# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Boral Bricks v Davey & Ors* [2010] QSC 131 |
| PARTIES: | **BORAL BRICKS PTY LTD ACN 082 448 342**<br>(applicant)<br>v<br>**NORMAL LISTER DAVEY (D.O.B. 3 MARCH 1948)**<br>(first respondent)<br>and<br>**CHRISTINE MAY DAVEY**<br>(second respondent)<br>and<br>**NORMAN LISTER DAVEY (D.O.B. 8 JULY 1972)**<br>(third respondent)<br>and<br>**LISA ANNESSE DAVEY**<br>(fourth respondent)<br>and<br>**DIANNE IRENE KIBBLER**<br>(fifth respondent)<br>and<br>**ALAN DOUGLAS KIBBLER**<br>(sixth respondent) |
| FILE NO/S: | BS12017/09 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| DELIVERED ON: | 30 April 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 March 2010 |
| JUDGE: | Douglas J |
| ORDER: | **Judgment for the applicant** |
| CATCHWORDS: | CORPORATIONS – VOLUNTARY ADMINISTRATION – DEEDS OF COMPANY ARRANGEMENT – where provisions of deeds of company arrangement purported to deem paid debts and other claims against the company's directors to the same extent that claims against the company were released by the deed – whether the deemed payment of debts included in the deed of company arrangement is binding on a creditor who claimed against the company's directors who had provided guarantees and indemnities<br><br>EQUITY – GENERAL PRINCIPLES – EQUITABLE ESTATES AND INTERESTS – CREATION – where the |

provisions of a guarantee purported to create an equitable charge attaching to guarantors' "equitable interest in freehold or leasehold property" – where property is freehold property – whether the equitable charge is effective – whether the document should be construed by omitting the word "equitable"

*Corporations Act* 2001(Cth), s 444D(1)

*Re Andersens Home Furnishing Co Pty Ltd (1996) 14 ACLC 1710*, cited
*Boral Resources (Qld) Pty Ltd v Andrews*, unreported, Philippides J, SC No 13789 of 2009, 3 March 2010, applied
*City of Swan v Lehman Bros Australia Ltd* [2009] FCAFC 130, referred
*DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431, distinguished
*Fitzgerald v Masters* (1956) 95 CLR 420, applied
*Hanson Construction Materials Pty Ltd v Norlis & Ors* [2010] QSC 34, cited
*Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11, followed
*Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285, distinguished

COUNSEL: A E Lyons for the applicant
P Travis for the respondent
M K Callanan (solicitor) for Hanson Construction Materials Pty Ltd

SOLICITORS: James Conomos Lawyers for the applicant
Piper Alderman Lawyers for the respondents
Patane Lawyers for Hanson Construction Materials Pty Ltd

[1] **Douglas J:** This is an application for summary judgment for the payment of a debt of $14,145.24 and for a declaration that the applicant is an equitable chargee of land. The applicant seeks orders for sale of the land also. The claim for the debt is based on the first, second, third and fourth respondents' status as guarantors and indemnifiers of the debts of a company called Norlis Pty Ltd. The charge claimed is said to extend over one parcel of land owned by the first and second respondents and another owned by the third, fourth, fifth and sixth respondents.

[2] The principal defences argued were that Norlis' entry into a deed of company arrangement had released the claims against the first four respondents and that the terms of the charging clause in charging the respondents' "equitable interest in freehold or leasehold property" did not extend to property in which they hold legal interests as registered owners.

**The defence founded on the deed of company arrangement**

[3] The deed of company arrangement in cl 8.2 purported to release all indemnities, guarantees and other claims against the directors of Norlis to the same extent that claims against the company were released or satisfied by the deed. Clause 8.1 had

released the company from all claims. Clause 9.1 provided that the releases provided by the deed from all claims should occur upon execution of the deed.

[4] Clause 9.2 then provided that all Norlis's "liabilities shall have been deemed to have been paid and fully satisfied in full (sic) regardless of when any amount is actually received by each Creditor from the Deed Administrator". This clause, the respondents argued, did more than release Norlis's debts, something already effected by cl 8 both in respect of Norlis and its directors including former directors and was more than a release of the indemnities provided by the first to fourth respondents. The argument was that cl 9.2 deemed the company's debts to have been paid in full with the result that there is no remaining claim for which the first four respondents became liable.

