

SUPREME COURT OF QUEENSLAND

CITATION: *Re Public Trustee of Queensland* [2012] QSC 281

PARTIES: **THE PUBLIC TRUSTEE OF QUEENSLAND**
(applicant)

FILE NO/S: BS5929 of 2012

DIVISION: Trial division

PROCEEDING: By way of application

ORIGINATING COURT: Supreme Court of Queensland

DELIVERED ON: 20 September 2012

DELIVERED AT: Brisbane

HEARING DATE: 27 July 2012

JUDGE: Applegarth J

ORDER: **1. A direction be made in accordance with s 134 of the *Public Trustee Act 1978 (Qld)* and s 96 of the *Trusts Act 1973 (Qld)*, that it is appropriate for the Public Trustee to commence proceedings seeking orders contained in the draft originating application attached to the Application in these proceedings filed on 5 July 2012.**

2. A direction be made in accordance with s 134 of the *Public Trustee Act 1973 (Qld)* and s 96 of the *Trusts Act 1978 (Qld)*, that:

(a) the Public Trustee may properly:

(i) comply with the six Notices of Proper Instructions dated 29 June 2012 enclosed with the letter from Opus Capital Limited to the Public Trustee dated 28 June 2012 save to the extent set out in sub-paragraph (b) below;

(ii) otherwise comply with directions from Opus Capital Limited to transfer the assets of the Registered Managed Investment Schemes of which Opus Capital Limited is the Responsible Entity and the Public Trustee is Custodian (“Schemes”), from the Public Trustee to The Trust Company (Australia) Limited, save to the extent set out in sub-paragraph (b) below;

(b) the Public Trustee may properly retain and not transfer to The Trust Company (Australia)

Limited, and may otherwise act to assert a lien over, the assets of each Scheme, in an amount sufficient to meet the claims for which the Public Trustee seeks to be indemnified, until such time as his right to indemnification and lien are finally determined by this Honourable Court, or are agreed by the Public Trustee and Opus Capital Limited.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO THE COURT FOR ADVICE AND AUTHORITY – PETITION OR SUMMONS FOR ADVICE – where applicant is custodian trustee of managed investment schemes seeking directions from the Court pursuant to s 134 *Public Trustee Act* 1978 (Qld) or s 96 *Trusts Act* 1973 (Qld) – where Opus Capital Limited (“Opus Capital”) is managing trustee – whether the applicant should commence proceedings against Opus Capital for the recovery of unpaid legal fees – whether the applicant should carry out instructions received from Opus Capital

Corporations Act 2001 (Cth), s 601FC
Public Trustee Act 1978 (Qld), s 134
Trusts Act 1973 (Qld), s 96

Glasscock v Trust Company (Australia) Pty Ltd [2012] QSC 15, cited

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66, cited

Re Beddoe [1893] 1 Ch 457, cited

COUNSEL: W Sofronoff QC S-G and D O’Sullivan for the applicant

SOLICITORS: Clayton Utz for the applicant

- [1] On 27 July 2012 I made directions in this matter upon the application of the Public Trustee of Queensland (“the applicant”). These are my reasons for making those directions.

Introduction

- [2] The applicant is the custodian trustee of the assets of 11 Managed Investment Schemes (“the Schemes”) for which Opus Capital Limited (“Opus Capital”) is the Responsible Entity. The applicant seeks an opinion or directions from the Court pursuant to s 134(1) of the *Public Trustee Act* 1978 or s 96 of the *Trusts Act* 1973 in relation to two questions which concern its role as custodian trustee.
- [3] The first question relates to whether it would be proper for the applicant to commence legal proceedings against Opus Capital to recover unpaid legal expenses. The second question concerns whether the applicant should properly act at all, and if so to what extent, on instructions given by the managing trustee, Opus Capital.

