Update - Commercial and Property Law 1991

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Commercial Law

Recent developments in commercial law have been dominated by the introduction of a federal scheme of corporate regulation. From 1 January 1991 the Australian Securities Commission became the sole regulatory authority for the vast majority of trading corporations in Australia.[1] At that time Tasmania, as well as the rest of Australia, witnessed the passage through Parliament of the *Corporations Law*, in addition to the *Australian Securities Commission Act* 1989. Since the inception of the legislation the Federal Government has continued to amend this area at breakneck speed. Amending acts during 1991 include the *Corporations Legislation Amendment Act* 1991 No.110/1991, *Corporations Legislation Amendment Act (No.2)* 1991 201/1991 and the *Corporations (Unlisted Property Trusts) Amendment Act* 1991 No. 200/1991. The Federal Attorney General has also indicated that in November 1992 a draft company law reform bill will be introduced into Parliament. This legislation will make significant amendments to the provisions dealing with loans to directors as well as markedly altering the corporate insolvency sections. The impact of the *Corporations Law* into Tasmania is obviously not exclusive to this State. Therefore the changes brought in this area by the federalising of corporate law are beyond the scope of a review of Tasmanian law. Nevertheless one aspect of corporate law development that is worthy of mention involves the insolvent trading legislation, now contained in s.592 of the *Corporations Law*.[2] The precursor to s.592, s.556, was discussed in the Tasmanian Supreme Court decision of *Castrisios v. McManus*[3] The Federal Commissioner of Taxation took action under s.556 to recover unpaid sales tax. Section 30 of the *Sales Tax Act*

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1 Many statutory corporations, such as public authorities would not come under the scrutiny of the *Corporations Law*.

2 For a full discussion of this section, see L. Griggs, "Inactive Directors - Under Attack", (1992) 11 *Uni. of Tas. L.R.* 75

3 (1991) 4 ACSR 1

provides that the tax imposed, when it becomes due and payable to be a debt due to the Commonwealth. Cox J. held that this tax did not come within the terms of the section.

> The learned magistrate pointed out that neither at the time of the sale of the commodity nor at the time the return is due to be lodged could it be said that the company incurred a debt in the sense that it contracted or entered into an obligation to pay an amount of money. He said, and I agree, that the legislation itself recognises the difference between a tax and a debt, and does not provide that the amount levied shall take on the character of a debt until it is due and payable and remains unpaid....[E]ven when it remains unpaid it is not a debt incurred by the company but is deemed to be a debt for ease of recovery in a court of competent jurisdiction. No act on the part of the company can be identified as one which brings the debt into existence. It does not incur the debt in the sense of bringing the liability of a debtor to a creditor upon itself. That arises only through failure to pay the tax.[4]

What is interesting about this case is that while the incurring of sales tax liability was not a debt incurred within the terms of the legislation, the liability could be taken into account in ascertaining whether there were reasonable grounds to expect that the company would be able to pay all its debts as and when they fall due. As Cox J. states:

> The learned magistrate found that the company was unable to pay the sales tax which was then owing at the time the trade debts were incurred. Although he held that the incurring of the obligation to pay sales tax was not the incurring of a debt within the meaning of. s.556(1)(a)...he was, in my view, clearly entitled to regard the amount of that obligation as one of the debts of the company it was unable to pay as they became due within the meaning of s.556(1)(b)(i) and (ii).[5]

In effect the word "debt" has been given two interpretations in the one section. In my submission it would have been preferable for the word "debt" to be given one consistent meaning within s.592. It is difficult to comprehend that one section within an act contains two interpretations to the one word.

In the insolvency area major reforms have been achieved by the introduction of the *Bankruptcy Amendment Act* 1991.[6] Again, while this amendment is not exclusively Tasmanian in operation, its impact will be felt here.

