

SUPREME COURT OF QUEENSLAND

CITATION: *Westpac Banking Corporation v Clark & Ors; ex parte Gallop Reserve Pty Ltd* [2015] QSC 353

PARTIES: **WESTPAC BANKING CORPORATION**
ACN 33 007 457 141
(plaintiff)
v
STEPHEN ROSS CLARK
(first defendant/respondent)

MARK CRAIG KENWARD (also known as MARK CRAIG KEMPSON KENWARD)
(second defendant)

MASTER PROJECTS QLD PTY LTD
ACN 113 244 045
(third defendant)

GALLOP RESERVE PTY LTD
ACN 010 759 421
(applicant)

FILE NO/S: BS No 13441 of 2010

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 7 December 2015

JUDGE: Martin J

ORDER: **I grant leave to Gallop Reserve Pty Ltd to commence enforcement proceedings upon Gallop Reserve Pty Ltd discontinuing its action against Mr Clark.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the applicant seeks leave to enforce a judgment obtained by the plaintiff against the first defendant – where the applicant entered into a deed with the plaintiff and others – whether the deed assigns the plaintiff's

rights in the judgment to the applicant such that it can obtain leave to commence enforcement proceedings

Charrington & Co Ltd v Wooder [1914] AC 71

Fraser v The Irish Restaurant & Bar Company Pty Ltd
[2008] QCA 270

Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd (1968) 118 CLR 429

COUNSEL: MT de Waard for the applicant
NH Ferrett for the respondent

SOLICITORS: Rostron Carlyle Solicitors for the applicant
Broadley Rees Hogan Lawyers for the respondent

- [1] The applicant in this matter is Gallop Reserve Pty Ltd ('Gallop'). It seeks leave to enforce a judgment obtained by Westpac Banking Corporation ('Westpac') against Stephen Clark (the first defendant) in August 2011. It claims that it is able to do that pursuant to a deed of transfer between it, Westpac and some others.

Background

- [2] In December 2007 Westpac entered into an agreement whereby it lent a sum of money to Matton Developments Pty Ltd ('Matton'). Mr Clark was a director of Matton and a guarantor of the obligations of Matton under the loan agreement.
- [3] Westpac sued Mr Clark on the guarantee and obtained default judgment, in August 2011, in the sum of \$832,607.32.
- [4] On 10 April 2013 Westpac, Gallop and some other parties executed an instrument entitled "Deed of Transfer and Acknowledgement" ('the Deed'). Gallop relies upon that deed in its application for leave to enforce the judgment.

The Deed

- [5] So far as is relevant, the Deed provides that Westpac:

"3.1.1 assigns to the Transferee all of Westpac's full, absolute and entire legal and beneficial interest, right and title in and to the Westpac Debt, the Westpac Finance Documents and the Westpac Guarantees; and

3.1.2 transfers to the Transferee all of Westpac's obligations and liabilities under the Westpac Finance Documents, the Westpac Guarantees or otherwise in connection with the Westpac Debt."

- [6] The Deed defines “Westpac debt” to mean:

“... all present and future money owing by the Obligors to Westpac under or in connection with the Westpac Facility (including the outstanding principal plus all interest, fees, charges and expenses payable, costs for the preparation of this deed and a settlement costs);”

- [7] “Westpac Facility” is defined to mean the Commercial Loan Agreement entered into between Westpac, Matton and others in December 2007. The “Westpac Guarantees” includes the guarantee given by Mr Clark.

The new proceeding

- [8] In a curious turn of events, Gallop commenced proceedings against Mr Clark in May 2015. It was curious in that Gallop relied upon the Deed as its basis to recover the money, that is, the same money in respect of which Westpac had obtained the default judgment referred to above.
- [9] Gallop now accepts that the cause of action which existed when Westpac sued Mr Clark had merged into the judgment. No explanation was given for the commencement of this action in the light of the judgment obtained by Westpac.
- [10] In his defence to the action commenced by Gallop, Mr Clark pleaded that the plaintiff’s rights in connection with the cause of action had merged in the default judgment obtained by Westpac. Further, he pleaded that the proceeding was an abuse of process because Westpac’s rights in the default judgment had not been assigned to Gallop.

The issue

- [11] The only issue to be decided is whether the Deed assigns Westpac’s rights in the judgment to Gallop such that it can obtain leave to commence enforcement proceedings. That issue will be determined by construing the terms of the Deed.
- [12] Clause 3.1.1 creates an assignment of all of “Westpac’s full, absolute and entire legal and beneficial interest, right and title in and to the Westpac Debt”. It would be difficult to conceive of a more compendious description of what was being transferred so far as the Westpac Debt was concerned. The assignee got everything.
- [13] Whether Gallop has a right to seek leave to commence enforcement proceedings depends upon the meaning of Westpac Debt. It is defined to mean “all present and future money owing by [Mr Clark] to Westpac under or **in connection** with the Westpac Facility.” The Westpac Facility was the agreement in which Mr Clark was a guarantor.

The meaning of clause 3.1.1

- [14] It was argued by Mr Clark that the assignment of the Westpac Debt should not be construed to include the judgment which resulted from the action taken upon the Westpac

Debt. Mr Ferrett, who appeared to Mr Clark, argued that there were a number of matters which told against the construction advanced by the applicant.

