

# SUPREME COURT OF QUEENSLAND

CITATION: *Perpetual Trustees Australia Ltd v Bank of Western Australia Limited & Ors* [2004] QSC 213

PARTIES: **PERPETUAL TRUSTEES AUSTRALIA LIMITED**  
**ACN 000 431 827**  
(applicant)  
**v**  
**BANK OF WESTERN AUSTRALIA LIMITED**  
**ACN 050 494 454**  
(first respondent)  
**and**  
**GRANT DENE SPARKS**  
(second respondent)  
**and**  
**RAYMOND WILLIAM RICHARDS**  
(third respondent)  
**and**  
**THE STATE OF QUEENSLAND**  
(fourth respondent)  
**and**  
**MAINSABLE PTY LTD (In Liquidation)**  
**ACN 082 010 722**  
(fifth respondent)

FILE NO/S: BS 5184 of 2004

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court

DELIVERED ON: 22 July 2004

DELIVERED AT: Brisbane

HEARING DATE: 5, 8 July 2004

JUDGE: Muir J

ORDER: **The application be dismissed and the applicant pay the costs, including reserved costs, if any, of the first, second and third respondents to be assessed on the standard basis.**

CATCHWORDS: CORPORATIONS – RECEIVERS, MANAGERS AND CONTROLLERS – WINDING UP – where the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were appointed Receivers and Managers of a company leased by the applicant – where the Receivers purported to surrender the gaming machine licence - whether

a gaming machine licence is property capable of being charged - whether the Receivers had power to surrender the gaming machine licence – whether the company’s winding up altered the Receivers’ powers in relation to the gaming machine licence

STATUTORY CONSTRUCTION – consequences of s109 of the *Gaming Machine Act 1991*

*Corporations Act 2001* s 420,s 493

*Gaming Machine Act 1991* s 77,s 78,s 95,s 109

*Gaming Machines and Other Legislation Amendment Act 2003* s 408,s 409

*Liquor Act 1992*

*Atkins v Mercantile Credits Ltd* (1985) 10 ACLR 153

*Australian Rice Holdings Pty Ltd v Commissioner of State Revenue (Vic)* 2002 ATC 4052

*Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222

*Bufalo Corporation Pty Ltd v Leone* (2001) 40 ACSR 327

*Burns Philp Trustee Co Ltd v Ironside Investments Pty Ltd* [1984] 2 Qd R 16

*Claremont Petroleum NL v Cummings* (1992) 110 ALR 239

*Fitti v Minister for Primary Industries and Energy* (1993) 40 FCR 286

*Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd* [2001] 38 ACSR 282

*Gough’s Garages Limited v Pugsley* [1930] 1 K.B. 614

*In re Cosslett (Contractors) Ltd* [1988] Ch 495

*Jack v Smail* (1905) 2 CLR 684

*New Imperial Pty Ltd v Beveridge* (1996) 14 ACLC 445

*Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (1987) 16 FCR 465

*Pennington v McGovern* (1987) 45 SASR 27 , 36

*Pyke v Duncan* [1989] VR 149

*R v Miller* (1893) 5 QLJ 40

*Re De Groot* [2001] 2 Qd R 359

*Re Landmark Corporation Ltd (In Liq)* (1969) 88 WN (Pt 1) (NSW) 195

*Re Lease by Stockland (Macquarie) Pty Ltd to Klumpp Holdings Pty Ltd* (1981) Q Conv R 54-371

