SUPREME COURT OF QUEENSLAND

CITATION:	*Yellowrock P/L v Eastgate Properties P/L & Ors* [2004] QSC 214
PARTIES:	**YELLOWROCK PTY LTD** **(ACN 005 747 268)** (applicant) **v** **EASTGATE PROPERTIES PTY LTD** **ACN 099 706 215 AS TRUSTEE FOR THE EASTGATE PROPERTIES UNIT TRUST** (first respondent) **and** **SEDGBERG PTY LTD** **ACN 074 990 873** (second respondent) **and** **I & A HOME CONSULTANTS PTY LTD** **ACN 010 871 271** (third respondent) **AND** **YELLOWROCK PTY LTD** **ACN 005 747 268** (applicant) **and** **EASTGATE PROPERTIES PTY LTD** **ACN 099 706 215** (respondent)
FILE NO/S:	BS 5581/04 BS 5582/04
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	26 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	9 July 2004
JUDGE:	Muir J
ORDER:	**The application be adjourned to a date to be fixed and the costs be reserved**

CATCHWORDS: CORPORATIONS – WINDING UP – LIQUIDATORS – PROVISIONAL LIQUIDATORS – MATTERS RELATING TO APPOINTMENT – where the applicant seeks the appointment of provisional liquidators to the respondent – whether it was desirable that provisional liquidators be appointed – principles applicable to the appointment of provisional liquidators – whether it is necessary to remove the respondent as trustee

Corporations Act 2001 s 459P, s461
Trusts Act 1973 s 80

Constantinidis v JGL Trading Pty Ltd [1995] 17 ACSR 625
Lubavitch Mazal Pty Ltd v Yeshiva Properties No 1 Pty Ltd (2003) 47 ACSR 197
Mack's claim (1900) WN (Eng)114
McConnell's case [1901] 1 Ch 728
Re McLennan Holdings Pty Ltd (1983) 7 ACLR 732
Re Nerang Investments Pty Ltd (1985) 9 ACLR 646
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596
Tickle v Crest Insurance Company of Australia Limited (1984) 2 ACLC 493
Willsmore v Willsmore and Tibbenham Ltd (1965) Sol Jo 699
Zempilas v JN Taylor Holdings Ltd (No 2) (1990) 55 SASR 103

COUNSEL: B O'Donnell QC for the applicant
P Hack SC for the respondent

SOLICITORS: Cranston McEachern for the applicant
Lynch and Company for the respondent

[1] **MUIR J:** In application S 5582/04 the applicant, Yellowrock Pty Ltd seeks the appointment of provisional liquidators to the respondent Eastgate Properties Pty Ltd and also orders under sections 459P and 461(1)(e), (f), (g) and (k) of the *Corporations Act* that Eastgate be wound up. In application S 5581/04 between Yellowrock as applicant, Eastgate as first respondent, Sedgberg Pty Ltd as second respondent and I & A Homes Consultants Pty Ltd as third respondent Yellowrock seeks orders that:

(a) Pursuant to s 80 of the *Trusts Act 1973* Eastgate be replaced as trustee of the Eastgate Properties Unit Trust;

(b) Alternatively, an injunction restraining Eastgate from dealing with monies to the credit of its account in the Trust Account of Lynch and Company, Solicitors or authorising the payment of monies from that account;

(c) An order that Eastgate be restrained from accepting or receiving from Australian Unity Mortgage Trust payment of "the amount known as the Interest Retention of the Eastgate facility".

[2] These matters were heard together on 9 July 2004.

[3] In the course of the hearing it became apparent that an important consideration in the determination of the applications was the entitlement of Yellowrock under a mortgage dated 29 May 2003 granted in its favour by Eastgate, as varied or affected by a Deed of Priority dated 22 September 2003 entered into between Perpetual Nominees Limited as custodian for Australian Unity Mortgage Income Trust, J. Hutchinson Pty Ltd, Yellowrock and Eastgate and a Deed of Compromise dated July 2003 entered into between Eastgate, Yellowrock, Gary Reichert, the Controller of Yellowrock, Ian George, the Controller of Sedgberg Pty Ltd, Sedgberg, I & A Home Consultants Pty Ltd and Revon King, the Controller of I & A Home Consultants.