Background

- [4] Between 20 March 2002 and 27 June 2007 the applicant signed Custody Agreements by which it was appointed custodian of the assets of the Schemes. The Schemes were principally engaged in borrowing money from members of the public, and from banks, and using that money to purchase and develop real properties, principally in Queensland. The assets of the Schemes have principally comprised real properties and cash in bank accounts.
- [5] By letters dated 4 September 2008, 30 September 2008 and 15 September 2009 the applicant gave notice pursuant to clause 12.1 of the Custody Agreements that it intended to resign as custodian of each of the Schemes. On the termination of each Custody Agreement Opus Capital was obliged “promptly to give the necessary Instructions” for the transfer of the Scheme assets and the applicant was obliged to transfer the Scheme assets in accordance with those instructions.
- [6] No such instructions were given until 29 June 2012. The applicant has concerns about those instructions and those concerns are one reason the matter has now come before the Court.
- [7] Initially, after receiving the applicant’s notices of termination, Opus Capital took steps to have the Scheme assets transferred to Perpetual Corporate Trustee. Issues arose, however, which caused a series of delays and no instructions to effect the transfer were provided to the applicant. In the absence of a replacement custodian trustee, the applicant has continued to fulfil that role since December 2008.
- [8] Notwithstanding the applicant’s serving a notice of termination pursuant to clause 12.1 of the Custody Agreements, there is a strong argument that those agreements continue to bind the applicant and Opus Capital until such time as the Scheme assets are transferred to a new custodian trustee.
- [9] In about late 2009 several matters came to the applicant’s attention which caused it to seek legal advice about its rights and obligations. Those matters caused the applicant to become concerned about the solvency of Opus Capital and several of the Schemes. The applicant remains concerned about the solvency of Opus Capital and the Schemes by reason of, among other things, the following Note from the consolidated interim financial report for Opus Capital for the half year ending 31 December 2011:
- “As at 31 December 2011 the Consolidated Entity’s current liabilities exceed its current assets by \$2,938,286 and total liabilities exceed total assets by \$2,518,300. The consolidated entity had net operating cash inflows of \$33,506 for the half year and made a net loss of \$629,070. **These conditions give rise to a material uncertainty which may cast significant doubt over the Consolidated Entity’s ability to continue as a going concern.**”
(emphasis added)
- [10] The applicant is particularly concerned that the latest financial statements appear to make very little provision for Opus Capital’s liability for the applicant’s legal fees.
- [11] I accept the applicant’s submission that it has a reasonably based concern as to the solvency of Opus Capital and certain of its schemes, and that the solvency of Opus

Capital and certain of its schemes is, at the least, an issue that would require further investigation.

- [12] This concern sets the context for a long-running dispute between the applicant and Opus Capital as to whether it was appropriate for the applicant to engage external legal advisors and whether it is entitled to be paid its costs or to a lien over the Scheme assets for those costs. Opus Capital now accepts that the applicant is entitled to be indemnified for costs reasonably incurred, with those costs to be determined, in its view, by a costs assessor. Opus Capital disputes that the applicant is entitled to a lien over any Scheme assets.

Recent events

- [13] By letter dated 30 May 2012 the applicant demanded payment from Opus Capital of all its legal fees and expenses by 14 June 2012, and stated that in default of payment, recovery proceedings would be commenced. Opus Capital then sought orders for the delivery of itemised bills from the solicitors engaged by the applicant.
- [14] On 28 May 2012 the applicant wrote to Opus Capital asking what its intention was in relation to the transfer of Scheme assets to a new custodian trustee. The applicant received no response to that letter.
- [15] Instead, Opus Capital wrote to the applicant on 28 June 2012. That letter:
- (a) stated that “Trust Company of Australia” had been appointed as custodian of the Schemes; and
 - (b) enclosed Notices of Proper Instructions dated 29 June 2012 directing the applicant to transfer the assets of six of the Schemes to Trust Company of Australia by no later than 4 pm on 2 July 2012.
- [16] Following this, the applicant sought a copy of the custody agreements by which “Trust Company of Australia” had been appointed custodian or a copy of the resolution appointing it. Opus Capital refused to provide those documents, asserting that the custody agreement was “confidential”.
- [17] Opus Capital instead provided to the applicant on 4 July 2012 a copy of a letter from The Trust Company (Australia) Limited, addressed “To Whom it May Concern”, stating that it had been appointed custodian of certain “trusts”.

