SUPREME COURT OF QUEENSLAND

CITATION:	*Perpetual Trustees Australia Ltd v Bank of Western Australia Ltd & Others* [2004] QCA 345
PARTIES:	**PERPETUAL TRUSTEES AUSTRALIA LIMITED** ACN 000 431 827 (appellant) **v** **BANK OF WESTERN AUSTRALIA LIMITED** ACN 050 494 454 (first respondent) **GRANT DENE SPARKS** (second respondent) **RAYMOND WILLIAM RICHARDS** (third respondent) **THE STATE OF QUEENSLAND** (fourth respondent) **MAINSABLE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION)** ACN 082 010 722 (fifth respondent)
FILE NO/S:	Appeal No 6809 of 2004 SC No 5184 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	24 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17 September 2004
JUDGES:	de Jersey CJ, McPherson JA & White J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	CORPORATIONS – CHARGES – PROPERTY CHARGED OR CHARGEABLE – whether receivers of company in liquidation had power to surrender gaming machine licenses held by company, pursuant to a charge – whether s 109H of Gaming Machine Act 1991 renders charge of no effect over gaming machine licenses *Gaming Machine Act 1991* (Qld), s 109H

Agnew v Commissioner of Inland Revenue [2001] 2 AC 710, considered
Commissioner of State Revenue (Vic) v Bradney Pty Ltd (1996) 96 ATC 5130, cited
National Provincial and Union Bank of England v Charnley (1924) KB 431, cited
Wallace v Love (1922) 31 CLR 156

COUNSEL: R G Bain QC with C A Wilkins for the appellant
D J S Jackson QC with S E Brown for the first to third respondents
J Brien for the fourth respondent
No appearance for the fifth respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Blake Dawson Waldron for the first to third respondents
Crown Law for the fourth respondent
No appearance for the fifth respondent

[1] **de JERSEY CJ:** The appellant leased premises to Mainsable Pty Ltd from which that company operated a business called 'C.B.D. Cellar Bar Dining'. To secure indebtedness, Mainsable gave, in favour of the first respondent bank, a mortgage debenture creating a fixed and floating charge over 'all (its) present and future rights, property and undertaking'. The second and third respondents were on 25 June 2003 appointed by the bank as receivers and managers of Mainsable.

[2] Mainsable held a gaming machine licence under the *Gaming Machine Act* 1991 (and also a liquor licence). Section 95 of that Act provides that the holder of such a licence may, by following a particular procedure, surrender the licence. The receivers and managers effected such a surrender.

[3] The Act provides for the endorsement, on a gaming machine licence, of 'an operating authority for the licensed premises under the licence'. Because Mainsable was what is termed in the legislation a 'category 1 licensee' (it held a general liquor licence), then consequent upon the surrender of the licence, all such operating authorities fell to be sold at an authorised sale, with the Public Trustee as the seller (s 95(2A)). That sale has not yet been carried through.

[4] The appellant, which is also a creditor of Mainsable, applied for declarations that the mortgage debenture 'did not charge the gaming machine licence', that the receivers and managers had no power to surrender that licence, and that the purported surrender was of no effect; and an injunction restraining the State from selling the operating authorities. The learned primary judge declined to grant that relief.

[5] There is no doubt that Mainsable's gaming machine licence fell within the 'secured property' covered by the mortgage debenture, and that the mortgage debenture expressly authorised its surrender. Before his Honour, the appellant relied however on s 109H of the Act, which provides:

> 'An encumbrance to the extent it is over an operating authority is of no effect.'

The appellant contended that the provisions in the mortgage debenture authorising the receivers and managers to surrender the gaming machine licence constituted 'the mechanism by which [the bank] would look to the [sale of] the operating authorities to satisfy the debt', giving rise, it was submitted, to an equitable charge over those operating authorities which would consequently be nullified by s 109H.

[6] In rejecting that contention, the learned judge regarded s 109H, which refers to operating authorities not gaming machine licences, as implying no limitation 'on secured creditors' contractual powers in relation to the gaming machine licence or monies coming into existence consequent upon their sale.' He observed:

> 'If the Legislature had intended to derogate from parties freedom to contract in this regard one would have expected it to have made that intention in that respect reasonably clear'.

The judge concluded 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'.