*Re Leslie Homes (Aust) Pty Ltd* (1984) 8 ACLR 1020

*Re National Westminster Finance Australia Ltd* [1991] 1 Qd R 130

*Re Rico Pty Ltd* (1999) 17 ACLC 16

*Re Row Dal Constructions Pty Ltd* [1966] VR 249

*South Australian Asset Management Corporation v Sheahan* (1995) 65 SASR 59

*Sowman v David Samuel Trust Ltd* [1978] 1 WLR 22

*Suncoast Milk Pty Ltd v Commissioner of Stamp Duties* [1997] 2 Qd R 529

*Tasmanian Seafoods Pty Ltd v Peters* [1999] QSC

02/07/1999

*Torpey Vander Have v Mass Constructions Pty Ltd* (2002) 55 IPR 542

*Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177

*Wily v Commonwealth of Australia* (1996) 66 FCR 206

*888 Casino & Tavern Pty Ltd v Hurlfohe Pty Ltd* (1997) 8 BPR 15,505

- COUNSEL: Mr RG Bain SC, with Mr CA Wilkins for the applicant  
Mr DJS Jackson QC, with Ms SE Brown for the first second and third respondents  
Ms J Brien for the fourth respondent  
Mr D Tucker, solicitor, for the fifth respondent
- SOLICITORS: Corrs Chambers Westgarth for the applicants  
Blake Dawson Waldron for the first, second and third respondents  
Mr CW Lohe, Crown Solicitor for the fourth respondent  
Tucker & Cowen for the fifth respondent

### **Introduction**

- [1] The applicant is the lessor to Mainsable Pty Ltd of premises in the Myer Centre in central Brisbane in which Mainsable carried on a business under the name “CBD Cellar Bar Dining”. Mainsable, in order to secure indebtedness to the first respondent Bank of Western Australia Limited, gave in favour of the Bank a fixed charge over particular assets and a floating charge over “all the present and future rights, property and undertaking of [Mainsable] of whatever kind and wherever situated...”
- [2] The second and third respondents were appointed Receivers and Managers of Mainsable by the Bank on 25 June 2003 pursuant to the Deed of Charge and thereafter carried on the business. In the course of so doing, the Receivers caused Mainsable to notify a surrender of the gaming machine licence held by Mainsable in respect of the demised premises pursuant to s 95 of the *Gaming Machine Act 1991* (“the Act”).
- [3] In the course of the hearing I formed the view that as the determination of the application had the capacity to affect Mainsable it was desirable that it be joined as a party to the application. An order joining it was made on 8 July and directions were made as to the future conduct of the proceedings. Mainsable did not avail itself of the opportunity to make submissions.

### **Relief sought on the application**

- [4] The applicant seeks declarations that:
- (a) The Deed of Charge did not charge the gaming machine licence;
  - (b) The Receivers had no power to surrender the gaming machine licence;

- (c) The purported surrender of the gaming machine licence was of no effect.

### **The applicant's contentions**

- [5] The central thrust of the applicant's argument is that the charge created by the deed could not attach to the gaming machine licence as it did not constitute property capable of being charged. Additionally, it is argued that if the licence is not property "It is difficult to see how a benefit accruing on the surrender of it can relevantly be characterised as property."
- [6] In order to understand the latter point it is necessary to have an understanding of some of the Act's provisions. Under the Act gaming machine licences cannot be transferred.<sup>1</sup> Section 109H of the Act provides that:  
"An encumbrance to the extent it is over an operating authority is of no effect."
- [7] "Operating authorities" were created under the *Gaming Machines and Other Legislation Amendment Act* 2003. Subsection 409(2) of that Act provides that immediately after the commencement of s 408, the number of operating authorities equal to the approved number of gaming machines for the licensee's licensed premises are allocated to that premises by operation of s 409(2).
- [8] An operating authority may be sold only by an entity prescribed by regulation.<sup>2</sup> Only category 1 licensees are permitted to purchase operating authorities and then only where the purchase is for a category 1 licensed premises for which the purchaser has an approved number of gaming machines that is more than the licensee's endorsed number of operating authorities. Mainsable was a Category 1 licensee and the subject premises were Category 1 licensed premises as Mainsable's gaming machine licence related to premises for which a prescribed liquor licence under the *Liquor Act* 1992 was in force.<sup>3</sup>
- [9] The proceeds of sale of operating authorities held in respect of a particular licensee are to be paid to the licensee less a prescribed percentage of the proceeds which must be paid into "the community investment fund."<sup>4</sup>
- [10] Where a person applies for the transfer of a liquor licence under the *Liquor Act* 1992 in respect of premises which are also licensed under the Act, application must be made for a gaming machine licence for the premises. If the relevant authorities under the Act and the *Liquor Act* 1992 are prepared to grant the applications, arrangements are made so that the transfer of the liquor licence and the issue of the gaming machine licence coincide. All operating authorities for the licensed premises are then automatically transferred to the holder of the new licence.<sup>5</sup>
- [11] Section 95 of the Act permits a licensee to surrender its gaming machine licence by following the procedures set out in the section. Upon the surrender of a gaming machine licence by a category 1 licensee, all operating authorities for the licensed