The applicant’s first question

- [18] The applicant seeks the Court’s direction as to whether it would be proper for it to commence proceedings against Opus Capital for the recovery of unpaid legal fees. Questions concerning litigation provide a familiar context for the seeking of judicial advice, and the applicable principles were set out by Boddice J in *Glassock v Trust Company (Australia) Pty Ltd.*¹ I respectfully adopt those principles.
- [19] The applicant submits that it is entitled to be indemnified for legal expenses incurred in the discharge of its duties as custodian trustee by reason of:
- (a) clauses 3.6, 9.2 and 10.1(a) of the Custody Agreements;
 - (b) the rights of reimbursement and exoneration conferred by the general law, arising from the nature of the office of trustee; and

¹ [2012] QSC 15 at [14]-[15].

(c) s 16 of the *Public Trustee Act 1978*.

- [20] The applicant submits that when clauses 3.6, 9.2 and 10.1(a) of the Custody Agreements are read together, their net effect is that Opus Capital promises to indemnify the applicant in respect of its costs and the expenses of retaining solicitors and Counsel only if the applicant considers their appointment or engagement necessary or desirable for the purposes of exercising its powers or performing its duties under the Custody Agreements. If the costs are reasonably incurred, then all costs will be indemnified except for those attributable to negligence or fraud.
- [21] The right to reimbursement under the general law is to be indemnified in respect of costs not improperly incurred.² The statutory right pursuant to s 16 of the *Public Trustee Act 1978* is an entitlement to indemnity for all legal expenses incurred by the Public Trustee. The statutory language, it is submitted, contains no qualification on that right.
- [22] The applicant also submits that it is entitled to assert a lien over the Scheme assets to secure its rights of indemnity. This is said to arise by reason of:
- (a) clauses 4.14 and 9.3 of the Custody Agreement;
 - (b) s 72 of the *Trusts Act 1973*; and
 - (c) the right of lien conferred by the general law.

The applicant submits that the question of whether it is able to assert a lien, and if so its extent, assumes greater significance given the evidence tending to suggest that Opus Capital and certain of the Schemes may not be solvent.

- [23] The merits of the argument concerning the applicant's entitlement to exercise a lien over Scheme assets are considered at length in its submissions. Opus Capital's view is that no such lien exists.
- [24] The present application is not the occasion to resolve the merits of those competing contentions. It is sufficient to observe that Opus Capital concedes that the applicant is entitled, at the least, to be indemnified for legal costs reasonably incurred. It is arguable that the applicant is entitled to be indemnified for all legal costs. It is also at least arguable that the applicant is entitled to assert a lien over Scheme assets sufficient to meet the claims for which it seeks to be indemnified. Those are issues that should be determined in appropriate proceedings in the event those proceedings do not resolve.
- [25] It is not the Court's function to investigate the evidence and make a finding whether or not the trustee will be successful in the litigation.³ The Court has merely to determine whether the proceedings should be taken in the best interests of the trust estate.⁴ It is in the best interests of the Schemes and their beneficiaries that any claim to indemnification by the applicant against Opus Capital be resolved.

² *Re Beddoe* [1893] 1 Ch 457 at 558.

³ *Glasscock v The Trust Company (Australia) Pty Ltd* (supra) at [14], citing *Salmiv v Sinivuori* [2008] QSC 321.

⁴ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at 102-103 [104]-[107].

- [26] Accordingly, I declare that it is appropriate for the applicant to commence proceedings seeking the orders contained in the draft originating application attached to the application filed in these proceedings on 5 July 2012.
- [27] For the reasons that appear below, on 27 July 2012 I directed that the applicant transfer the Scheme assets in accordance with the instructions received by it on 29 June 2012. The question of whether the applicant may exercise a lien over those Scheme assets is also one for final determination in appropriate proceedings. Accordingly, I directed that the scheme assets be transferred to the new custodian but that the applicant retain and not transfer an amount sufficient to meet its claim for indemnification until such time as its rights to indemnification and lien are finalised by this Court or agreement between the parties.

