

CITATION: *David Hambleton as joint and several Liquidator of Sky 5 Pty Ltd and Ors v Tuxford and Anor (No 2) [2012] QCATA 90*

PARTIES: David Hambleton as joint and several Liquidator of Sky 5 Pty Ltd
(First Applicant)
Stephane Nijskens
Gerda Nijskens
(Second Applicants)
v
Stanley Gordon Tuxford
(First Respondent)
Kevin George Hutchinson
(Second Respondent)

APPLICATION NUMBER: APL460-11

MATTER TYPE: Appeals

HEARING DATE: 5 April 2012

HEARD AT: Brisbane

DECISION OF: **Mr Charles Brabazon QC, Member**

DELIVERED ON: 28 May 2012

DELIVERED AT: Brisbane

ORDERS MADE:

- [1] **The appeal is allowed in part.**
- [2] **The orders made by this Tribunal on 14 November 2011 are affirmed – except that Stephane and Gerda Nijskens are to be paid the sum of \$16,003.88.**
- [3] **To the extent necessary the time limit fixed for making claims by Mr and Mrs Nijskens under the *Property Agents and Motor Dealers Act 2000* is extended.**
- [4] **Pursuant to s 530 of the *Property Agents and Motor Dealers Act 2000*, the Chief Executive of the Department of Employment, Economic Development and Innovation is to pay to Stephane Nijskens the sum of \$139,311.95.**
- [5] **Pursuant to s 488(3)(c) of the *Property Agents and Motor Dealers***

Act 2000 the respondent Stanley Gordon Tuxford is named as the person who contravened s 470(1) and who is liable for the financial loss of Stephane Nijskens.

[6] Upon payment of the sum of \$139,311.95 from the Claim Fund to Stephane Nijskens, the respondent Stanley Gordon Tuxford is liable to reimburse the Claim Fund by paying that sum of to the Chief Executive of Employment, Economic Development and Innovation.

[7] Pursuant to s 530 of the *Property Agents and Motor Dealers Act 2000*, the Chief Executive of the Department of Employment, Economic Development and Innovation is to pay to Stephane and Gerda Nijskens the sum of \$16,003.88.

[8] Pursuant to s 488(3)(c) of the *Property Agents and Motor Dealers Act 2000* the respondent Stanley Gordon Tuxford is named as the person who contravened s 470(1) and who is liable for the financial loss of Stephane Nijskens and Gerda Nijskens.

[9] Upon payment of the sum of \$16,003.88 from the Claim Fund to Stephane and Gerda Nijskens, the respondent Stanley Gordon Tuxford is liable to reimburse the Claim Fund by paying that sum of to the Chief Executive of Employment, Economic Development and Innovation.

CATCHWORDS:

PROPERTY AGENTS AND MOTOR DEALERS – Claim against the fund by liquidator – whether event caused financial loss – who suffered loss – payment of dividend

Property Agents and Motor Dealers Act 2000, ss 469, 470, 476, 488, 530, 574
Queensland Civil and Administrative Tribunal Act 2009, ss 42, 61

APPEARANCES and REPRESENTATION (if any):

APPLICANT:

Mr Steele of counsel for the liquidator

REASONS FOR DECISION

The issues

- [1] There are two issues in this appeal. The company Sky 5 Pty Ltd is in liquidation. The liquidator is Mr David Hambleton. He cannot agree with the Chief Executive of the Department of Employment, Economic Development and Innovation (the Office of Fair Trading – OFT). Their dispute is about money. The Chief Executive will not hand any money over to Mr Hambleton. First, he says that the fund he controls is not liable to pay the money. Secondly, he says that any money has to go directly to creditors of Sky 5, Mr Stephane Nijskens (in four cases) and to him and his wife (in one case). Who is right?
- [2] A short explanation of their different views is necessary. The details can be found in the judgment of this Tribunal dated 14 November 2011. There is not much dispute about the basic facts.
- [3] The directors of Sky 5, Mr Hutchinson and his daughter, wanted to make money. The idea was to sell blocks of land in the Waverly View Estate, owned by Land Equity Pty Ltd. Sky 5 was to act as the vendor, and obtain contracts with purchasers, in its own name. At settlement (called a “back to back” settlement) Sky 5 would use the purchasers’ money to pay for the land, and keep as its profit an expected mark-up on Land Equity’s wholesale price.
- [4] Originally, Sky 5’s plans were probably genuine ones. But, from around late 2006, things went seriously wrong. Sky 5 appointed a real estate agent, Mr Gordon Tuxford to sell lots in the estate. He knew that any deposits from purchasers had to go into a trust account until settlement. He made about twenty sales, including these. He had no trust account. Sky 5 did not have a real estate corporation licence and did not maintain a trust account.
- [5] Mr Nijskens entered into four contracts of sale, to buy lots 85, 73, 51 and 4. The deposits totaled \$185,000. In each case, Tuxford acted as agent for the vendor, called either Sky Pty Ltd or Sky 5 Pty Ltd. Tuxford had been appointed an agent for Sky 5 Pty Ltd. (It seems that there was no company called simply Sky Pty Ltd).
- [6] The deposits were paid in different ways – cash to Tuxford, by bank cheque to Sky 5, or bank transfer to a business called Eco Smart Homes. Hutchinson was in control of Eco Smart Homes. He signed the contracts of sale, on behalf of the vendor.
- [7] The liquidator has paid a dividend of \$45,688.05 to Mr Nijskens. Taking that into account, his personal loss is \$139,311.95.
- [8] The deposits were not placed in a trust account. Tuxford knew that he was required to place the deposits into a trust account. The deposits have disappeared.