[4] The sole business of Eastgate has been the acquisition, development and sale of land at Lytton Road, Murarrie acquired in six parcels in early 2002. The parcels were amalgamated and re-subdivided into three freehold titles in a strata title complex comprising eight units and J. Hutchinson Pty Ltd, a builder, was engaged to construct buildings on the site. The building work was done and, as is often the way, has resulted in litigation between Eastgate and Hutchinson.

[5] In order to finance the acquisition of the land Eastgate borrowed moneys from Yellowrock. Yellowrock asserts that the sum borrowed was $2,200,000, the sum stated in Clause 1 of the mortgage as the amount advanced by Yellowrock to Eastgate. It is contended on behalf of Eastgate and the other respondents that the advance was $2,062,716. It is unnecessary, for present purposes, to determine the precise amount of Yellowrock's loan.

[6] Eastgate was the vehicle which Messrs Reichert, King and George chose to undertake the subject development. Each of them became a director of Eastgate and the shares in it were held by their respective companies.

Relevant provisions of the mortgage

[7] Clause 3.1 of the mortgage provides for the principal moneys secured by the mortgage to be payable upon demand made by Yellowrock after 1 July 2003. Clause 3.2 provides:-

> "The Mortgagor shall pay to the Mortgagee interest on the Secured Moneys at the rate of 30% per annum calculated from 1st May 2002 until the date of payment of such interest. Such interest shall be payable upon demand at any time after 1st July 2003."

The Deed of Priority

[8] In the Deed of Priority Perpetual is referred to as the "First Mortgagee", Hutchinson as the "Second Mortgagee" and Yellowrock as the "Third Mortgagee". Clause 3.1 of the Deed provides for the priorities as between mortgagees. Clause 3.2 deals with partial releases of mortgage. Clause 3.2, after dealing with the circumstances in which Perpetual and Hutchinson would give partial releases of mortgage, provides:–

> "(f) The Third Mortgagee agrees to partially release its Securities on settlement of the sale of the Mortgaged Property and

acknowledges that it will only be entitled to payments in exchange for those releases in the circumstances described in clause 3.2(g).

(g) The parties agree that upon the Second Mortgagee being paid out the Second Mortgagee's Priority the balance of the net proceeds of the sales referred to in clause 3.2(c) will be paid to the Third Mortgagee to pay out the moneys owing to the Third Mortgagee under its Securities."

Clause 3.2(h) provides that upon the sales of five specified units Yellowrock was to receive nothing but that its solicitors were to receive their usual costs for acting for it in the sale. The agreement as to payment of sale moneys in Clause 3.2(h) is expressed to be "without limiting the other provisions of this Clause 3.2".

[9] It is Yellowrock's contention that Clause 3.2(g) constitutes an agreement by Eastgate to assign to Yellowrock part of a chose in action, namely a share of the net proceeds of sale of each of the properties the subject of the deed.

The Deed of Compromise

[10] In the Deed of Compromise, entered into before the Deed of Priority, it is provided, in Clause 4:-

"Notwithstanding the terms of the Yellowrock mortgage:-

(a) Yellowrock shall take no step in enforcing the terms of the Yellowrock mortgage against Eastgate unless Eastgate is in default of its obligations under this Deed;

(b) **Yellowrock shall be entitled to charge Eastgate interest in accordance with the provisions of the Yellowrock mortgage**;

(c) **Yellowrock's entitlement to be paid principal and interest by Eastgate under the Yellowrock mortgage is postponed and Eastgate shall have no obligation to make any payment to Yellowrock thereunder until after the occurrence of all of the following events**:-

(Emphasis added)