[5] This provision, according to the submission, was different from a release by the company under a deed of company arrangement. Such a release had been held, by the Full Court of the Federal Court in *City of Swan v Lehman Bros Australia Ltd* not to affect a creditor's rights under a guarantee or indemnity.[1] Since the argument in this matter, the appeal in that case to the High Court has been dismissed.[2]

[6] The issue, therefore, is whether the deemed payment of debts included in the deed of company arrangement should be treated differently from the release effected in this deed by cl 8.2. The question turns on the language of s 444D(1) of the *Corporations Act* 2001(Cth) which provides that a deed of company arrangement, so far as concerns claims arising on or before the day specified in the deed, binds all creditors of the company.

[7] The simple and obvious answer is that the applicant here is suing on its indemnity, not as a creditor of the company, but because of the guarantor's independent liability to it. The respondents' riposte to that is that the deed of company arrangement binds those creditors who voted against the deed as well as those who voted in favour of it so that they must acknowledge that the company's debts have been deemed to have been paid with the result that they cannot be claimed pursuant to the indemnity.

[8] The solution to the problem may be found in the reasoning of the majority decision in the High Court in *Lehman Bros Holdings Inc v City of Swan*:[3]

> "49. In the course of argument, the Court was taken to a great deal of extrinsic material which was said to bear upon the question of how s 444D(1) should be construed. It is neither necessary nor desirable to rehearse the detail of those arguments. Nothing that was said in the report of the Australian Law Reform Commission concerning its General Insolvency Inquiry (the 'Harmer Report'), the draft Bill that was incorporated in the Harmer Report, or the several exposure drafts and explanatory memoranda relating to the legislation which now comprises Pt 5.3A of the Act, assists in resolving the disputed questions of construction and application of s 444D(1). Those

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1 See *City of Swan v Lehman Bros Australia Ltd* [2009] FCAFC 130 at [39], [44]. [69-77], [113-114], and [151]. See also, in this Court, *Re Andersens Home Furnishing Co Pty Ltd* (1996) 14 ACLC 1710, *Hanson Construction Materials Pty Ltd v Norlis & Ors* [2010] QSC 34 at [29]-[32]

2 See *Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11.

3 *Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11 at [49] – [55].

sources do not assist because in none of them was any direct consideration given to the point which must now be decided.

50. In the Full Court of the Federal Court, some emphasis was given to ss 444E to 444H and s 444J as indicating that a deed of company arrangement can deal only with claims against the subject company. It may be accepted that nothing in those sections points away from that conclusion. **But the critical observation to make is an observation about the text of s 444D(1). That sub-section identifies who is to be bound by a deed of company arrangement ('all creditors of the company') but at once proceeds (by the 'so far as concerns' clause) to limit the extent to which those creditors are to be bound ('so far as concerns identified claims'). Contrary to the submissions of Lehman Holdings and Lehman Asia, there is no textual footing for reading the word 'claims', in the 'so far as concerns' clause in s 444D(1), as including claims against persons other than the subject company.** Even if it were accepted that, as Lehman Asia submitted, it would be sensible to recognise that a creditor of one of a group of companies may have interlocking, even dependent, claims against one or more other companies in the group, Pt 5.3A directs attention only to the particular subject company; it does not deal with groups of companies.

51. It may readily be accepted that any claims Litigation Creditors may have against Lehman Holdings or other Lehman Entities are claims that arise on or before the day specified in the Deed, and arise out of the same transactions as are the subject of those creditors' claims against Lehman Australia. It may also be readily accepted that if a claim is made against Lehman Holdings or another Lehman Entity, that company or those companies would very likely make a claim against Lehman Australia. And in that way, both Lehman Holdings and at least some other Lehman Entities are likely contingent creditors of Lehman Australia. And as contingent creditors of Lehman Australia, Lehman Holdings and the relevant Lehman Entities would be bound by the Deed.

52. But none of these observations confronts the critical observation that s 444D(1) limits the extent to which a deed of company arrangement binds creditors. Creditors are bound "so far as concerns claims" against the subject company that arose before a specified date. And it is s 444D(1) alone which makes a deed of company arrangement binding on creditors.