[7] The essential submission for the appellant is that the power of the receivers and managers to surrender the gaming machine licence was incidental to a charge over the operating authorities, thereby falling within the purview of s 109H, which would render the encumbrance, to that extent, of no effect. Consequently, the receivers and managers would lack the power to surrender the licence. As put by counsel for the appellant, 'Surrender of the gaming machine licence was indistinguishable from enforcement (within the bounds of the *Gaming Machine Act*) of the fixed charge over the operating authorities which the Mortgage Debenture created and which section 109H rendered ineffectual. Put another way, surrender of the gaming machine licence by the bank or the receivers and managers was enforcement of the contractual appropriation of the operating authorities to payment of Mainsable's debt to the bank'.

[8] Section 109H refers to an encumbrance 'to the extent it is over an operating authority'. The provision focuses on the operating authority. Relying on the provision, the appellant seeks to characterise the power to surrender the gaming machine licence as the charging of the operating authority. Certainly effecting a surrender of the licence has consequential effect on the authority. But that does not warrant characterising what amounts to a contractual right available to Mainsable and its receivers and managers, as a charging mechanism in relation to the operating authorities.

[9] The mortgage debenture has been drawn carefully to exclude, from the subject matter of the charge, at least so far as it is fixed, property which it could not lawfully embrace. Clause 4.1(a)(ii)F provides that the charge is a fixed charge on 'Licences (other than those which the Chargor is prohibited by law from charging or is incompetent to charge by way of fixed charge);'. While that may not necessarily overcome a contention that the power to surrender the gaming machine licence charges the operating authority, it tends to suggest that the parties did not intend that such a charge should arise.

[10] The question in the appeal is whether, in terms of s 109H, the right to surrender a gaming machine licence is an encumbrance over the operating authority. Because of the nature of that right, and its detachment (in an immediate sense) from the operating authority, to regard the right to surrender as falling within the section would necessitate an extremely broad construction of the terms of the section.

[11] Whether a charge arises depends on the objectively discerned intention of the parties, and as ordinarily understood, a charge will of course attach directly to the subject property, and at the same time carry with it the right to invoke the assistance of the court, as by the appointment of a receiver or the making of an order for sale (cf. *National Provincial and Union Bank of England v Charnley* [1924] KB 431, 440, 449-450). Those are not features of this situation. See also *Wallace v Love* (1922) 31 CLR 156, 164, where an encumbrance was said in law 'to indicate a burden on property, a claim, lien or liability attached to property'. The character of a charge or encumbrance is ordinarily proprietary, and that does not sit well with the exercise of a power to surrender property.

[12] Mr Bain QC, who appeared for the appellant, referred to *Agnew v Commissioner of Inland Revenue* (2001) 2 AC 710 paras 44, 46, as to the commercial sense of regarding the proceeds of a debt as 'merely the traceable proceeds' of the debt. He relied on the case to meet the circumstance that the power to surrender relates to the gaming machine licence, not to the operating authority, whereas s 109H refers only to the operating authority. I do not consider that case assists in the construction of s 109H, or answers the concern that the appellant is asking the court to give a very broad interpretation to the section, to advantage the appellant, where the legislature could by clear language have plainly secured that result.

[13] Further, there are provisions in the *Liquor Act* 1992 (s 129(1)(c), s 131B and 113) and the *Gaming Machine Act* (s 109, s 78(1) and (5)) which, when read together, contemplate the holding of both a liquor licence and a gaming machine licence by a receiver and manager. Through these various provisions, and others to which Mr D J S Jackson QC (for some of the respondents) took the court in detail, the affairs of a licensee may be conducted by a receiver. The receiver could then in the ordinary way exercise the powers of the licensee in respect of a licence. That feature tells strongly against the broad construction of s 109H for which the appellant contended.

[14] Quite apart from the aspect of the ordinary meaning and scope of the terms of the section, which do not favour the appellant's position, there are the explanatory notes for the bill, which describe the purpose of s 109H as being to 'ensure that only category 1 licensees can hold authorities and in holding them have an unfettered ability to deal with them'. The learned primary judge considered the purpose was to avoid the inconvenience involved where the relevant government authority would otherwise be obliged to deal with mortgagees making claims to operating authorities or as to their disposition. Although Mr Bain submitted that this could not reasonably be drawn from the explanatory notes, it does provide a practical illustration of one potentially relevant consequence were the licensee not to have the 'unfettered ability' to which the explanatory notes refer.