(i) the payment by Eastgate to J. Hutchinson Pty Ltd of $4,353,171.00 (including GST);
(ii) the payment by Eastgate to any of the parties hereto of any sums expended by such parties for the benefit of Eastgate;
(iii) the payment by Eastgate of the costs, charges and expenses of Eastgate incurred in the development of the Eastgate Industrial park so far as concerns the sale or leasing of lots in the Eastgate Industrial Park;

> (iv) (the sale by Eastgate of such of the lots in the Eastgate Industrial Park and the receipt by Eastgate of the proceeds of sale as is sufficient to permit Eastgate (after payment of the monies referred to in sub-paragraphs (i)-(iii) and subject to the consent of the project financier) to repay Yellowrock all monies payable to it in accordance with the terms of the Yellowrock mortgage …"

[11] Clause 4(b) plainly confirms Yellowrock's entitlement under Clause 3.2 of the mortgage to interest at the rate of 30% per annum calculated from 1 May 2002 until the date of payment. Clause 4(c), by postponing "Yellowrock's entitlement to be paid principal and interest … under the … mortgage", is not inconsistent with Clause 4(b). Clause 4(c) addresses the time for payment, not the date from which interest accrues. Yellowrock's entitlement to interest from 1 May 2002 therefore remains unaffected by Clause 4 of the Deed of Compromise except, of course, to the extent to which the date for payment is altered.

[12] The respondents originally contended that on the proper construction of Clause 3 of the Mortgage, as varied by Clause 4 of the Deed of Compromise, no interest accrued until the occurrence of the matters listed in Clause 4. That argument appears to have been abandoned but if, it has not, I find against it.

[13] However Mr Hack SC, who appeared for the respondent, advanced further arguments both orally and, subsequently, in writing.

The respondents' first argument

[14] Under clause 3.2 of the mortgage interest becomes payable "on demand at any time after 1 July 2003." Until demand is made the amount of interest payable cannot be calculated but under Clause 4(a) of the Deed of Compromise, Yellowrock cannot take a "step in enforcing the terms of the … mortgage" unless Eastgate is in default under the Deed of Compromise. Yellowrock has not been able to make a lawful demand for interest "as there is no allegation that Eastgate is in default." Therefore, "at the present date no interest is chargeable pursuant to" the mortgage.

The respondents' second argument

[15] Yellowrock is not entitled to payment until "the precise events" specified in sub-clauses (i) to (iv) of Clause 4(c) of the Deed of Compromise have occurred.

[16] The effect of Clause 4(c)(i), properly construed, is that Yellowrock is entitled to be paid interest if Eastgate's liability to Hutchinson is fixed at the sum stated in sub-clause (i). That is the amount Eastgate agreed to pay Hutchinson under an agreement entered into with Hutchinson. Hutchinson was paid an additional $942,494 and thus the requirements of sub-clause (i) cannot be fulfilled.

The respondents' third argument

[17] The effect of sub-clause (iii) is that Yellowrock was entitled to be paid interest only after Eastgate had made the payments described in the sub-clause. During the development Eastgate collected GST from purchasers payable pursuant to the

Contracts of Sale, incurred input tax credits and incurred a liability to make a payment to the Deputy Commissioner of Taxation in relation to Eastgate's GST liability. That is a "cost or expense" incurred by Eastgate in the sale of the lots. As the liability has not been satisfied pre-condition (iii) has not been fulfilled and no moneys are due and payable.

[18] Additionally, the necessity to commence and prosecute the Hutchinson litigation arose directly from the development of the land. The legal expenses incurred and to be incurred in the litigation fall within paragraph (iii). That also means that the interest cannot be due and payable.

The respondents' fourth argument

[19] The fourth pre-condition has not been satisfied as a result of the non-satisfaction of the first three. Furthermore, as Eastgate paid the extra moneys mentioned above to Hutchinson, Eastgate has never received proceeds of sale sufficient to permit it to pay Yellowrock all moneys payable by it in accordance with the terms of the Yellowrock mortgage. It is not an answer for Yellowrock to contend that the obligation was to pay as much as Eastgate could pay as the obligation to pay any moneys was postponed until sufficient funds were available to pay the full sum. The fourth condition has not been satisfied and no moneys are thus payable.