---

<sup>1</sup> *Gaming Machine Act* 1991 s 77

<sup>2</sup> *Gaming Machine Act* 1991 s109B

<sup>3</sup> Schedule to the *Gaming Machine Act* 1991

<sup>4</sup> *Gaming Machine Act* 1991 s109E

<sup>5</sup> *Gaming Machine Act* 1991 ss 78(3)(4) and (5).

premises must be sold at an authorised sale.<sup>6</sup> That digression concluded, I return to the applicant's argument.

- [12] The right to surrender the gaming machine licence is but an incident of the personal right to hold the licence; the right to surrender is not divisible from the personal right to hold and is, therefore, incapable of itself constituting property. Section 109H, by rendering encumbrances over operating authorities of no effect, reveals a legislative intention to prohibit mortgagees from obtaining the value of operating authorities under the securities. The applicant also has another discrete argument which it is convenient to address later.

### **The contentions of the Bank and the Receivers**

- [13] There was adequate power under the Deed of Charge for the Receivers to surrender the licence. That power is an adjunct to the right of the Receivers to carry on the business. Prima facie, the business of a public house is subject to the security. If the goodwill of a public house is mortgaged the right to maintain and deal with the licence authorising the carrying on the business is conferred on the mortgagee. If the mortgagee goes into possession it is entitled to call for a transfer of the licence as against the mortgagor.
- [14] As an incident of carrying on the business it is part of the authority of the Receivers who intend to cease carrying on the business to surrender the licence. They are authorised to do so in order to generate the maximum return for the mortgagee and the appointing secured creditor. Although the operating authorities cannot be charged, the future property comprising the proceeds of the sale from the pool will come within the charge. Indeed, it was the duty of the Receivers to surrender the gaming machine licence.
- [15] The purpose of s 109H, as appears from the explanatory notes, is to avoid the relevant government authority having to deal with mortgagees making claims to operating authorities or as to their disposition. The explanatory notes relevantly provide:

“This ensures that only category 1 licences can hold authorities and in holding them have an unfettered ability to deal with them.”<sup>7</sup>

### **Relevant Provisions in the Deed of Charge**

- [16] The powers of the Bank and the Receivers under the Deed of Charge include the following:

“Powers of Bank

- 13.1 At any time after an event of default, the Bank, in addition to powers conferred by other provisions of this charge or by law, may do any one or more of the following:

---

<sup>6</sup> *Gaming Machine Act 1991* s 95

<sup>7</sup> *Gaming Machine and Other Legislation Amendment Act Explanatory Notes*, p 15.