- [9] Mr and Mrs Nijskens became the purchasers of Lot 84 in the estate. Tuxford witnessed their signatures, on the contract of sale. Hutchinson signed for the vendor. They gave a bank cheque for \$22,000, to pay the deposit to Sky 5 Pty Ltd. In fact, it was deposited into the account of Eco Smart Homes. The deposit has not been seen since.
- [10] Lot 84 was different to the others. It was not vacant land. There was a house on it, in poor condition. Tuxford told them that they could renovate the house before settlement. He proposed to use it as a sales office which he did.
- [11] Mr Nijskens was a motor vehicle dealer, and was experienced in house renovations. He saw that the damaged house could be repaired and put into good condition. He did that. Tuxford did use the house as his office.
- [12] Time passed. The contracts of sale did not settle, because the deposits had disappeared. Land Equity rescinded the contracts. The house was bulldozed. All Mr Nijskens work came to nothing.
- [13] The extent of his loss is not clear. He says that it was \$78,000. The liquidator admitted a claim for materials worth \$49,464. During this Tribunal's hearing, Mr Nijskens relied upon a folder of accounts and receipts. He was requested to put the paperwork in order, so that it could be understood. A list was suggested.
- [14] He then provided copies of invoices totaling \$17,512.58. For the purposes of this judgment that is the figure that can be accepted, as his loss. There is no proof that the larger figures are accurate.
- [15] The liquidator admitted a total claim of \$69,464. In addition to the \$47,464 for materials, the deposit of \$22,000 was admitted. The liquidator has paid a dividend of \$23,508.70. That dividend comprises two amounts – \$7,445.46 as part of the \$22,000 deposit, and \$16,063.24 as part of the cost of materials.
- [16] In the member's judgment, Mr and Mrs Nijskens were awarded \$14,554.54 from the claim fund. Taking into account the part payment of \$7,445.46, that restored their deposit of \$22,000.
- [17] The judgment went on to refuse compensation for \$17,512.58 spent on the renovation – "that loss was not caused by an event under section 470 of the Act and is not payable from the fund."
- [18] In any case, the \$16,063.24 dividend would have to be taken into account, as a part payment of the \$17,512.58 cost of materials. That leaves \$1,449.34. Was it right to refuse compensation for the cost of the building materials?
- [19] The member took into account, that money was spent before settlement, and so was a "risky activity". There was a finding that there was "neglect" (of their own interests) according to s 488(2) of PAMDA. The Tribunal may allow a claim (under s 470) only if satisfied, on the balance of probabilities, that the event happened, and that the claimant suffered

financial loss because of the happening of the event. The Tribunal must consider, if there is evidence of “the claimants’ own neglect or default.”