The proper construction of clause 4 of the Deed of Compromise

[20] The first and subsequent contentions mistake the nature of the obligations imposed by Clause 4 of the Deed of Compromise. The object of the clause, as I have already stated, is not to prevent interest accruing under the mortgage or even, for that matter, to prevent the making of a demand. Rather, the object of clause 4(c) is to defer Yellowrock's right to payment and Eastgate's obligation to make payment until: Hutchinson has been paid the stipulated sum; the other paries to the Deed of Compromise have recouped their contributions to the venture; the developed lots have been sold and all nominated expenses (apart from those accruing under the mortgage) have been paid.

[21] Clause 4(c) does not operate to place Yellowrock in the position that, if the venture fails to realise sufficient net profit to enable payment to Yellowrock in full under the mortgage, Yellowrock's entitlement to any repayment at all disappears. Such a construction of a commenced contract would be perverse and there is no indication in the Deed of Compromise that this improbable result was intended. Indeed, in "submissions in response to the applicant's submissions in reply" delivered after I intimated that judgment was to be given on 23 July, Mr Hack SC made it plain that the respondents were not advocating such a conclusion.

[22] It is implicit in clause 4(c) that any payments required to be made under it must be paid within a reasonable time. In addition there is the general rule principle that the parties to a contract must do everything necessary on their part to enable the other party to have the benefit of it[1]. It may be that the application of these principles provides an answer to the respondents' contentions but it is not possible to make a determination in that regard on the present state of the evidence.

---

[1] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 606-607

[23] The obligation under Clause 4(a) is not to "enforce" the terms of the mortgage. That prevents Yellowrock from exercising its powers under the mortgage as secured creditor. It does not prevent interest from accruing or Yellowrock from demanding repayment of principal. A security is not "enforced" by the creditors demanding payment but it might be if the creditor exercised powers under the security in order to obtain payment.

[24] I can see no substance in the argument that if Eastgate's liability to Hutchinson exceeded the sum stated in clause 4(c)(i) Yellowrock ceased to be entitled to repayment of its loan. For the respondents' argument to succeed an implied term to such effect would need to be found and the criteria for the implication of such a term have not been met. Again, I infer from Mr Hack's final submission that this argument was not being advanced.

[25] The fees and costs incurred in the Hutchinson litigation do not fall within clause 4(c)(iii). Under the Deed dated 6 August 2003 Eastgate was obliged to pay Hutchinson (including GST) $4,353,171 by a bank cheque for $3,785,275 with the balance payment of $467,896 to be secured by second mortgage. Eastgate's Statement of Claim against Hutchinson alleges that Hutchinson demanded $942,494 ($374,588 more than the sum to which it was entitled) as a condition of releasing its mortgage. Eastgate paid that sum under protest and now seeks to recover it. In addition, Eastgate claims the following damages:

(a) $275,373 by reason of breach of the Hutchinson Deed resulting from Hutchinson's failure to rectify an encroachment;

(b) $15,869 being additional legal costs and outlays incurred by Eastgate in taking steps to rectify the encroachment;

(c) $42,135 being a loss to Eastgate by reason of Hutchinson's wrongfully appointing a Receiver and Manager to Eastgate.

[26] It is argued by Mr O'Donnell QC who appears for the applicant that the claim against Hutchinson is thus one to recover moneys overpaid to Hutchinson and repayment for losses sustained by Eastgate by reason of Hutchinson's breach of the Deed through failure to rectify an encroachment and the wrongful appointment of a Receiver and Manager.

[27] It may well be that the costs of the litigation are capable of being described, in a broad sense, as costs "incurred" in the development of the Eastgate Industrial Park. It does not seem to me however that such costs fall within the limiting words in sub-paragraph (iii), namely costs incurred "so far as concerns the sale or leasing of Lots".

