# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Carter & Anor v Schmierer* [2003] QSC 035 |
| PARTIES: | **SUSAN RUTH CARTER** and **JASON WALTER BETTLES**<br>(applicants)<br>v<br>**TREVOR JOHN SCHMIERER**<br>(respondent) |
| FILE NO/S: | SC11402 of 2002 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 25 February 2003 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 January 2003 |
| JUDGE: | Mackenzie J |
| ORDER: | **1. It is declared that, insofar as it is asserted that the charge is invalid because it was not executed in accordance with s 126 and/or s 127 of the *Corporations Act* 2001 (Cth), the appointment of applicants as receivers and managers of The Gold Coast B E S T Pty Ltd on 13 November 2002 pursuant to a charge granted by the company to Asset Loan Company Pty Ltd dated 29 August 2002 is valid.**<br>**2. It is ordered that the respondent pay the applicants' costs of and incidental to the application to be assessed.** |
| CATCHWORDS: | MORTGAGES – MORTGAGES AND CHARGES – GENERALLY – RECEIVERS – APPOINTMENT GENERALLY – where contest between the appointment of persons in the capacity as receivers and managers by two companies both holding charges over the mortgagor's property – whether the appointment of receivers and managers by the applicant was valid – whether the mode of execution of the mortgage by the applicant corporation created a valid mortgage debenture<br><br>*Corporations Act* 2002 (Cth), s 126, s 127, s 129, s 198D, s 251A, s 418A(2)<br><br>*Australian Capital Territory Television Pty Ltd v The Minister for Transport and Communications & Ors* (1989) 7 |

ACLS 525, considered
*195 Crown Street Pty Ltd v Hoare; Ivermee & Anor* [1969] 1 NSWR 193, cited
*Lincoln Contractors Pty Ltd v Searle* [1982] Wd R 71, considered
*MYT Engineering Pty Ltd v Mulcon* Pty Ltd (1999) 162 ALR 441, cited

COUNSEL: M R Bland for applicant
K A Barlow for respondent

SOLICITORS: McCullough Robertson for applicant
Russell & Company for respondent

[1] **MACKENZIE J:** This is an application pursuant to s 418A(2) of the *Corporations Act* 2001 (Cth) ("*Corporations Act*") that the applicants have been validly appointed as receivers and managers of The Gold Coast B E S T Pty Ltd ("the company") pursuant to a charge dated 29 August 2002 granted by the company in favour of Asset Loan Company Pty Ltd ("Asset Loan") and registered with ASIC on 6 September 2002.

[2] The application claimed specifically:

1. A declaration that the charge is valid and enforceable as a first ranking security;
2. A declaration that the applicants were validly appointed as receivers and managers of the company on 13 November 2002 and that they have been validly acting in that capacity since that date;
3. An order requiring the respondent as receiver and manager appointed on 29 October 2002 by another company pursuant to a charge registered on 20 September 2002, being a second ranking security, deliver up to the applicants the property the subject of Asset Loan's charge; and
4. Further or alternatively an order requiring the respondent to account to the applicants for the proceeds realised as a result of the sale, realisation or disposal of the assets the subject of Asset Loan's charge.

[3] However, the draft order frames the relief in terms of s 418A(2). Section 418A relevantly provides as follows:

> (1) Where there is doubt, on a specific ground, about:
>
> (a) whether a purported appointment of a person, after 23 June 1993, as receiver of property of a corporation is valid; …
>
> the person, the corporation or any of the corporation's creditors may apply to the Court for an order under subsection (2).
>
> (2) On an application, the Court may make an order declaring whether or not:
>
> (a) the purported appointment was valid; …

> … on the ground specified in the application or on some other ground."

[4] On 29 August 2002 the company executed a mortgage debenture in favour of "Asset Loan Company Pty Ltd ACN 093 980 548". The attestation clause includes the following:

> "In witness whereof the parties hereto have hereunto affixed their hands and seals the day and year first hereinafter written."