> The Act is perceived by many to be aimed at the "high flyer" and seems to have been introduced after publicity surrounding the activities of certain bankrupts, and the futile attempts of their trustees to maintain control and extract funds so as to pay a dividend to creditors. The Act now tightens control over

4 (1991) 4 ACSR 1, p.12-13
5 (1991) 4 ACSR 1, p.5
6 No.9/1992

> bankrupts and gives trustees greater investigative and recovery powers.[7]

One of the major reforms of the Act is the introduction of a new income contribution scheme. A person deriving income will make contributions to their trustee from income received after the date of bankruptcy. The amount of the contributions will be determined by the following formula: the contribution will equal the assessed income less the actual income threshold amount; divided by two. "Assessed Income" is the amount assessed by the trustee that the bankrupt will derive for the next twelve months, less income tax payments and child maintenance payments, plus tax refunds received.[8] The actual income threshold amount is calculated by reference to the *Social Security Act* 1991 and the number of dependants.[9] The Official Receiver may vary the contribution if the bankrupt suffers hardship.

A number of provisions in the Act also align the powers of the Official Receiver with those of the Tax Commissioner. The Official Receiver is to given full and free access, at all reasonable times, to all premises and books[10] and the Official Receiver can require any person to provide information, documents and attend the Official Receiver's office as is required. A further extension of the Official Receivers powers occurs with ss.139ZQ-ZT. These sections reverse the onus of proof.

> [N]o longer must the trustee prove that a voidable disposition was made, but rather, the person in whose favour the disposition was made must establish that the disposition is not voidable. Further, the legislature hangs "the Sword of Damocles" over the head of the recipient of the disposition in the form of possible criminal sanctions.[11]

As Hutchinson and Keay conclude:

> It will be interesting to see how the Official Receiver and registered trustees seek to implement their newly-endowed powers, for much will depend on how aggressive they are in using them. Prima facie the powers are broad and the effect could be, particularly in respect of ss.139ZQ-ZT, draconian.[12]

Other effects of the legislation include:

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7 G. Hutchinson and A. Keay, "Clipping the wings of the high flyers?", (1992) 66 *Law Institute Journal* 387

8 See s.139N

9 As at 26 March 1992 this amount was $23,232.30 for a person with no dependants. See Hutchinson and Keay, p.388

10 See s.77AA

11 Hutchinson and Keay, p.389

12 Hutchinson and Keay, p.389

- a fresh system of discharge for bankrupts which allows trustees to grant the discharge and also provisions which can extend or reduce the time of bankruptcy.
- overseas travel restrictions
- clarification of meeting procedures.

Real Property

In 1991 the Supreme Court of Tasmania had the opportunity to consider the nature and role of a caveat as well as discussing the operation of s.102 of the Land Titles Act 1980. A further decision also dealt with the extent of an easement. Decisions in Victoria and South Australia also raised the indefeasibility dispute.

The caveat

In *S. v. Tasmania Bank*[13] the plaintiff secured a loan to her husband by taking a mortgage over subdivisional land of which he was the registered owner. The mortgage was executed in November 1986 but was not lodged for registration nor registered; despite being in registrable form. A caveat was lodged forbidding any dealing with the land. In November 1987 the husband borrowed money from the Tasmania Bank and forged a letter of instruction to the plaintiff's solicitors instructing them to consent on his wife's behalf to the registration of the mortgage to the Tasmania Bank. The trustees consented and the mortgage to the bank was registered in May 1988. There was no evidence to suggest that the Tasmania Bank had knowledge of the husband's fraud. The issue was whether the earlier registration of the caveat protecting the equitable mortgage to the wife was a prior registered estate or interest and therefore was binding on and took precedence over the Bank's mortgage. The essence of the plaintiff's claim was that the caveat was registrable as a "dealing" and once registered the estate or interest which it claimed was also effectively registered and thus took priority over all subsequent dealings. This argument was rejected by Wright J. A caveat was not a "dealing" that created or registered estates or interest. Wright J. stated:

> In my opinion a caveat is not a dealing affecting an estate or interest in land within the meaning of this subsection, even though it may be a dealing for some purposes of the Act.[14]

Wright J. continued:

> If the applicant is correct it means that anybody, by lodging a caveat, can secure an indefeasible interest in the subject property. However to my mind this is manifestly absurd because a caveat is merely a notice preventing registration of any dealing which may impinge upon the interest claimed and, as already noted, it can be removed... It also seems to me that although a caveat may be regarded as creating an interest in

13 Unreported No. 20/1991
14 Unreported No. 20/1991 p. 4

> land, it does so only for purposes which are not inconsistent with its statutory character. It seems to me that it is an inseparable and immutable concomitant of the statutory scheme that even though a caveat may be a registered dealing creating an "interest" in the subject land, it can have no priority as such over instruments which achieve registration subsequent thereto and which effect a disposition or acquisition of land, once registered.[15]

Registration of the caveat did not therefore create any indefeasible interest in the caveator and the Bank's registered legal mortgage prevailed over the plaintiff's earlier created but unregistered equitable mortgage.

This limited or qualified role for the caveat was again emphasised in *Australian Eagle Insurance v. Parry*.[16] On 8 April 1991, in the Supreme Court at Darwin, the applicant obtained a judgment against one Mrs. Parry for $589,352.60 together with costs and interest. On 14 May 1991 a certificate of the judgment was registered in the Supreme Court of Tasmania. At all material times the respondent and Mrs. Parry were the registered proprietors under the *Land Titles Act* 1980 of 2.051 hectares of land at St. Helens. On 29 May 1991 a writ of *fieri facias* was issued out of the Supreme Court of Tasmania commanding the sheriff that of the lands, goods and chattels of Mrs. Parry he should cause to be made *inter alia* the judgment sum. On 19 June 1991 a caveat was lodged on title by the respondent. It stated that he was "claiming Estate or Interest in the whole of the property by virtue of the provisions of Section 79 of the *Family Law Act* in ALL the land mentioned in the schedule following." On or after 28 August 1991 the applicant lodged a caveat claiming an estate or interest as the judgment creditor of Mrs. Parry by virtue of the judgment. Pursuant to the *Land Titles Act* 1980 s.135 the applicant has summoned the respondent to attend before this court to show cause why his caveat should not be removed.

Crawford J. held that the applicant was not entitled to have the caveat removed. While his honour found that the first caveat was defective in that it did not state what estate or interest was being claimed and therefore did not comply with s.133,[17] the caveat was also defective because

> The assertion by a caveator, who at the time of the lodgment of the caveat does not have an estate or interest in the land, that he has commenced proceedings which may result in such an interest being vested in him does not disclose a sufficient caveatable interest.[18]

However the applicant was not entitled to an order for removal unless it can also claim an estate or interest in the land. His honour

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15 Unreported No. 20/1991 p. 4-5
16 Unreported No. 110/1991
17 See the comments of Crawford J., Unreported No.110/1991 p. 2
18 Unreported No. 110/1991 p. 2

found that the authorities did not support the conclusion that the applicant was entitled to an estate or interest in the land[19] and that the provisions of the *Land Titles Act* 1980, (in particular s.61) did not support the applicants argument.

Section 61 of the Land Titles Act 1980 applies to writs of *fieri facias* and

> provides by way of s.61(2) that no execution of any writ shall bind or affect any or estate or interest in registered land except within the period of 3 months after it has been recorded in accordance with s.61(3). The next subsection goes on to provided that where application is made in the prescribed form the Recorder shall record the writ on the folio. Subsection 4 goes on to allow the Recorder to register a transfer completed pursuant to the execution of a writ. Subsection 5 provides that the Recorder shall not register on a folio a registered dealing until a period of 3 months has elapsed since the writ was recorded or satisfaction of the writ has been registered. Subsection 6 states that "Unless and until a writ has been recorded in accordance with subsection (3), no sale or transfer under the writ shall be valid as against a person dealing with the registered proprietor...". Subsections (7) and (8) allow for the Recorder to record the satisfaction of a writ or to cancel the recording of a writ if no transfer pursuant to a sale under the writ has within that period been lodged for registration.