[28] Clause 5 of the Deed of Compromise made the entering into of the "Hutchinson Deed" a condition precedent to the operation of the Deed of Compromise. Clause 6 requires the directors of Eastgate to all that is necessary to facilitate the obtaining of the finance necessary to enable the Deed of Compromise and the Hutchinson Deed to be performed. When that is considered as a whole, it seems unlikely that the matters singled out for mention in clause 4(c)(iii) included reference to matters arising under the Hutchinson Deed. There is the added consideration that it was

thought necessary to specifically provide for the payment to Hutchinson in clause 4(c)(i).

[29] I do not accept either that Eastgate's liability for GST falls within clause 4(c)(iii). A liability to pay tax is not readily recognizable as a cost, charge or expense incurred in a development "so far as concerns the sale or leasing of Lots".

[30] Nor does it seem to me that an obligation to account to the revenue for moneys collected from others on account of GST, after appropriate deductions, amounts to a costs or expense within sub-paragraph (iii).

[31] In response to the contention by Mr O'Donnell that there was nothing in the Deed of Compromise which required Yellowrock to release its mortgage over any of the land before receiving full payment Mr Hack, submitted that the contention was contrary to the requirements of clauses 4(a) and 4(c) of the Deed of Compromise. The argument was to the effect that a refusal to release the mortgage on any lot unless full payment as made to it would constitute the enforcement of the mortgage.

[32] Enforcing a mortgage cannot be equated with a refusal to relinquish the security or to abandon rights under the mortgage.

Other considerations relevant to the appointment of a provisional liquidator

[33] The Directors of Eastgate, until 23 June 2003[2], were Messrs Reichert, King and George. Mr Reichert lives in Melbourne. The other two directors are resident in Brisbane or in the Brisbane area. Messrs George and King have been responsible for the day to day management of Eastgate and of the property development. The directors have had a falling out and Mr Reichert has had difficulty in obtaining access to Eastgate's books and records. He obtained an order giving him access to those records on 4 June 2004 but even then had difficulty in obtaining his entitlements under the order.

[34] On inspecting the records pursuant to the order Mr Reichert discovered that sums of $360,000 had been paid on 23 March 2004 to each of Sedgberg and I & A Home Consultants, purportedly by way of dividend. He discovered also that on 19 February 2004 almost $360,000 was paid to G.J. Hall and that, as at 1 July 2004, the balance of moneys in Lynch and Company's Trust Account was $42,853.

[35] There is some doubt as to whether Eastgate conducted the subject development in its own right or as trustee. Messrs George and King and their respective companies contend that Eastgate acted on its own behalf throughout. A number of contemporaneous records, including the Development Deed dated 17 April entered into between the parties to the Deed of Compromise, and the Deed of Compromise itself, suggest a contrary conclusion. The Deed of Compromise recites, *inter alia*, that Eastgate is the Trustee of the Eastgate Property Trust. It is however unnecessary for present purposes to resolve this question.

[36] There has been a falling out between Mr Reichert on the one hand and Messrs George and King on the other. There is evidence which strongly suggests that Mr

---

[2] On 23 June 2004 Messrs George and King lodged with ASIC a Notice recording that Reichert was no longer a Director of Eastgate as a result of his position being vacated through his failure to attend Directors' Meeting for six months contrary to the requirements of paragraph 51.3(b) of Eastgate's Constitution.

Reichert has been wrongly excluded from participation in the affairs of Eastgate. As discussed earlier, he has had difficulty in obtaining access to Eastgate's financial records. The evidence also shows that Mr Reichert has been unfairly dealt with by his co-directors in the calling and holding of meetings. For example, there seems to have been no attempt on the part of Messrs King and George to ascertain Mr Reichert's availability before nominating dates and times for meetings. On one occasion, in March 2004, a meeting proceeded despite Messrs George and King being advised that Mr Reichert was in hospital and despite the fact that there seemed to be no pressing need for the board to deal with the items on the agenda to which Mr Reichert had not indicated his assent.