[15] Neither the terms of the section, nor the extrinsic material, provides any warrant for giving the section the expansive reach for which the appellant contends. As pointed out by the learned judge, had the legislature intended to interfere with the power to

surrender a gaming machine licence, it could reasonably be expected to have done so directly and clearly, not leaving it to an implication said to be drawn from a provision which in fact refers to other matters. The latter approach would be a surprising way for the legislature to seek to limit the rights of freely contracting parties.

[16] I would dismiss the appeal, with costs to be assessed.

[17] **McPHERSON JA:** Perpetual Trustees, which is the appellant, leased to Mainsable Pty Ltd premises in the Myer Centre in Brisbane in which Mainsable conducted a business known as CBD Cellar Bar Dining. In order to secure its indebtedness to the Bank of Western Australia, Mainsable in 1999 executed an instrument in the form of deed of charge in favour of the Bank incorporating a fixed charged over specified assets and a floating charge over the undertaking of Mainsable including its present and future assets. The instrument was duly registered as a fixed and floating charge on its execution on 17 August 1999.

[18] In 2003 Mainsable made default and on 25 June 2003 the Bank appointed Mr Sparks and Mr Richards as receivers and managers under the charge. They took possession of the premises and conducted the business there until April 2004.

[19] The essential question on appeal is whether the respondents, who are the Bank and the receivers, are, as Muir J held at first instance, entitled to a gaming machine licence, or the proceeds of its disposal, as part of Mainsable's property subject to the deed of charge; or whether Perpetual Trustees is entitled to the benefit of that licence under the terms of its lease to Mainsable. The company Mainsable itself was at the judge's direction added as a party in the proceedings below; but it has not appeared on the appeal, nor did it do so in the proceedings below. The State of Queensland was also joined as a respondent to the application, and appeared by counsel on the appeal but only to state that it would abide the order of this Court.

[20] Gaming machines in Queensland are closely regulated by the *Gaming Machine Act 1991*. Gaming and the conduct of gaming, which is otherwise illegal, is by s 55(1)(b) of the Act made lawful on premises on which a licensee is licensed to conduct gaming. Mainsable was duly licensed so to do on the leased premises in respect of 24 gaming machines it had there. On 1 July 2003 the *Gaming Machines and Other Legislation Amendment Act 2003* came into effect. It had as its object the fixing of an upper limit on the number of gaming machine licences issued in the State: s 109A. Part of the means by which this was provided for in the legislation was to impose a requirement that the holder of certain gaming machines licences obtain an operating authority, meaning "an authorisation for a category 1 licensee to … install and operate a gaming machine on category 1 licensed premises": See definition in the scheduled "Dictionary" to the Act. The leased premises on which Mainsable conducted its business place them in "category 1 licensed premises", in terms of the definition in the Schedule, for the reason that it held a general liquor license in respect of those premises under the *Liquor Act 1992*. The receivers applied for and were granted the necessary operating authorities shortly after their appointment in June 2003, and they are indorsed on the gaming machine licence.

[21] After the receivers ceased to carry on Mainsable's business in April this year they formed the opinion that it was in the interests of the receivership to surrender Mainsable's gaming machine licence. Surrendering such a license is something that

is authorised by s 95 of the Act on taking the steps specified in that provision. Section 95(2A) provides that, in the event of its surrender, all operating authorities must be sold at an authorised sale, which is one conducted by a selling entity (in this instance the Public Trustee) in accordance with s 109B. When that takes place, s 109E(1) provides for a percentage of the sale proceeds to be paid into the community fund with the balance being paid to the licensee.

[22] Except as specifically provided in s 78, s 77 of the Act contains a prohibition on the transfer of a gaming machine licence, which no doubt made a surrender of the gaming machine licence an attractive option to the receivers and managers in this instance. The question here is, in any event, not whether the receivers were exercising their powers properly in surrendering the licence but whether under the deed of charge and the *Gaming Machine Act* they have any power to do so. As to the deed itself there can be no doubt. Clauses 13.4 and 13.5(a) of the deed invest the receivers with the powers of the Bank. Clause 13 confers on the Bank various express powers, which by cl 13.1(o) includes the power to "surrender or transfer the Secured Property to any person". The receivers therefore had and have the power to surrender the gaming machine licence if it forms part of the Secured Property as defined in the deed. The Secured Property is described generally in cl 1.1 of the deed of charge as meaning "all the present and future rights, property and undertaking of the chargor [Mainsable] of whatever kind …". Whether or not the gaming machine licence is, correctly speaking, "property" in the terms of that description, it is certainly a "right" of Mainsable under the *Gaming Machine Act*.