After consideration of the authorities[20] Crawford J. stated that:

> It is my opinion that if it had been intended that the provisions of the *Land Titles Act* 1980 s.61 would create in the judgment creditor an estate or interest in the land of the judgment debtor, it would have been clearly stated and not left as an inference to be drawn from a vague indication of the possibility of that intention.[21]

In essence the *Land Titles Act* 1980 did not give a judgment creditor a "charge or lien on the property of the debtor" and that a caveat lodged by the judgment creditor only protected existing rights and did not enlarge or add to the proprietary rights of the caveator. Under the *Land Titles Act* 1980 a judgment creditor did not have any estate or interest in the judgment debtor's land. However certain sections enabled the creditor to effectually forbid any disposition by the debtor which would remove the debtor's estate or interest in the land from the reach of a writ of *fieri facias* to enforce the judgment. In that rather limited sense the caveat could be said to 'bind' the land to answer a future execution.

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19 Quoting *Hall v. Richards* [1959] Tas. S.R. 58

20 Such as *Hall v. Richards* [1959] Tas. S.R. 58, *Bond v. McClay* [1903] St. R, Qd. 1, *Pirpiris v. Iovanella* [1975] V.R. 129 and *Hurley v. Bonds* (1966) 1 D.C.R. (N.S.W.) 193

21 Unreported No. 110/1991 p. 6

Section 102 of the* Land Titles Act *1980

Section 102 of the *Land Titles Act* 1980 has been considered in the context of the Recorder of Titles' right under s.102(6) to cancel covenants.

In *R. v. The Recorder of Titles; Ex parte Horlock & Ors.*[22] Cox J. reviewed an order of the Recorder, in reliance of s.102(6), to cancel a covenant. The covenant was not to erect more than one messuage on the land comprised in a Certificate of Title of which one Mr. Assandri was the registered proprietor. In 1949 Mr. Assandri's predecessor in title took a transfer of the relevant land. The sale to Mr. Assandri's predecessor was implemented by Memorandum of Transfer registered No. 128478 which contained certain conditions, one of which was a prohibition against erecting more than one messuage on the said Lot. When Mr Assandri took title the land was described as subject to '128478 FENCING & OTHER CONDITIONS in Transfer'. On 15 October 1990, pursuant to an application by Mr. Assandri "to have the conditions "Not to erect more than one messuage on the said Lot' extinguished from the land comprised in" his Certificate of Title, the Recorder made an order cancelling the covenant. Mr. Assandri then obtained planning approval to subdivide his land. An order was then sought to examine and quash the determination of the Recorder of Titles made in October 1990.

It was held by Cox J. that the Recorder of Titles was in error in making the order that he did. His honour quoted from Zeeman J. in *Sieminski v. Brooks Nominees Pty. Ltd.*[23] in considering the requirements of s.102(2)(a)(iii).[24]

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22 Unreported No. 25/1991

23 Unreported No. 56/1990

24 This subsection provides that for the burden of a covenant to run with freehold registered land, notice of the covenant is required to be recorded on the folio of the Register constituting the title to the land intended to be burdened.

> "The whole object of the Act is to define the nature and extent of the title as registered, and so that the certificate of ownership shall disclose the full title of the owner with whatever charges liens or other encumbrances may be registered against it. A purchaser under such a certificate ought not to be put upon enquiry as to anything beyond what the certificate itself discloses... To give to others rights which are not spread upon the face of the register is, in my opinion, quite opposed to the whole intention of the Act....Nevertheless, I hold that for there to be 'notice of the covenant recorded on the folio of the Register' within the meaning of s.102(2)(a)(iii), as a minimum, what needs to be recorded on such folio is either the substantial effect of the covenant or a reference to the instrument creating the covenant where its terms may be found."[25]