- (a) enter, take possession of, have access to and make use of the Secured Property as often as the Bank deems expedient; and  
...
- (c) exercise the rights, powers and remedies of the Chargor over, in connection with or comprising part of the Secured Property; and
- (d) manage the Secured Property; and
- (e) carry on any business or activity within the powers of the chargor; and
- (f) subject to obligations imposed by law, sell or agree to sell the Secured Property.  
...
- (m) lease or license, end, renew, surrender, or accept the surrender of a lease or licence of, the Secured Property, and compromise with or make concessions to tenants, lessees or licensees, or agree to do any of these things, for any period and on any terms; and  
...
- (o) surrender or transfer the Secured Property to any person; and  
...
- (s) do anything which should have been done by the Chargor under this charge but which has not been done or which the Bank considers has not been done properly; and  
...
- (y) do or cause to be done anything to protect the priority of this charge, to protect the Chargor's or the Bank's estate or interest in the Secured Property, to enforce this charge, to recover the Secured Money or to protect or enhance the Secured Property; and  
...
- (aa) do anything incidental to any of the powers conferred on the Bank by this clause 13.1

[17] "Secured Property" is defined as "... all the present and future rights, property and undertaking of [Mainsable] of whatever kind and wherever situated..."

[18] The powers exercisable by the Bank in the event of default by Mainsable are conferred also on receivers appointed by the Bank.<sup>8</sup>

**Putting aside the consequences of Mainsable's winding up, did the Receiver's have power to surrender the licence?**

[19] The authorities relied on by the applicant support the proposition that a non-transferable licence of the nature of that under consideration is not normally treated by the law as "property" but is considered as a right personal to the holder.<sup>9</sup>

---

<sup>8</sup> Clause 13.4 of the Deed of Charge

<sup>9</sup> *R v Miller* (1893) 5 QLJ 40 at 42 per Griffith CJ; *Jack v Smail* (1905) 2 CLR 684 at 704-5 per Griffith CJ, 709 per Barton J and 715 per O'Connor J; *Burns Philp Trustee Co Ltd v Ironside Investments Pty Ltd* [1984] 2 Qd R 16 at 21 per Shepherdson J; *Pyke v Duncan* [1989] VR 149 at 159-60 per Nathan J; *Re Lease by Stockland (Macquarie) Pty Ltd to Klumpp Holdings Pty Ltd* (1981)

- [20] It is therefore, arguable that, as the applicant asserts, an interest in the licence could not be created by the Deed of Charge. There are other authorities which suggest a contrary conclusion<sup>10</sup> but, even if the licence could not be charged effectively, it does not follow that Mainsable could not, by the Deed of Charge, confer on the Bank and the Receivers power to deal with the licence.
- [21] Under clause 13.1(e) the Receivers were given power to carry on any business or activity within the powers of Mainsable. Clause 13.1(d) gives the receivers the power to “manage the Secured Property.” “Secured Property” is defined so as to include “present and future rights”. Clause 13.1(c) empowers the receivers to exercise the “rights, powers and remedies” of Mainsable “in connection with..the Secured Property”. The latter power extends beyond the rights of Mainsable to realise the property the subject of its charge.
- [22] The phrase “in connection with” has been described as being of wide import.<sup>11</sup> Meanings which have been ascribed to it include “relation between things one of which is bound up with or involved in another” or “having to do with”.<sup>12</sup> The licence is an adjunct to Mainsable’s business which is included in the Secured Property. It was attached to the demised premises which was also part of the Secured Property and related directly to the goodwill of the business. It therefore seems to me that dealings with the licence, such as its surrender, constitute the exercise of a right “in connection with” the Secured Property. The Bank and the Receivers point out that the surrendering of the licence enhances the Receiver’s ability to dispose of the gaming machines. They cannot be sold without the Chief Executive’s written approval<sup>13</sup>. Matters such as this assist in demonstrating the existence of an appropriate “nexus”.
- [23] But, whether or not the licence is charged by the Deed of Charge, clause 13.1(c) expressly confers on the Receivers the power to exercise rights and powers over the “Secured Property.” The “Secured Property” includes rights of Mainsable of whatever kind. The licence meets that description. And, of course, clause 13.1(0) expressly permits the surrender of the Secured Property.
- [24] In my view, the surrender of the licence is authorised also by subclauses (y) and (aa) of clause 13.1. The surrender was effected in order “to recover the Secured Money” and to “enhance the Secured Property.” Under subclause (aa) the Receivers have power to do “anything incidental to any of the powers” conferred on the Bank or on them by clause 13.1. In this regard it is relevant that the holder of a gaming machine licence, as one might expect, has continuing obligations in respect of the licence, the licensee’s business and the business premises<sup>14</sup>. The avoidance of