53. **Because creditors are bound under s 444D(1) only to the limited extent identified in that provision, the assent of some creditors (even a majority by number and value of those who vote) to giving up claims against another does not bind other creditors to do so.** No creditor is bound to give up such claims because the Act does not bind them beyond the limit prescribed by s 444D(1). More particularly, the Act does not bind creditors to give up a claim against a person other than the subject company – here, Lehman Australia.

54. In this respect, Pt 5.3A (and, in particular, s 444D(1)) stands in sharp contrast with Pt 5.1 of Ch 5 of the Act, which regulates

> arrangements and reconstructions. The provisions of Pt 5.1 (which derive ultimately from the *Joint Stock Companies Arrangement Act* 1870 (UK)) make a compromise or arrangement binding on creditors (or on a class of creditors) if agreed to by a majority in number of the creditors (or class) whose debts or claims aggregate at least 75 per cent of the total amount of the debts and claims of the creditors (or class of creditors) present and voting, and if approved by order of the Court. Unlike s 444D(1), the provision of Pt 5.1 which makes certain compromises or arrangements binding on creditors (s 411(4)) does not qualify the extent to which creditors are bound. Beyond noting this contrast, it is neither necessary nor appropriate to go on to consider whether Pt 5.1 of the Act could have been engaged to achieve the result sought to be achieved by the Deed under consideration in these appeals. Nothing in these reasons should be understood as endorsing the criticisms made in this matter in the Full Federal Court of the earlier decision of the Full Federal Court in *Fowler v Lindholm***.**
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> 55. **Effect must be given in the application of s 444D(1) to the words 'so far as concerns claims arising on or before the day specified in the deed'. Effect must be given to those words, recognising that the claims to which they refer are claims against the subject company. In the present case, the effect of those words is that creditors are not bound in respect of claims against Lehman Holdings or other Lehman Entities. That is, the provisions of cl 9 and cl 11.5 of the Deed which provided first for a moratorium, and then for a release, in respect of claims against Lehman Holdings or other Lehman Entities, did not bind creditors."** (Emphasis added.)

[9] Nor, on that reasoning, should the deemed payment of a debt bind creditors of guarantors. If a moratorium or release does not bind them there is no logical reason why a deemed payment should.

[10] Another route to the same solution is provided by Heydon J in his separate reasons in the same decision.[4] His Honour discussed the rule of construction that "clear and unambiguous words be used before there will be imputed to the legislature an intent to expropriate or extinguish valuable rights relating to property without fair compensation" and went on to say:[5]

> "A Deed may extinguish the rights of minority creditors against the company itself without compensation, for although the rule of construction must be applied to the operation of the statute in that regard, the words are sufficiently clear and unambiguous. However, in relation to a contention that the statute permits the extinguishment of the proprietary rights of minority creditors against persons other than the company without fair compensation, the rule of construction poses the inquiry whether there are clear and unambiguous words

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4 See *Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11 at [63] – [71] in similar terms to those expressed by Rares J in the Full Court of the Federal Court.

5 *Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11 at [63]-[64].

> supporting that quite different outcome. That is an inquiry which is not fruitful for those opposing the plaintiff."

[11] His Honour went on to conclude[6] that s 444D(1) binds creditors of the company in relation to their claim against the company, not against other debtors.

[12] I respectfully agree with that argument so that for those reasons also it is my view that this defence to the applicant's claim must fail.

**Was the charge effective?**

[13] The charge created by cl 9 of the guarantee extended to all the guarantors' "equitable interest in freehold or leasehold property." In the credit application form the director guarantors were required to disclose whether their residences were owned and their spouses who were also guarantors were required to disclose their residential addresses. The "certificate of guarantee" at the end of the document also provided that the supplier may "take a charge over any real property that I have a legal or equitable interest in". The respondents, who, as well as the defendants to the action, included another supplier to Norlis that has obtained a judgment declaring it to be an equitable chargee in the land, argued that, as the land was freehold property, the defendants to the action by Boral Bricks Pty Ltd held no separately existing equitable interest to which Boral Bricks' charge could attach.

[14] In developing that argument, they relied on the decision of the High Court in *DKLR Holding Co (No. 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*[7] where members of the court, in the context of determining how duty should be assessed on an instrument of trust, had pointed out that the legal owner of land did not have a separate equitable estate in it because that estate was absorbed into the legal estate.[8] Reliance was also placed in a similar context on the decision of the Court of Appeal in *Suncorp Insurance and Finance v Commissioner of Stamp Duties*[9].

