principal is aware that a contractor is unable to pay debts and the principal then pays subcontractors directly and takes an assignment, S.86(2) is likely to defeat any attempt by the principal to set off those payments against amounts due from the principal to the liquidator of the contractor. The *Ken Strukt* case is not authority to the contrary.

- **Philip Davenport.**