---

Q Conv R 54-371 at 58,814 per McPherson J; 888 *Casino & Tavern Pty Ltd v Hurlfobe Pty Ltd* (1997) 8 BPR 15,505 at 15,509 per Windeyer J

<sup>10</sup> *Banks v Transport Regulation Board (Vic)* (1968) 119 CLR 222 at 232 per Barwick CJ; *Pennington v McGovern* (1987) 45 SASR 27 at 31 per King CJ and 36 per White J; *Suncoast Milk Pty Ltd v Commissioner of Stamp Duties* [1997] 2 Qd R 529 at 543-4 per Fitzgerald JA and 563 per Fryberg J (McPherson dissenting); *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue (Vic)* 2002 ATC 4052 at 4056-8 [17-28]; *Tasmanian Seafoods Pty Ltd v Peters* [1999] QSC 2/07/99 and *Fitti v Minister for Primary Industries and Energy* (1993) 40 FCR 286

<sup>11</sup> *Our Town FM Pty Ltd v Australian Broadcasting Tribunal (No 1)* (1987) 16 FCR 465 at 479-80.

<sup>12</sup> *Claremont Petroleum NL v Cummings* (1992) 110 ALR 239 at 280

<sup>13</sup> *Gaming Machines Act* s 265

<sup>14</sup> See eg., *Gaming Machine Act* s 73(1)(A) and s 10 and Schedule 2 of the *Gaming Machine Regulation* 2002

obligations and liabilities which the chargor is unable to meet would seem to fit comfortably within the scope of the Receivers' incidental powers and constitute the exercise of a right "in connection with" the Secured Property.

- [25] The contractual intention of the parties, to be ascertained from the words of the Deed of Charge and, in particular, the definition of "Secured Property, clause 13 and clause 7.4 (which deals, inter alia, with licences) is that all property rights and interests, both present and future, of Mainsable be caught by the Deed of Charge and that the Bank and the Receivers be able to deal with all such rights and interests to maintain, enhance and realise the Bank's security. That the conferring of powers and rights in relation to licences of the type under consideration is not unusual and may go little further than the position which the general law will imply, appears from the following passage from the reasons of Windeyer J in *888 Casino & Tavern Pty Ltd v Hurlfobe Pty Ltd*:<sup>15</sup>

"The general law is that "incidental rights such as goodwill of the business carried upon and inseparably connected with the mortgage property follow the security" (see *Fisher & Lightwood's Law of Mortgage*, Tyler, Young and Croft, Australian ed, 1995, Butterworths at para 3.28 and the cases cited there) and it was held in *Gay v Johnston* (1936) 37 SR(NSW) 454 that prima facie the business passes if the business is a public house and "if the goodwill of a public house passes so also does the licence authorising the carrying on of the business and consequently if the mortgagee goes into possession he is entitled to call for a transfer of the licence": *Gay v Johnston* at 465, *Burns Philp Trustee Co Ltd v Ironside Investments Pty Ltd* [1984] 2 Qd R 16."

- [26] These matters suggest that there is nothing strained or artificial about the construction of clause 13 which has been adopted. I am unable to accept the contention that s 109H, by rendering encumbrances over operating authorities void, implicitly prevents a mortgagee or receiver from "realising the worth of operating authorities associated with a gaming machine licence." The explanation for s 109H put forward by the Bank and the Receivers appears to have merit but even it did not, there would be no warrant for implying a prohibition on secured creditors' contractual powers in relation to the gaming machine licences or moneys coming into existence consequent upon their surrender. If the Legislature had intended to derogate from parties freedom to contract in this regard one would have expected it to have made intention in that respect reasonably clear.<sup>16</sup> Why the Legislature would want to prevent a creditor with security over licensed premises from surrendering a gaming machine licence so as to terminate obligations attaching to it which the chargor is unable to meet was not explained.