[15] The respondents also argued that the language in the certificate of guarantee did not permit the guarantee to be construed beyond its precise terms so that it should be treated as charging the non-existent equitable interest.

[16] A similar argument was made before Philippides J in *Boral Resources (Qld) Pty Ltd v Andrews*[10]. There her Honour said:

> "The relevant principles concerning the creation of an equitable charge are well settled. To constitute a charge in equity it is not necessary that any general words of charge be used. It is sufficient if the Court can fairly gather from the language of the instrument that the intention of the parties is to constitute the property referred to as a security (*Craddock v Scottish Provident Institution* (1893) 69 LT 380, 382; *Allen's Asphalt P/L v SPM Group Ltd* [2009] QCA 134, [47]). The charge asserted and relied upon by the plaintiff is contained in clause 9 of the guarantee given by the defendants and is

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6 *Lehman Bros Holdings Inc v City of Swan* [2010] HCA 11 at [69].
7 (1982) 149 CLR 431.
8 See, for example, per Gibbs CJ at 442, Aickin J at 463 and Brennan J at 474.
9 [1998] 2 Qd R 285 at 288-289.
10 (No 13789 of 2009; Philippides J, 3 March 2010, unreported).

relevantly in the following terms: 'The guarantor hereby agrees to charge all their equitable interest in freehold or leasehold property'. It is said that the effect of that charging clause is to create an equitable charge in favour of the plaintiff in the Flinders View property.

However the submission made by Stoddart is that the charge asserted by the plaintiff does not extend to the legal interest currently held by the defendants in the Flinders View property. The argument raised by Stoddart is that, as the defendants are the registered proprietors of the fee simple in land and hold a single and absolute legal estate in the land, there is no separately existing equitable interest to which the charge of the plaintiff can attach.

In making this submission reliance is placed on *DKLR Holding Co (No. 2) Proprietary Limited v The Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431. That case concerned a declaration of trust whereby the proposed trustee (DKLR Holding) was to hold only the legal estate in the land in question and the transferor (29 Macquarie) would not part with the beneficial ownership. The directors of 29 Macquarie resolved accordingly. An argument was advance on behalf of DKLR that the transfer of the land to it by 29 Macquarie was effective to transfer only the bare legal estate and to leave the remaining estate in 29 Macquarie, that is the entire beneficial estate.

However, as Atkin (sic) J observed at 463:

> 'If one person has both the legal estate and the entire beneficial interest in the land he holds an entire and unqualified legal interest and not two separate estates, one legal and other equitable. If he first holds the legal estate upon trust for some other person and therefore that person transfers to him the entire equitable interest then again the first-named person does not hold two separate interests, one the legal and the other equitable estate; he holds a single entire estate – he is the absolute owner of an estate in fee simple in the land. The equitable interest merges into the legal interest to comprise a single absolute interest in the land. It is a fundamental principle of both the common law of equity that the holder of an estate in fee simple cannot be a trustee of that fee simple for himself for what he holds is a single estate, being the largest estate in land known to the law.'

Similarly, Brennan J noted (at 474):

> 'A transferee does not become a trustee by failing to acquire an interest in the property transferred ; a trustee holds on trust only such interest is not carved out of a legal estate but impressed upon it.'