[23] We now come to the point in dispute between the parties. Clause 4.1(a) of the deed of charge provides that it is to operate as a fixed charge over certain specified rights of Mainsable. Clause 4(1)(a)(ii) both extends and limits the scope of that charge to:

> "(f) Licences (other than those which the chargor [Mainsable] is prohibited by law from charging or is incompetent to charge by way of fixed charge)".

"Licence" is defined in cl 1.1 to mean "a licence, permit, or other form of authority .. which allows an activity to be carried out on or in connection with the Secured Property". On the face of it, therefore, the deed creates a fixed charge over Mainsable's gaming machine licence unless it is one that Mainsable is precluded or prohibited by law from charging by way of fixed charge.

[24] There was no such exclusion or prohibition in the *Gaming Machine Act 1991*, nor did the Act render Mainsable incompetent to give a fixed charge over its gaming machine licence. There is, however, and since 1 July 2003 there has been, in s 109H of the amended legislation the following provision:

> "109H. An encumbrance to the extent it is over an operating authority is of no effect."

Perpetual Trustees relied on this provision to submit that not only Mainsable's operating authorities but its gaming machine licence is of no effect; and that, on that footing, the Bank or the receivers are not entitled to surrender the gaming machine licence.

[25] It may, I think, be accepted that, at any rate before the amending legislation commenced on 1 July 2003, the deed of charge created a fixed charge over the

gaming machine licence. It is not easy to see why or how this state of affairs was changed when the *Gaming Machines Amendment Act* came into force on that date. It may be accepted that the fixed charge over the licence constituted an "encumbrance" within the meaning of s 109H; but that provision applied and applies only, if at all, to the operating authorities and not to the gaming machine licence as such. Mr Bain QC on behalf of Perpetual Trustees submits that the two are, however, so closely associated or connected as to make the operating authority an indistinguishable part or incident of the gaming machine licence, so that it too is rendered effective by force of s 109H.

[26] Mr Bain relied on a passage in the reasons of the Privy Council in *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710, 729, in which Lord Millett said:

> "While a debt and its proceeds are two separate assets, however, the latter are merely the traceable proceeds of the former and represent its entire value. A debt is a receivable; it is merely a right to receive payment from the debtor. Such a right cannot be enjoyed in specie; its value can be exploited only by exercising the right or by assigning it for value to a third party. An assignment or charge of a receivable which does not carry with it the right to the receipt has no value. It is worthless as a security. Any attempt in the present context to separate the ownership of the debts from the ownership of their proceeds (even if conceptually possible) makes no commercial sense."

The context in which that statement was made was a charge over book debts in terms of which the chargor was left in control of the debts which it was free to receive and apply payments to its own account. The Judicial Committee held that such a charge over uncollected book debts was capable of operating only as a floating and not a fixed charge. As Lord Millett pointed out ([2001] 2 AC 710, 728), book debts are by their nature extinguished by payment. There is therefore no true analogy with the gaming machine licence here, which continued to exist and be capable of being surrendered even after 1 July 2000. In the event of surrender, the associated operating authorities must be sold at an authorised sale, and the proceeds dealt with in accordance with s 109E. The gaming machine licence therefore survives until it is surrendered, as also do the operating authorities until they are sold in accordance with that section in consequence of that surrender.

[27] I therefore see no reason to read the statutory provision in the way suggested by Perpetual Trustees. It is true that, after 1 July 2003 when the amending Act came into force, Mainsable was not authorised to operate the gaming machines under its licence without the operating authorities which the receivers then duly obtained on or shortly after that date. It does not follow that the operating authorities became part of the security by way of fixed charge subject to the deed of charge, or that the receivers were in some way prevented by s 109H from surrendering the gaming machine licence.