[5] Beneath that appears "signed by Asset Loan Company Pty Ltd ACN 093 980 548 in the presence of" a person whose signature is indecipherable but appears to be that of Mr Percival, a director of Asset Loan. No seal was affixed. A Bill of Sale was executed contemporaneously. The charge was registered with ASIC on 6 September 2002 and, subject to the outcome of this mater, is a first ranking security. On 20 September 2002 Oxford Funding Pty Ltd ("Oxford Funding") registered a charge which is a second ranking charge. On 29 October 2002 the respondent was appointed receiver and manager on behalf of Oxford Funding. Then on 13 November 2002 the applicants were appointed receivers and managers pursuant to the mortgage debenture in favour of Asset Loan.

[6] There had been one other complication. Due to a solicitor's error the ACN of Asset Loan Company Pty Ltd was incorrectly stated in the documents. The ACN shown for it was in fact that of a related company, Asset Loan Company (NSW) Pty Ltd, of which Mr Percival was also a director. After notification of this error to ASIC the records of ASIC were amended to reflect the true position. The original Certificate of Entry of Charge had shown the name of the chargee as Asset Loan Company (NSW) Pty Ltd. The replacement certificate issued on 4 November 2002 showed Asset Loan Company Pty Ltd as chargee and the certificate recorded that the charge had been lodged at the time when the original charge had been lodged, 08.52 EST on 6 September 2002.

[7] The Deed of Appointment appointing the applicants as receivers and managers purports to be "executed by the mortgagee by its duly appointed agents in the presence of" one of the directors, Mr Percival. Since the appointment of the applicants as receivers and managers postdated the appointment of the respondent, correspondence ensued about the disposal of assets of the company in the intervening period. The respondent, through an employee Mr O'Chee, sought information for the purpose of verifying the validity of the charge under which the applicants were appointed. On 14 November 2002 the respondent's solicitors wrote asserting that the mortgage debenture in favour of Asset Loan had been improperly executed because it had been executed by a single director in breach of s 127 of the *Corporations Act*. It was asserted that it was wholly invalid and that therefore the applicants' appointment was ineffective and that they therefore had no right to deal with any assets.

[8] The applicants replied, saying that Mr Percival was authorised to sign the document. It was alleged that it was irrelevant that only one director signed it. It was asserted that failure to comply with s 127 of the *Corporations Act* did not invalidate the document.

[9] Section 126 of the *Corporations Act* states that a company's power to make a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. This may be done without using the company seal. Section 127(1) provides that a company may execute a document without using the common seal if the document is signed by:

(a) two directors
(b) the director and company secretary
(c) a sole director who is also company secretary.

The company may execute a deed if it is expressed to be executed as a deed and it is executed in accordance with the procedure just referred to. It is also provided that the express methods of executing documents do not limit the ways in which documents or deeds may be executed. The methods in s 127 have particular significance in regard to s 129 which sets out certain assumptions that a person may make when dealing with a company.

[10] There is also provision in s 198D that the directors of a company may delegate its powers to, *inter alia*, a director. However, any such delegation must be recorded in the minute book (s 125A). The exercise of power by a delegate is as effective as if a director had exercised it. No relevant minute to this effect was produced in evidence. However, although there is no evidence of how Asset Loan performed its fundamental obligations of advancing the money to the company, there is a minute authorising any one director to sign or otherwise deal with negotiable instruments.

[11] The respondent's argument focuses principally on the fact that the deed of mortgage is not executed in accordance with s 127(1). There can be no argument, however, that so far as the other party is concerned, the credit contract/loan agreement, the Notice of Details of a Charge forwarded to ASIC, the bill of sale and the mortgage debenture providing for the advance to the company were duly executed by the sole director and secretary of the company, Mr Swanepoel. The ASIC Historical Company Extract shows this. There is evidence in the affidavit of Mr Percival that Asset Loan performed its obligation by advancing the sum agreed on ($20,000) to the company. It may also be observed that the submission of the Notice of Details of a Charge to ASIC demonstrates that the mortgagor company did not take any issue about the validity of the document evidencing the transaction of whether it was bound by their terms. It is true that Mr Percival's affidavit does not purport to deal with the issue of his authorization to execute the deed of mortgage. It is directed more towards the error in description of the company's ACN, which was an issue initially but was not pressed in this application. The result is that there is no direct evidence of any authority given to him by the company to execute the mortgage and there is also no evidence on the subject from the other director, Mr Hare.