- [20] The member found that the “neglect” was spending significant amounts of money before settlement – “a risky activity”.
- [21] In my opinion, Mr and Mrs Nijskens did suffer financial loss, because of Tuxford’s failure to put the deposit in a trust account. The absence of the deposit meant that the contract of sale was not completed. No other reason was suggested or found in the evidence. The loss was financial.
- [22] What of PAMDA s 488? Was there “neglect”? In my opinion, there was not. The land existed, and became available, as expected. Tuxford was well known to the Nijskens, who regarded him as a close friend. They were members of a church congregation when Tuxford was the minister. They trusted him. There was no suggestion, that they could not have the contract of sale. They were not neglectful of their own interests.
- [23] The sum of \$1,449.34 explained above, is money lost, in addition to the \$14,554.54. That is a total of \$16,003.00.
- [24] Hutchinson was experienced in real estate matters. The facts strongly suggest that he and Tuxford acted together. The liquidator’s conclusion is probably quite right – “I have no doubt but Hutchinson and Tuxford were working together to secure the benefit of the deposits ... Sky 5 could not complete the purchase of the allotments from Land Equity Pty Ltd without the deposit funds ... I believe that the process was a sham arrangement conducted by Hutchinson and Tuxford.”
- [25] Tuxford’s conduct amounted to an “event” contrary to s 470(1)(e) of the *Property Agents and Motor Dealers Act 2000* (PAMDA). The Nijskens’ money was entrusted to Tuxford.
- [26] The member’s judgement says that there was insufficient evidence to find that Hutchinson was acting as a “relevant person”, in relation to this sale. That finding seems to have been based on the OFT’s submission, that Hutchinson was not “a relevant person”. That conclusion, or assumption, may be doubted, but it is not considered further in these reasons.
- [27] Hutchinson and his daughter have disappeared. Tuxford has a solicitor, but nothing else.
- [28] Those unhappy events mean that the innocent parties were entitled to assistance from the fund maintained under PAMDA. They qualify because there is an “event” according to s 470 of the Act. This Tribunal may allow a claim when there is such an event – see s 488. There must be “financial loss because of the happening of the event.” The ‘event’ in this case was Tuxford’s failure to put the deposits into a trust account.
- [29] The Chief Executive may refer claims to the Tribunal. That has happened. All the necessary legal and procedural requirements have been satisfied to put the resolution of claims by the innocent parties in the hands of this Tribunal.

- [30] It was submitted here, that the event was a failure to observe the requirements of s 11(d) of the *Land Sales Act 1984*. There are some difficulties with that. The section refers to, “the owner of land to which that act applies.” Sky 5 did not own the land. The Act applies to a proposed subdivision of land.
- [31] It is more appropriate to apply s 470(1)(e) of PAMDA –
- “(1) A person may make a claim against the fund if the person suffers financial loss because of the happening of any of the following events—
- (e) a stealing, misappropriation or misapplication by a relevant person of property entrusted to the person as agent for someone else in the person’s capacity as a relevant person.”
- [32] Mr Hambleton was appointed liquidator on 5 June 2008. He says that the first step should be to put all the funds in his hands. The individual claimants would then be creditors of the company. There are some other creditors. He proposes to make a final distribution of the company’s assets. Some other monies have come into his hands. There has already been a distribution of about one third of these claims. He predicts that the claimants will receive a large proportion of their claims, in a final dividend.
- [33] The Chief Executive opposes the liquidator’s scheme. He says that the claimants should be paid directly from the fund and recover 100% of their losses, after taking into account dividends paid by the liquidator.
- [34] It is necessary to say something about the OFT’s allegation that the company was responsible for the failures of Mr Hutchinson and Mr Tuxford – that the company would not have suffered any loss but for neglect or default of its directors and agent.
- [35] For the liquidator, in a comprehensive written submission, it was said that the misbehaviour of the company’s director Mr Hutchinson, and its agent, Mr Tuxford, is no barrier to its claim. The company and its directors are separate entities, and the effect of that separation is reinforced by decisions of the courts. Mention was made of *Dennis Wilcox Pty Ltd v FCT* (1988) 79 ALR 267 at 274; *Industrial Equity v Blackburn* (1977) 137 CLR 567; *McLeod v R* (2003) 214 CLR 230.
- [36] In the *McLeod* decision, the High Court put it this way:
- “... a company has rights, interests and duties which differ from those of its directors, officers and members. The conduct or state of mind of the latter is not always to be attributed to the former; this is particularly evident upon an insolvent winding up.” (at para 28, Gleeson CJ, Gummow and Hayne JJ).
- “Even when the shares of a company are closely held for purposes (or interests) of the body corporate are not synonymous with the interests of the person or persons in control.” (McHugh J).