**If the Bank and/or the Receivers had power under the Deed of Charge to surrender the licence, did that power cease on the commencement of Mainsable's voluntary winding up on 22 July 2003?**

- [27] Mainsable went into voluntary liquidation on 22 July 2003. The applicant contends that after the commencement of the winding up the Receivers' powers were limited

<sup>15</sup> (1997) 8 BPR 15,505, See also *Torpey Vander Have v Mass Constructions Pty Ltd* (2002) 55 IPR 542 at 557

<sup>16</sup> cf *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177 at 181 per Barwick CJ

to the holding and disposition of the property charged. Reliance is placed also on the fact that the Receivers had no approval under s 420C of the *Corporations Act* to carry on Mainsable's business after winding up and on the prohibition in s 493(1) on a company's carrying on business after the passing of a resolution for voluntary winding up "except so far as is in the opinion of the liquidator required for the beneficial disposition or winding up of that business".

- [28] In *Re Rico Pty Ltd*<sup>17</sup> Young J expressed the view that the apparent reason for the introduction of s 420 was the existence of authority for the proposition that the receivers' role as the agent for the company ceases on liquidation. In *Re Leslie Homes (Aust) Pty Ltd*<sup>18</sup> McLelland J, after referring to observations of Williams J in *Visbord v FCT*<sup>19</sup> said:

"The position appears to be that where there is a winding up the receiver may, as agent, deal with property which is subject to the charge but may not, as agent, create liabilities provable in the winding up. In *Sowman v David Samuel Trust* [1978] 1 WLR 22, a case in many respects similar to the present, Goulding J expressed his conclusion as follows (at 30):

Winding up deprives the receiver, under such a debenture as that now in suit, of power to bind the company personally by acting as its agent. It does not in the least affect his powers to hold and dispose of the company's property comprised in the debenture, including his power to use the company's name for that purpose, for such powers are given by the disposition of the company's property which it made (in equity) by the debenture itself. That disposition is binding on the company and those claiming through it, as well in liquidation as before liquidation, except of course where the debenture is vulnerable under s 95 or s 322 of the Companies Act 1948 or is otherwise invalidated by some provision of law applicable to winding up."

- [29] Hope JA, with whose reasons the other members of the Court agreed, in *Atkins v Mercantile Credits Ltd*<sup>20</sup> after referring to McLelland J's judgment in *Re Leslie Homes* "as most helpful" and quoting, with approval, the passage from *Sowman v David Samuel Trust* set out above, observed that, after winding-up:

"..the receivers and managers were entitled to continue in possession, and to carry on business in the way that has been described in authorities that I have referred to."

- [30] Street J in *Re Landmark Corporation Ltd (In Liq)*<sup>21</sup> made the following remarks which have been approved in a number of subsequent cases:

"The secured creditor is entitled to stand outside the winding-up and to rely upon his security, including his contractual right thereunder to appoint a

---

<sup>17</sup> (1999) 17 ACLC 16

<sup>18</sup> (1984) 8 ACLR 1020

<sup>19</sup> (1943) 68 CLR 354 at 382

<sup>20</sup> (1985) 10 ACLR 153 at 159

<sup>21</sup> (1968) 88 WN (Pt 1) (NSW) 195 at 196

receiver. The effect of a winding-up order is to restrict the company's corporate *capacity* to pursue its objects in its memorandum: at most its business can thereafter only be carried on so far as is necessary for its beneficial winding-up..”