On the facts before Cox J. the covenant was not set out on the relevant folio, but there was a reference to the instrument creating the covenant. While his honour considered this to be a clumsy and oblique way to provide notification, he found that conditions of s.102(2)(a)(iii) were satisfied.[26] "The next question is whether or not the land intended to be benefited by the covenant is identified in the instrument containing the covenant."[27] In essence should the benefit of a covenant run with parts of land originally expressed to have that benefit but which parts have been excised. After consideration of the authorities[28] (authorities which were not conclusive on the matter) Cox J. decided not to rule on this conundrum, instead stating:

> "Having regard to these considerations and to the fact that a comprehensive mechanism is available under Part XV(A) of the *Conveyancing and Law of Property Act* 1884 for the resolution of such questions, with full opportunities for those interested to make representations and with access to the Supreme Court provided for, I have little doubt that it was not the intention of Parliament in enacting s.102(6) to empower the Recorder to make such decisions. The summary power is confined to culling from the Register those covenants which do not satisfy the criteria of s.102(2)."[29]

Easements

In *Krolczyk v. Raffan*[30] the plaintiff was the occupier and proprietor of registered land. The defendants were the occupiers and registered proprietors of neighbouring land. On the plaintiff's land was a right of way allowing access for the defendants to their land. As Crawford J. stated: "The question which arises for determination is whether the [defendants] may only use the right of way by entering

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25 Unreported No. 25/1991, p. 5
26 See his comments at pp.5-6, Unreported No. 25/1991
27 Unreported No. 25/1991, p. 6
28 For example *Rogers v. Hosegood* [1900] 2 Ch. 388, *Re Arcade Hotel Pty. Ltd.* [1962] V.R. 274, *Ellison v. O'Neill* (1968) 88 W.N. (Pt. 1) (N.S.W.) 213 and *Federated Homes Ltd. v. Mill Lodge Properties Ltd.* [1980] 1 All E.R. 371
29 Unreported No. 25/1991, p. 8
30 Unreported No. 62/1991

and leaving at [specified points as shown on the sealed plan], or whether they may enter and leave their land at any point on the right of way where it abuts their land."[31]

His honour held that a grant of a right of way involved such access as is reasonable and does not involve a right to cross at all points. However in this case reasonable access was not confined to the points stated on the sealed plan and the plaintiff was therefore not entitled to restrict access in the manner sought. His honour commented that:

> The determination of this case depends on the actual words used when creating the easement, so that other cases decided in the past have limited value as precedent. However, the trend of authority is to allow entry and exist to and from the dominant tenement at more than one point along a right of way which abuts that tenement.[32]

Indefeasibility Dispute

Readers may also be interested in two 1991 Supreme Court decisions which have challenged "one of the basic tenets of the Torrens system in Australia: immediate indefeasibility of title."[33] In the Victorian Supreme Court decision of *Chasfild Pty. Ltd. v. Taranto*[34] Gray J considered that the legislative intention for that state was to adopt deferred indefeasibility. Similarly the South Australian decision of *Rogers v. Resi-Statewide Corporation Ltd.*[35] considered that there was a parliamentary intent in favour of deferred indefeasibility of title. While it is considered that these decisions were made in reliance on particular statutory provisions existing in those States[36] and that they would not apply in Tasmania[37], the two decisions:

> "provide an illustration of the unfortunate divergence which exists between the Torrens statutes of the various States and Territories in Australia. Whilst divergencies on minor matters might be tolerated, it cannot be satisfactory that there should be divergence on such a fundamental matter as the nature of indefeasibility conferred by the system."[38]

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31 Unreported No. 62/1991 p. 1
32 Unreported No. 62/1991 p. 4
33 P. Butt, "Shaking the foundations", (1991) 65 ALJ 611
34 [1991] 1 VR 225
35 Unreported, 3 May 1991)
36 In the Victorian case it was s.44 of the *Transfer of Land Act* 1958; in the South Australian case, s.69 of the *Real Property Act* 1886
37 It is submitted that the High Court decision of *Breskvar v. Wall* (1971) 126 CLR 376 and s.42 of the *Land Titles Act* 1980 support the concept of immediate indefeasibility in this jurisdiction
38 P. Butt, p. 613