[28] We have seen that the word "licence" is defined in the deed to mean an authority which allows an activity to be carried on. The operating authorities are capable of answering this description. However, cl 4.1(a)(ii)(f) expressly excludes from the scope of the fixed charge given by the deed a licence which the chargor Mainsable is prohibited from charging or is incompetent to charge. On behalf of

Perpetual Trustees, Mr Bain QC submitted that it was not possible to avoid the reach of s 109H by excluding something from the charge or "encumbrance" in that fashion. I am quite unable to see why that should be so. Section 109H does not make the giving of a fixed charge over the operating authorities criminal or illegal. It simply renders it ineffectual or without effect "to the extent" that it creates an encumbrance "over an operating authority". It was perfectly legitimate for the operating authorities to be excluded, as they are by cl 4.1(a)(ii)(f), from the scope of the fixed charge given by the deed of charge. Far from contravening s 109H, the deed gives effect to that section by providing that the fixed charge or encumbrance does not extend to the operating authorities viewed as a form of licence over which s 109H rendered Mainsable incompetent to give a fixed charge. Because s 109H would have deprived any such charge of effect, it therefore became something which Mainsable was under cl 4(1)(a)(ii)(f) incompetent to charge and so fell outside both the charge and s 109H. It nevertheless left Mainsable's gaming machine licence, and the power of the Bank and the receivers to surrender it untouched. It is not suggested that there is anything in the Act in its amended form to prevent gaming machine licences from being surrendered as distinct from being used or operated without the operating authorities. On the contrary, the power to surrender such a licence is expressly conferred.

[29] The Bank and the receiver advance a further submission about s 109H. They say it affects the fixed charge conferred by the deed of charge only *to the extent that* it is an encumbrance *over* the operating authorities. To that extent, and to that extent only, it renders them of no effect. It affects only proprietary and not contractual rights. This leaves untouched the operation of the deed of charge as a contract between the Bank and Mainsable. By that contract the parties agreed that the Bank or its receivers had the power pursuant to cl 13.1(o) to surrender the gaming machine licence. Perpetual Trustees has no standing to prevent that contract from being performed. Unlike Mainsable, it is not a party to that contract, and Mainsable has not appeared before the Court to contend that the contract ought not to be carried into effect.

[30] The validity of these propositions depends ultimately on the meaning, purpose and scope of s 109H. The object which it is designed to achieve is not altogether clear. Perpetual Trustees submitted that its purpose was to prevent undesirable persons from controlling an operating authority, and that s 109H was directed as much to the contractual dimension of an encumbrance as to its proprietary elements. On the other hand, Mr Jackson QC submitted, and Muir J accepted, that its purpose is to avoid the Public Trustee, or other relevant authority which is conducting the sale under s 95(2A) and s 109B, from having to deal with a multiplicity of chargees or mortgagees each laying claim to operating authorities or to the proceeds of their disposition. In reference to what is now s 109H, the explanatory notes to the Bill that became the amending Act of 2003 stated that it:

> "… ensures that only category 1 licences can hold authorities and in holding them have an unfettered power to deal with them."

The explanatory note is almost as obscure as the section itself in disclosing the secret of its purpose; but it perhaps goes some way to supporting Mr Jackson's hypothesis about its true object.

[31] For my part, looking at the terms of s 109H itself, I am persuaded that, having as it does a nullifying effect on otherwise legitimate proprietary rights, it ought not

to receive a wider operation or effect than its terms require. It renders ineffectual an encumbrance only to the extent that it is over an operating authority. The word encumbrance ordinarily connotes something in the nature of a mortgage or charge: see *Commissioner of State Revenue (Vic) v Bradney Pty Ltd* (1996) 96 ATC 5130, 5132; and, in the absence of a clear indication to the contrary, there is no compelling reason to assume that the impact which s 109H was designed to achieve went further than that. In short, I see no reason for holding that it was intended to interfere with or nullify the agreement embodied in the deed of charge to the effect that the receivers should have and be authorised to exercise the power of the Bank under cl 13.1(o) to surrender Mainsable's gaming machine licence. That remains so even if the operating authorities are by s 109H deprived of effect as part of the Bank's proprietary security. But, as I have already said, it is my view that, in any event, cl 4(1)(a)(ii)(f) of the deed effectively excluded those authorities from the ambit of the property secured, and so took them outside the operation of s 109H of the Act leaving the Bank's contractual rights untouched.

[32] The result is that the Bank and the receivers are entitled to surrender the gaming machine licence, and to receive the balance of the proceeds of the sale of the operating authorities pursuant to s 95(2A). I agree with the orders proposed by the Chief Justice.

[33] **WHITE J**: I have read the reasons for judgment of the Chief Justice and McPherson JA and respectfully agree that this appeal should be dismissed with costs.

[34] I agree with the observations of McPherson JA as to the meaning and scope of s 109H of the *Gaming Machines Act* 1991 and the conclusion to which he and the Chief Justice have come that there is no warrant for giving it any wider operation than its terms strictly require.