

# CASE NOTES AND COMMENT

## CORPORATE SUICIDE: DAVID DEFEATS (A DECEASED) GOLIATH

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### INTRODUCTION

The recent decision of the ACT Court of Appeal in *Stergiou v Citibank Savings Ltd*<sup>1</sup> should be noted by all practitioners representing corporate clients. During the hearing of the appeal in *Stergiou* the court was made aware by the appellants that the respondent, Citibank Savings Ltd, had been deregistered in June 1996, almost seven years prior to the time when they initiated litigation in February 2003. The case highlights the problems that can arise when it is overlooked that a corporate 'client' has in fact been deregistered. In such circumstances there is no client, and therefore no plaintiff, and all proceedings brought in the name of the deregistered company are a nullity.

### BACKGROUND

The decision in *Stergiou* represents only the most recent chapter in litigation that spans more than 13 years. In April 1988 Stanley and Ekaterine Stergiou entered into a mortgage contract with Citibank Savings Ltd pursuant to which they mortgaged their house in the Canberra suburb of Hackett to Citibank Savings. In 1991 Citibank Savings debited the Stergiou's loan account with various amounts that were not explained to the satisfaction of the Stergiou. The Stergiou responded to these unexplained debits by declining to make any further payments to Citibank Savings.

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<sup>1</sup> [2005] ACTCA 15 (Unreported, Crispin P, 3 May 2005) (*Stergiou*).

They made their last payment under the loan on 30 November 1991.

Not surprisingly Citibank Savings responded to this action with a notice of demand followed by the issuance of a writ of summons and statement of claim to seek possession of the house. Citibank Savings were initially successful in gaining judgment for possession of the house.<sup>2</sup> The Stergiou sought a stay of execution pending an application to the Federal Court for leave to appeal but were unsuccessful and Citibank Savings proceeded to take possession of the house. However, after Citibank Savings had taken possession the Stergiou were granted leave to appeal and were ultimately successful in the Full Court of the Federal Court. On 30 June 1993 the judgment was set aside, the statement of claim was struck out and Citibank Savings were given liberty to replead the claim. Accordingly the Stergiou regained possession of their house.<sup>3</sup>

Citibank Savings recommenced their original proceedings by filing an amended statement of claim. On 12 May 1995 Higgins J gave judgment for the Stergiou in relation to Citibank Savings' claim because Citibank Savings had not successfully demonstrated that at the appropriate time that there was a default under the mortgage for the period of one month required to justify the issuing of a default notice under section 93 of the *Land Titles Act 1925* (ACT).<sup>4</sup> Citibank Savings appealed from the decision of Higgins J and were successful in the Full Court of the Federal Court on 13 June 1996.<sup>5</sup> Their success rested on the decision of the Full Federal Court that Higgins J had not determined whether the Stergiou were in default on the date that the ejectment proceedings were commenced.<sup>6</sup> Accordingly the matter was remitted to Higgins J for rehearing but he found that Citibank Savings were unable to demonstrate that the Stergiou had been in default as at 23 March 1992, the date on which the

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<sup>2</sup> Ibid [5].

<sup>3</sup> Ibid [5].

<sup>4</sup> *Citibank Savings Ltd v Stergiou* [1995] ACTSC 43 (Unreported, Higgins J, 12 May 1995).

<sup>5</sup> *Citibank Savings Ltd v Stergiou* (1996) 145 ALR 80.

<sup>6</sup> Ibid 83.

ejection proceedings had commenced.<sup>7</sup> The bank were back to where they started.

Citibank Savings did not commence any further proceedings to obtain possession of the house until 2003. In the meantime the Stergiou pursued their own claim for damages against Citibank Savings alleging a conspiracy by Citibank Savings. They claimed damages for ‘mental anguish’ for the unexplained debits to their account and for ejection from their house. The Stergiou also commenced actions against various firms of solicitors<sup>8</sup> including applications for special leave to appeal to the High Court.<sup>9</sup> Every one of these claims by the Stergiou ultimately failed, one such claim being described by the Full Court of the Supreme Court of the ACT as ‘utterly hopeless’.<sup>10</sup>

### THE DECISION IN *STERGIOU*

It appears that Citibank Savings refrained from commencing fresh proceedings to gain possession of the house until the Stergiou various litigation efforts reached their respective conclusions.<sup>11</sup> Finally Citibank Savings attempted to settle the matter in a letter to the Stergiou on 20 December 2002. However, the Stergiou failed to respond and Citibank Savings issued a notice of demand on 13 January 2003. Again there was no response from the Stergiou so Citibank Savings commenced proceedings on 19 February 2003. Connolly J gave judgment for Citibank Savings on 21 May 2004 and made orders to give possession of the house to Citibank Savings. The Stergiou appealed. As Crispin P noted in *Stergiou*, given that the Stergiou had not made any payments under the loan for twelve and a half years ‘one would have thought that the appeal would have had little chance of success’.<sup>12</sup> Crispin P described the appearance of Mr Stergiou on 16 February 2005, when the matter was called on

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<sup>7</sup> *Citibank Savings Ltd v Stergiou* [1997] ACTSC 59 (Unreported, Higgins J, 28 August 1997).