- [31] In *South Australian Asset Management Corporation v Sheahan*<sup>22</sup> Doyle CJ, with whose reasons the other members of the court agreed, after referring to *Re Landmark Corporation* with approval, explained:

“The principle underlying the decision is that a secured creditor is entitled to exercise its rights under its security notwithstanding the making of an order for the winding-up of the company which granted the security. There are some qualifications to be made to this principle, but the right to possession of the assets or assets over which security is granted is not subject to any relevant qualification.”

- [32] On a similar theme Sheppard J said in *Wily v Commonwealth*<sup>23</sup>

“Whatever the nature of any obligation owed by the former [receiver and manager] to the latter [liquidator] and whatever the concomitant rights of the latter against the former, they do not detract from the position that the proprietary interest of the chargee lies outside the winding-up (*Re Landmark Corporation Ltd.*) and that the bundle of rights constituting the chargee's interest remains intact.”

His Honour then went on to quote from the reasons of Goulding J in *Sowman v David Samuel Trust Ltd*<sup>24</sup>.

- [33] The subject of a receiver's post liquidation powers was more recently revisited by the Court of Appeal in *Grahame Webb Investments Pty Ltd v St George Partnership Banking Ltd*<sup>25</sup> In that case Fitzgerald JJA, with whose reasons the other members of the court agreed, said:

“Compulsory winding-up affects both the powers of a receiver and the agency relationship between the receiver and the corporation in receivership. After compulsory winding-up, a receiver continues to have powers, including powers which can be exercised in the name of the corporation in receivership and liquidation. Although a receiver cannot incur liabilities which are enforceable against the company in liquidation or its assets, recent decisions in this country...establish that a receiver's powers after compulsory liquidation include power to carry on the company's business incidentally to the beneficial disposal of its assets and that a receiver continues to have a limited agency on behalf of the company in so far as such an agency is compatible with the statutory winding-up scheme.”

---

<sup>22</sup> (1995) 65 SASR 59

<sup>23</sup> (1996) 66 FCR 206 at 224

<sup>24</sup> At 30

<sup>25</sup> (2001) 38 ACSR 281.

- [34] The applicants, in their submissions, seize on observations in a number of the cases to the effect that liquidation does not affect a receiver's powers to hold and dispose "of the property charged" to draw the conclusion that, upon liquidation, the receivers' powers are limited to the realisation of such property. But where the authorities state that a receiver has power to deal with charged property in particular circumstances they do so because that is the issue for determination or a necessary step in the process of reasoning supporting the ultimate conclusion. In none of the authorities relied on by the applicant was the Court required to determine the point under consideration.
- [35] The respective rights and obligations of the chargee (and any receivers appointed by it) on the one hand, and of the chargor, on the other, are to be found in the instrument of charge, unless supplemented, diminished or qualified by statute. Those rights and obligations survive the winding-up except to the extent that the *Corporations Act* provides to the contrary. I can see no basis for concluding that on a winding up all such rights, which do not concern directly the disposition of the property charged, cease to have effect. Such a conclusion would be inconsistent with the entitlement of the secured creditor to "stand outside the winding-up and to rely upon his security".
- [36] The conclusion would be inconsistent also with the authorities which acknowledge the ability of receivers, after winding-up, to exercise powers conferred on them by the instrument of charge including the power to carry on the company's business<sup>26</sup> and to conduct legal proceedings<sup>27</sup> (but not so as to incur liabilities enforceable against the company).
- [37] I also accept the argument advanced on behalf of the Bank and the Receivers, that although the surrender of the licence may be the relinquishment of a right of Mainsable it is but part of a process of creating an asset, namely cash, which when it comes into existence will be property of Mainsable and subject to the charge.
- [38] To borrow from the language of Greer LJ in *Gough's Garages Ltd v Pugsley*, the rights conferred on the Bank in relation to licences were just as much security for the Bank's debt as any other rights conferred by the Deed.
- [39] As Goulding J said in *Sowman v David Samuel Trust Ltd (In Liquidation)*<sup>28</sup>:
- "In truth the rights and powers given by the debenture are themselves property, but not property of the company, and if they are not extinguished by the fact of winding-up, their enforcement or exercise is not within the scope of section 227 [of the Companies Act 1948 which concerned voidable disposition of property] at all."
- [40] The applicant derives no assistance either from s 420C of the *Corporations Act*. Subsection (1) is merely facilitative or enabling in its terms and subsection (2) expressly provides that subsection (1) does not affect a power that the receiver has