[12] The applicant submitted that s 127(4) of the *Corporations Act* expressly provided that s 127 did not limit the ways in which the company may execute a document (including a deed). It was submitted that the execution of the mortgage debenture by a single director was not a breach of the section and did not affect the validity of the charge. Associated with this, it was submitted that it was elementary that a director had authority to execute a document which did not impose any substantial obligations upon a company and which was solely for a company's benefit. Execution of such a document was necessarily within the director's implied

authority. It was submitted, in the alternative, that Asset Loan was entitled to exercise the rights conferred by the mortgage debenture on the basis that it was a party to the deed by virtue of the fact that it was named as a party in the document. It was also submitted that the document may be treated as a deed poll.

[13] Clause 23 of the mortgage debenture provided that in the event of the company defaulting, Asset Loan was entitled to appoint receivers. The company conceded the powers in cl 26 *et seq* to the receivers.

[14] The case is one of a third party asserting that a deed, where both parties named in it have acted upon it as if it were a binding document, is of no effect. It is said that this results from a defect in the mode of execution by the mortgagee, which is a corporation. As between the mortgagor and the mortgagee the mortgagor has accepted that it is bound by the deed and registered it as a charge with ASIC. It has not disputed its validity in any way. It would, as between the parties, be estopped from denying its validity. As to this, and authentication of a document, see 195 *Crown Street Pty Ltd v Hoare*; *Ivermee & Anor* [1969] 1 NSWR 193 at 198 and 203, approved in *MYT Engineering Pty Ltd v Mulcon Pty Ltd* (1999) 162 ALR 441, where the subtleties involved in execution of documents by companies are also discussed.

[15] In *Australian Capital Territory Television Pty Ltd v The Minister for Transport and Communications & Ors* (1989) 7 ACLC 525, 535 Gummow J discussed, in a somewhat different factual context from the present, whether a third party may challenge the validity of internal processes of a company in executing a document. In *Lincoln Contractors Pty Ltd v Searle* (1982) QD R 71, Master Lee, as he then was, deals with the more general question of the effect of a deed *inter partes* where it is formally executed by the party subject to the liability but not the other. He held that the latter, which was a company, was a party in the sense that it was named as such in the document even though it had not executed it. Alternatively, the document operated as a deed poll and was enforceable as such by the party entitled to the benefit under it.

[16] In the present case the question for decision is a narrow one, whether on the facts of the case the mode of purported execution leads to the conclusion that the deed cannot support the appointment of the present applicants as receivers. Without asserting that the conclusion can necessarily be extrapolated to cases where the facts are markedly dissimilar, I have come to the conclusion that on the facts of the case mere apparent non-compliance with s 126 and s 127 is not fatal and that the deed of mortgage is effective to enable the applicants to be appointed as receivers and managers by Asset Loan, and the applicants are entitled to a declaration in accordance with s 418A. They are also entitled to have their costs, since it was necessary in view of the respondent's opposition to the validity of their appointment, to have the issue determined by the court.

[17] Accordingly:

1. It is declared that, insofar as it is asserted that the charge is invalid because it was not executed in accordance with s 126 and/or s 127 of the *Corporations Act* 2001 (Cth), the appointment of the applicants as receivers and managers of The Gold Coast B E S T Pty Ltd on 13 November 2002 pursuant to a charge granted by the company to Asset Loan Company Pty Ltd dated 29 August 2002 is valid;

2. It is ordered that the respondent pay the applicants' costs of and incidental to the application to be assessed.