> Here, however, the interest charged is the equitable interest in respect of which the chargors held the legal estate. In my view, the respondents reliance on *DKLR Holding* and *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1988] 2 Qd R 285 where *DKLR Holding* was discussed is misconceived.
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> The present case is unlike the position before the High Court in *DKLR Holding* where the legal estate was sought to be transferred without the equitable estate which had merged with the larger legal estate. As the High Court there held, in transferring the legal estate the equitable estate could not be 'carved out' of the legal estate. I do not consider that *DKLR Holdings* precludes the defendants from 'impressing' on their legal estate in the Flinders View property an equitable interest in favour of the plaintiff.
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> A consideration of the principles set out in *Allens Asphalt v SPM Group* [2009] QCA 134 to which I have already referred indicates an intention on the part of the parties that the Flinders View property be provided as security in the nature of an equitable charge.
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> In this regard I note that the circumstances surrounding the entry into the guarantee document make it abundantly clear that the plaintiff was concerned to obtain security in respect of the application by B & L Andrews Proprietary Limited for credit in a substantial amount of up to $100,000. At the time of the entry into the credit application and guarantee the land was the subject of a registered mortgage. The parties to the credit application and guarantee understood that the defendants owned the land in question and there is no evidence to suggest that the security was not intended to cover that land.
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> The effect of the respondent's intentions would be to render the charging clause nugatory. It is inconsistent with the accepted approach to the construction of commercial documents so as to make commercial sense of them and avoid a capricious and unreasonable result.
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> In the circumstances, these are strong arguments against the construction contended for by the respondent in addition to the fact that the primary submission misunderstands the propositions of law outlined in authorities such as *DKLR Holding.* In the circumstances the plaintiff is entitled to the judgment and declarations sought in the draft order."

[17] I agree with her Honour's reasons which seem to me to be buttressed in this case also by the clear conclusion available from the entry into the guarantee and indemnity in the circumstances to which I have referred that the property was intended to be used as security, something also evidenced by the certificate of guarantee.

[18] There is also a respectable argument that the word "equitable" was used mistakenly. The surrounding circumstances suggest that an equitable charge was intended to be

created over the land, not a charge over an equitable interest in the land. It seems to me to be one of those sorts of mistakes that would be susceptible to correction by ascertaining the true meaning of the document by construing it without recourse to extrinsic evidence, apart from the factual matrix surrounding the creation of the document, and without the need for the remedy of rectification. As Dixon CJ and Fullagar J said in *Fitzgerald v Masters*:[11] "Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency."

[19] Here the word "equitable" can be omitted in order to make the charging clause conform with the certificate of guarantee and avoid the absurd consequences of the attempt to impose a literal meaning on the charging clause that has no legal effect.

[20] In the circumstances this argument does not seem to me to be a sufficient reason to refuse to grant summary judgment.

**Should the court appoint a statutory trustee and order a sale of the respondents' property?**

[21] The last point made for the respondents was that, essentially on discretionary grounds, there was no need at this stage to order the appointment of a statutory trustee or to order a sale of the property. The arguments were that the entities identified by the applicant as having an interest or claiming an interest in the property had not been named as parties and should have been,[12] the value of the properties had not been put in evidence and the respondents were currently marketing the properties through professional agents. It was also argued that there were less expensive means of enforcing any small money claim that the applicant could establish and that Bendigo and Adelaide Bank Ltd had already served a notice of exercise of power of sale on the respondents in respect of a security it held over the property.

[22] The applicant submitted, however, that the affected parties had been put on notice of the application although they had not been made parties to it and had not appeared to oppose it. In respect of the evidence of the land's value, the applicant submitted that there was no particular practice requiring the bringing of evidence of value of the land before the court but that in this case, there was some evidence suggesting that there was equity left in the property. Mr Lyons for the applicant also submitted that trustees for sale were required as there were co-owners with some of the respondents who were not themselves subject to the charge.

[23] He also submitted that there was no intention that the applicant's actions would affect the bank's rights as mortgagee and pointed out that the action was not a foreclosure action in which time was often provided to respondents to sell but one where the respondents had already had at least nine months opportunity to pay. There was also evidence before me that Bendigo and Adelaide Bank Ltd was aware of the proceedings and did not consent to nor oppose them.

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11 (1956) 95 CLR 420, 426-427. See also, among many other examples, *City of Swan v Lehman Brothers Australia Ltd* [2009] FCAFC 130 at [133] and, for a general discussion, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (LexisNexis, 4th ed, 2002) at 26-040.

12 See *Uniform Civil Procedure Rules* 1999 r 31(2).

[24] The respondents also argued that the scheme administrator should have been joined as a party on the basis that the claim mounted a specific attack on the deed of company administration. That does not seem to me to be accurate on the analysis which I prefer that these claims are not brought in respect of creditors of the company but rather because of the independent obligations of the guarantors as indemnifiers.

**Conclusion**

[25] It seems to me, therefore, that the issues raised are not such as to suggest that the respondents have a real prospect of defending the claim or that there is a need for a trial.

[26] Accordingly I propose to give the judgment sought subject to any further submissions about its terms and costs.