---

<sup>26</sup> *Bufalo Corporation Pty Ltd v Leone* [2001] 40 ACSR 327; *Atkins v Mercantile Credits Pty* [1985] 10 ACLR 153; *Graeme Webb Investments Pty Ltd v St George Partnership Banking Ltd* [2001] 38ACSR 282 at 297

<sup>27</sup> *Gough's Garages Limited v Pugsley* [1930] 1 K.B. 614; *New Imperial Pty Ltd v Beveridge* [1996] 14 ACLC 445

<sup>28</sup> [1979] 1 WLR 22 at 30

otherwise than under that subsection. Nor does s 493(1) add anything to the above discussion. It is directed to the acts of the company not to the conduct of lawfully appointed Receivers and Managers.

### **The Applicant's further contentions**

- [41] In a supplementary outline of submissions delivered after the hearing the applicant advanced the following additional argument.
- [42] Although the gaming machine licence was not "property", the operating authorities were. Any terms of the Deed of Charge which empowered the Bank and the Receivers to surrender the licence, necessarily, would lead to the sale of the authorities. That in turn, would make the proceeds of sale available to the Bank. This contractual right, being "the mechanism by which [the Bank] would look to the [sale of] the operating authorities to satisfy the debt ... would amount to an equitable charge."
- [43] In support of these contentions the applicant cites *In re Cosslett (Contractors) Ltd*<sup>29</sup>; *Sykes & Walker, The Law of Securities*<sup>30</sup>; *Re Row Dal Constructions Pty Ltd (In Liq)*<sup>31</sup>; *Re National Westminster Finance Australia Ltd*<sup>32</sup>; and *Re De Groot*<sup>33</sup> and submits:

"The ability of the Bank and the Receivers to deal with the gaming machine licence was notwithstanding, subject only to the qualifications that in the exercise of their powers with respect to the charged assets (as opposed to the gaming machine licence *per se*) they could create a factual circumstance whereby the Gaming Machine Licence could be cancelled by the Chief Executive pursuant to the provisions of the ... Act. Nothing in the [Deed of Charge] altered this. If its terms permitted the surrender of the licence they could not have operation because of section 109H."

- [44] As explained earlier, there was nothing in the Act which prevented the Deed of Charge from conferring rights on the Bank and the Receivers in relation to the gaming machine licence. Those rights permitted the Receivers to surrender the licence. The effect of s 109H was that the Deed of Charge could not create an encumbrance over the operating authorities. But for the reasons discussed earlier, it is impossible to discern in s 109H an implied prohibition on the conferring and exercising of contractual rights in relation to gaming machine licences. The surrender process and its consequences are expressly provided for in the Act. Once the licence is surrendered and the operating authorities are sold there is no reason why the charge created by the Deed of Charge should not attach to the part of the proceeds of sale to which Mainsable is entitled.

### **Conclusion**

- [45] For the above reasons the applicant is not entitled to the relief it seeks. It will be ordered that the application be dismissed and that the applicant pay the costs,

---

<sup>29</sup> [1988] Ch 495 at 508

<sup>30</sup> 5<sup>th</sup> Ed 1993 at p 9

<sup>31</sup> [1966] VR 249 at 259

<sup>32</sup> [1991] 1 Qd R 130 at 135-136

<sup>33</sup> [2001] 2 Qd R 359 at 377-8

including reserved costs, if any, of the first, second and third respondents to be assessed on the standard basis. I will hear submissions as to the costs of the other parties.