<sup>8</sup> See, for example, *Stergiou v Clynes t/as Minter Ellison* (1997) 138 FLR 281.

<sup>9</sup> *Stergiou v Reid* [1997] 19 Leg Rep SL3d.

<sup>10</sup> *Stergiou v Clynes t/as Minter Ellison* (1997) 138 FLR 281, 282.

<sup>11</sup> *Stergiou*, above n 1, [12].

<sup>12</sup> *Ibid* [18].

for hearing, as ‘a small, tired, sick David forced to fight a corporate Goliath without any sling or stones’.<sup>13</sup>

But the Stergiou were armed with what Crispin P described as one last ‘legal missile’.<sup>14</sup> Mr Stergiou handed up to the bench an historical company extract obtained from the Australian Securities and Investments Commission (ASIC) which revealed that Citibank Savings Ltd had been deregistered on 13 June 1996. By coincidence 13 June 1996 was the same day that the Full Federal Court had delivered its judgment in favour of Citibank Savings. But this appears to be no more than a coincidence of dates because Citibank Savings made application to ASIC to be deregistered on 30 November 1994. After duly publishing the required notices Citibank Savings was effectively deregistered on 13 June 1996. Crispin P noted that the consequences of this act of ‘corporate suicide’ were ‘catastrophic’ because all ‘proceedings for or against a deregistered company are a nullity’.<sup>15</sup>

As a result of this ‘legal missile’ the matter was promptly adjourned. On 11 April 2005 a notice of motion was filed seeking reinstatement of Citibank Savings pursuant to section 601AH of the *Corporations Act 2001* (Cth). Section 601AH allows a ‘person aggrieved’ to apply to the court for reinstatement of the relevant company. A person aggrieved is a ‘person who has a genuine grievance because an order has been made which prejudicially affects his or her interests’.<sup>16</sup>

The notice of motion to reinstate Citibank Savings was ostensibly filed on behalf of Citibank Savings and a company called Citibank Pty Ltd.<sup>17</sup> It subsequently came to light that the rights of Citibank Savings under the mortgage had been assigned to Citibank Pty Ltd prior to the deregistration of Citibank Savings. However, Citibank Pty Ltd failed in its attempt to have Citibank Savings reinstated under the *Corporations Act*. Crispin

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<sup>13</sup> Ibid [18].

<sup>14</sup> Ibid [19].

<sup>15</sup> Ibid [20] citing *International Bulk Shipping & Services Ltd v Minerals & Metals Trading Corporation of India* [1996] 1 All ER 1017.

<sup>16</sup> *Basto, in the Matter of Torsif Pty Ltd* [2003] FCA 675 (Unreported, Sackville J, 4 July 2003) [13]. See also *Deputy Commissioner of Taxation v Lanstel Pty Ltd* (1996) 22 ACSR 314, 315–316.

<sup>17</sup> *Stergiou*, above n 1, [23].

P rejected the application on four grounds: orders could not be made in proceedings that are a nullity because any orders made would also be nullities; the application was made by two companies, one of which was unregistered and had no standing and the second company was not a party to the proceedings; it would be inappropriate to reinstate the company as a technical device to retrospectively validate proceedings in which the company had no interest because it had assigned its rights to Citibank Pty Ltd; and in any event, even if Citibank Savings was reinstated the Stergiou would succeed in their appeal because the proceedings were founded upon the service of a notice issued by a deregistered company demanding payment of a debt which had not been owed to it.<sup>18</sup>

Citibank Pty Ltd was therefore unable to demonstrate that it was a person aggrieved. There was no order that had been made that had prejudicially affected its interests. Citibank Pty Ltd was the owner of the debt due by the Stergiou and Citibank Pty Ltd had acquired that debt prior to the deregistration of Citibank Savings. There was nothing in the deregistration of Citibank Savings that in any way affected this debt. Citibank Pty Ltd was the current owner of the debt and there was nothing stopping Citibank Pty Ltd pursuing the Stergiou for the repayment of that debt. Even if the former directors of Citibank Savings had made the application for reinstatement of the company this would not have overcome the problem. They would not be persons aggrieved either. The deregistration of Citibank Savings had not prejudicially affected any person because when Citibank Savings was deregistered it had no assets. Accordingly the application was dismissed<sup>19</sup> and the Stergiou succeeded in their appeal and the proceedings were dismissed.<sup>20</sup>

## CONCLUSION

As a result the only option is for Citibank Pty Ltd as the true owner of the debt due by the Stergiou to commence fresh proceedings. So after 13 years of litigation the bank is back to

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<sup>18</sup> Ibid [27] – [30].

<sup>19</sup> Ibid [34].

<sup>20</sup> *Stergiou v Citibank Savings Ltd* [2005] ACTCA 19 (Unreported, Crispin P, Gray and Tamberlin JJ, 10 May 2005).

where it started on 22 February 1992 when it served its first notice on the Stergiou pursuant to section 93 of the *Land Titles Act*. Legal practitioners would be wise to conduct a search of the ASIC database to ensure that their current corporate clients involved in litigation do in fact exist. The consequences of finding that your 'client' does not exist are rather grim indeed as the decision in *Stergiou* demonstrates.