- [37] Therefore, it was submitted that the company should not be penalised for its directors' misconduct, the liquidator was in proper control of the company, and the full amount of the various claims should be paid out, with no deduction for the amount of the dividends already paid. (That final submission can be dismissed – it is not an arguable proposition).
- [38] In my opinion, the principal submission for the liquidator should be accepted. That is, the company and its director and agents are separate entities so that reprehensible conduct by those individuals should not be attributed to the company. That is this case. Sky 5, once under the independent control of the liquidator, and free of the misguided efforts of its directors and agent, is entitled to right the wrongs that have been done to it.
- [39] The liquidator has lodged appropriate claims, it was submitted, and that there was no good reason for OFT refusing to pay them in full. It is said for the company that it suffered financial loss, by not being able to complete its contracts.
- [40] Mr Hambleton has made every effort, to insist that he is the proper claimant of the fund, rather than the individuals who paid deposits. At the same time, it is clear that his claims are based entirely on the amounts paid by the purchasers, and nothing else. For example, see his submission to QCAT, dated 7 April 2011, the form containing a "statement of claim details", and ex 3, a summary of the details of individual purchasers whose deposits were lost.
- [41] The answer to the competing claims is this. It became clear that the company could not complete its undertaking, to sell land to the purchasers. When Land Equity called for settlement of the contracts, and there was no response, it rescinded them. They then became entitled to a refund of their deposits. The consideration for these deposits wholly failed, and they should have been repaid.
- [42] Mr Hambleton is right to say that the disappearance of the deposits was a reason why the contracts could not be completed. It is another thing to claim that the result was a "financial loss" because Sky 5 could not complete the contracts. The deposits had not become the property of Sky 5. A deposit, intended to be held in a trust account, is the beneficial property of the purchaser until settlement. Its disappearance was a financial loss for the purchaser, not Sky 5. Sky 5 was never entitled to the money.
- [43] For the company, it is not so clear what it had lost. The opportunity to settle the contracts was lost, but it is not possible to know the value of that lost opportunity. What costs were involved? What was the real market value of the blocks? In short, what did the company really lose?
- [44] What Sky 5 lost was the opportunity to complete the contracts. That opportunity may have been of some value. We do not know the amount of that loss, if any.

- [45] In the written submissions for the liquidator it is asserted that, “on paper, Sky 5 would have made about \$50,000 per lot, a far more significant sum than the amount claimed to have been misappropriated”. If that claim could be proved, then, it might be the foundation for some other claims against the fund. It does not affect the rights of the present claimants.
- [46] The OFT has been right in asserting that the individual purchasers are entitled to payments from the fund.
- [47] There may be issues about further distributions by the liquidator and further recovery for the fund. They can be dealt with, in any further application to QCAT.
- [48] Section 492(5) of PAMDA says, “Interest is not payable from the fund in relation to a claim allowed against the fund.”
- [49] Those words seem clear enough. However there are decided cases which show that there may be exceptions, where a claim is for a lost opportunity, to use the funds. In that case, it is said, the claim is really a claim for damages, and so outside the apparent prohibition.
- [50] See the decisions in *Hungerford v Walker* (1989) 171 CLR 125 (High Court), *Chief Executive, Department of Tourism, Racing & Fair Trading v Hunter* [2002] QDC 272 (District Court), *Gettens v XFar Homes Pty Ltd* [2012] QCAT 150 and *Ryan v Ferrantino* [2010] QCAT 495. See also Judge McGill’s decision in *Bieto v Triline Australia Pty Ltd (No 2)* [2003] QDC 307.
- [51] As that last decision shows, there should be evidence of the loss that has been suffered, by the unavailability of the money.
- [52] In the present proceedings, the various purchasers have not been active parties in the appeal. Any possible issues about interest as damages have not been dealt with.
- [53] It should be recorded that Mr Hambleton has done much good work for the benefit of many unfortunate purchasers who lost their deposits. Without his assistance, it is likely that some would not have recovered anything.
- [54] These are the orders of the Tribunal:
- (a) The appeal is allowed, in part.
 - (b) The orders made by the Member of this Tribunal on 14 November 2011 are affirmed – except that Stephane and Gerda Nijskens are to be paid the sum of \$16,003.88.
 - (c) To the extent necessary the time limit fixed for making a claim by Mr and Mrs Nijskens under the *Property Agents and Motor Dealers Act 2000* is extended.

- (d) Pursuant to s 530 of the *Property Agents and Motor Dealers Act 2000*, the Chief Executive of the Department of Employment, Economic Development and Innovation must pay:
 - (i) to Mr Nijskens the sum of \$139,311.95;
 - (ii) to Mr and Mrs Nijskens the sum of \$16,003.88.
- (e) Pursuant to s 488(3)(c) of the *Property Agents and Motor Dealers Act 2000* declare that the respondent Stanley Gordon Tuxford is the person who contravened the terms of s 470(i) of that Act, and is liable for the financial losses of the first respondents..
- (f) Upon payment of the sums of \$139,311.95 and \$16,003.88 from the Claim Fund to Mr Nijskens, and to Mr and Mrs Nijskens, Stanley Gordon Tuxford is liable to reimburse the Claim Fund by paying those sums to the Chief Executive of Employment, Economic Development and Innovation.