[37] The way in which Messrs George and King went about resolving on the dividends referred to earlier has more than a hint of the clandestine about it. Also it appears likely that the dividend was not paid out of profits, contrary to the requirements of the *Corporations Law*[3], Eastgate's constitution and the provisions of the Deed of Compromise. In resolving to pay the dividend Messrs George and King appear to have determined Eastgate's "profit" without reference to Eastgate's liability for interest under the mortgage, without taking into account its liability for tax and by reference to a projection or estimate of future rather than actual profits. Nor do they appear to have taken into account the prospect that such payment may have put it out of the power of Eastgate to continue to meet its lawful obligations. The Deed of Compromise requires Yellowrock to be paid the principal and interest under the mortgage before profits are shared equally between Yellowrock, Sedgberg and I & A Home Consultants.

[38] Eastgate now finds itself in a position in which the funds which the majority directors wish to use to meet Eastgate's tax liabilities are claimed by Yellowrock as its secured creditor. There is also considerable doubt as to whether, as the majority assert, Mr Reichert has ceased to be a director[4].

[39] The evidence supports the view that the majority cannot be relied on to protect minority rights or generally to act *bona fide* in the best interests of Eastgate. In these circumstances it is desirable that a provisional liquidator be appointed pending the hearing of the winding up application with a view *inter alia*, to ascertaining whether Eastgate has claims against directors and the payees of the dividends which should be pursued and also with a view to determining the order in which debts should be paid. There is a need for a person independent of the board to examine the company's financial affairs with a view to resolving competing claims[5].

[40] In reaching this conclusion I am conscious of the authorities which refer to the appointment of a provisional liquidator pending the determination of a winding up petition as, for example, a remedy "of a wholly extraordinary nature"[6] and "a drastic intrusion into the affairs of the company … not to be contemplated if other measures would be adequate to preserve the status quo."[7]

---

3 S 254T

4 See e.g., *Mack's claim* (1900) WN (Eng) 114 and *Willsmore v Willsmore and Tibbenham Ltd* (1965) 109 Sol Jo 699, Wallace & Young Australian Company Law & Practice p 1047, Palmer's Company Law 24th ed., para 60-23, Gore-Brown on Companies 43rd ed., para 25-16, *McConnell's* case (1901) 1 Ch 728 at 731

5 cf *Tickle v Crest Insurance Company of Australia Limited* (1984) 2 ACLC 493 and *Re Nerang Investments Pty Ltd* [1985] 9 ACLR 646

6 *Constantinidis v JGL Trading Pty Ltd* (1995) 17 ACSR 625 per Meagher JA

7 *Zempilas v JN Taylor Holdings Ltd (No 2)* (1990) 55 SASR 103 per King CJ

[41] I am conscious also of the generally accepted principle that a provisional liquidator should be appointed only if the court is satisfied that there is a reasonable prospect that a winding up order will be made[8].

[42] I acknowledge the force of Mr Hack's point that the appointment of a provisional liquidator may have a detrimental effect on the conduct of the Hutchinson litigation. But, as opposed to that, the reality is that the joint venture, for which Eastgate is the operating entity, had been largely completed and Eastgate has ceased to trade.

Replacement of trustee

[43] Mr O'Donnell submits that the matters which warrant the appointment of a provisional liquidator also warrant the removal of Eastgate as trustee. That submission would be well founded if Eastgate were to remain under the control of the majority. As provisional liquidators are being appointed to it however, it does not seem to me that there is any need to remove it as trustee. Accordingly I propose to adjourn the application and reserve the costs.

Winding Up

[44] In view of the appointment of provisional liquidators there would not appear to be any need for the winding up application to be heard with undue haste. It was submitted on behalf of Eastgate that it was inappropriate to deal with the application summarily and that the hearing would take rather longer than the time available on 9 July 2004. I adjourn the hearing of the application to a date to be fixed and reserve the costs.

---

[8] See e.g., *Lubavitch Mazal Pty Ltd v Yeshiva Properties No 1 Pty Ltd* (2003) 47 ACSR 197 at 217 and *Re McLennan Holdings Pty Ltd* (1983) 7 ACLR 732