The applicant's second question

- [28] The applicant's second question concerns whether it ought to follow Opus Capital's instructions of 29 June 2012 to transfer the Scheme assets to a new custodian trustee. Issues arise as to:
- (a) whether The Trust Company (Australia) Limited ("the Trust Company") has been regularly appointed as custodian of the Scheme assets; and
 - (b) whether transferring the Scheme assets to the Trust Company may contravene s 601FC(1)(i) of the *Corporations Act 2001* (Cth).
- [29] The applicant has sought but been denied access to the custody deed said to appoint the Trust Company as custodian of the Schemes. The applicant points out that it is not obvious how the Trust Company can be appointed as custodian of 11 different Schemes pursuant to a single custody deed. The applicant also notes that the letter from the Trust Company dated 3 July 2012 does not identify the Schemes as Managed Investment Schemes registered pursuant to Part 5C of the *Corporations Act 2001* (Cth), referring to them simply as "trusts", and that the names of 5 of the trusts set out in the letter do not match the names of the Schemes.
- [30] The applicant identified these concerns in a letter to the solicitors for Opus Capital on 5 July 2012, however it received no response.
- [31] Opus Capital disputes that it is proper for the applicant to review the Trust Company custody deed. It says that the custody deed is confidential.
- [32] The applicant also has concerns regarding the mechanics of transferring the Scheme assets to the Trust Company. Each of the Notices of Proper Instruction direct the applicant to transfer money held by it in different Scheme bank accounts to a single bank account in the name of the Trust Company.
- [33] Section 601FC(1) of the *Corporations Act 2001* (Cth) states:
 "In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:
- ...
- (i) ensure that scheme property is:
 - (i) clearly identified as scheme property; and

- (ii) held separately from property of the responsible entity and property of any other scheme; ...”.

[34] Section 601FC(5) provides:

“A responsible entity who contravenes subsection (1), and any person who is involved in a responsible entity’s contravention of that subsection, contravenes this subsection.”

[35] Section 601FC(6) further provides:

“A person must not intentionally or recklessly be involved in a responsible entity’s contravention of subsection (1).”

[36] The applicant submits that there is at least a doubt as to whether it is permissible for the monies belonging to different Schemes to be held in a single bank account, consistently with the terms of s 601FC(1)(i)(ii). The relevant property is said to be the chose in action represented by the account holder’s claim against the bank, and that property would not be “held separately from” like property if it were transferred to a single bank account, regardless of what journal entries may be made in respect of cash held in the single bank account.

[37] The applicant is concerned that by paying the money as directed it will be “involved in” any contravention of s 601FC(1)(i) by virtue of s 601FC(5).

Resolution of the second question

[38] At the hearing on 27 July 2012 the applicant did not press for orders that it should not follow Opus Capital’s instructions of 29 June 2012. Rather, it proposed orders permitting it to follow those instructions, subject to retaining a lien over Scheme assets.

[39] In their letter dated 27 July 2012 the solicitors for Opus Capital invited the applicant to contact representatives of the Trust Company to satisfy itself that the Trust Company’s appointment was valid.

[40] I suggested at the hearing on 27 July 2012 that I would be more satisfied making the orders contended for if the applicant put the Trust Company on notice of its possible contravention of s 601FC(1)(i) of the *Corporations Act* 2001 (Cth). Queen’s Counsel for the applicant indicated that his instructing solicitors would correspond with the Trust Company, and it is on this basis that I directed the applicant to transfer the Scheme assets in accordance with Opus Capital’s instructions.

Conclusion

[41] The application was properly brought because the trustee had a reasonable doubt as to the proper course of action.⁵ The Court has not been asked to finally determine the parties’ rights, but has been asked to provide directions and an opinion to guide future conduct. The matters about which the Court’s guidance was sought concern legal rights and obligations, and not matters of commercial judgment.

[42] It is for these reasons that I made the directions sought on 27 July 2012.

⁵ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (supra) at 83 [36].