- [15] First, there is no reference to the judgment in the Deed. That is, one could be forgiven for thinking, unusual. But, by itself is not sufficient to demand the construction advanced on behalf of Mr Clark.
- [16] Secondly, the phrase “in connection with” should not be construed broadly to the extent that it includes the judgment based upon the Westpac Debt. As was pointed out, the parties to the Deed included parties to the proceedings and the default judgment preceded the Deed by nearly 2 years. The failure to mention what would ordinarily be regarded as a critical instrument occurred in circumstances where the parties were careful to identify the other critical instruments.
- [17] The construction advanced for Mr Clark would mean that, as the cause of action had merged in the judgment and, as there was no other amount owing under the Westpac Facility, then the Deed assigned nothing to Gallop.
- [18] The term “in connection with” was considered in *Fraser v The Irish Restaurant & Bar Company Pty Ltd*¹ by Muir JA:

“[40] **The expression ‘in connection with’ is capable of having a wide meaning but in common with expressions such as ‘relating to’ and ‘in respect of’ its meaning must be derived from the context in which it was used.** The following passages from the reasons in *Workers' Compensation Board (Qld) v Technical Products Pty Ltd* illustrate the point:

‘It has been said, perhaps somewhat extravagantly, that the words “in respect of” “have the widest possible meaning of any expression intended to convey some connexion or relation between the two subject-matters to which the words refer”: *Trustees Executors & Agency Co. Ltd. v. Reilly* [[1941] VLR 110 at 111], cited in *State Government Insurance Office (Q.) v. Crittenden* [(1966) 117 CLR 412 at 416]. The words were cited again by Gibbs J. in *McDowell v Baker* [(1979) 144 CLR 413 at 419], and by Mason J. in *State Government Insurance Office (Q.) v. Rees* [(1979) 144 CLR 549 at 561], when his Honour added the comment: “But, as with other words and expressions, the meaning to be ascribed to ‘in respect of’ depends very much on the context in which it is found”.

...

Undoubtedly the words “in respect of” have a wide meaning, although it is going somewhat too far to say, as did Mann C.J. in *Trustees Executors & Agency Co. Ltd. v. Reilly* [[1941] V.R 110 at 111], that “they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject-matters to

¹ [2008] QCA 270.

which the words refer”. **The phrase gathers meaning from the context in which it appears and it is that context which will determine the matters to which it extends.’**

[41] The following observations of Davies J in *Hatfield v Health Insurance Commission*, although directed to a question of statutory construction, are also of relevance:

‘Expressions such as “relating to”, “in relation to”, “**in connection with**” and “in respect of” are commonly found in legislation but invariably raise problems of statutory interpretation. They are terms which fluctuate in operation from statute to statute... .

The terms may have a very wide operation but they do not usually carry the widest possible ambit, for they are subject to the context in which they are used, to the words with which they are associated and to the object or purpose of the statutory provision in which they appear.’

[42] After quoting the passage from *Hatfield*, Spigelman CJ, with whose reasons the other members of the Court agreed, said in *R v Orcher*:

‘[32] Finally, the Full Federal Court returned to this matter in *Health Insurance Commission v Freeman* (1998) 158 ALR 267 at 273 where the Court said:

“The words ‘**in connection with**’ have been accepted as capable of describing a spectrum of relationships between things, one of which is bound up with or involved in another: see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288. However, as was pointed out by Sackville J in *Taciak v Commission of Australian Federal Police* (1995) 59 FCR 285 at 295, the question that remains in a particular case is what kind of relationship will suffice to establish the connection contemplated by the statute. That requires a ‘value judgment about the range of the statute’: see *Pozzolanic* (at 289).”

[43] Again, the views expressed are equally applicable to contractual construction.” (emphasis added)

[19] Expressions such as “in connection with” generally mean that a broad connection, but not necessarily causal, is sufficient.

[20] But, in any event, all words must be read in context and, in this case, with a view to the commercial purpose of the contract. As Barwick CJ said in *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd*²:

² (1968) 118 CLR 429 at 437.

“In the search for [the parties’] intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements.”

Why wasn’t the judgment referred to?

- [21] With respect to the argument advanced by Mr Clark that the failure to specifically refer to the judgment should be taken into account in construing the assignment, it is appropriate to recall that most disputes about the interpretation of a contract occur because the words in question are susceptible of more than one meaning. If the words were clear, there would not be a dispute. In *Charrington & Co Ltd v Wooder*³ Lord Dunedin said:

“I do not think it rests with either party to say to the other ‘If the meaning is as you contend, why did you not express it otherwise?’ Both contentions as to the true meaning can be expressed by a gloss... If either of the glosses had been expressed there would be no possibility of dispute. It therefore comes back to the question, What is the true interpretation of the expression in the contract?”

- [22] So far as there is some uncertainty in the meaning of clause 3.1.1 it is possible to refer to one of the recitals for assistance:

“D. The parties have requested Westpac to transfer all of its rights and obligations in connection with the Westpac Debt, the Westpac Finance Documents and the Westpac Guarantees to the Transferee.”

- [23] It was also contended by Mr Clark that the form of the notice of assignment given to him, having been specified in the Deed, also demonstrated that there was no intention to transfer the benefit of the judgment. The Deed specified that the form of the notice of assignment was to state, among other things:

“We inform you that all debt Matton Developments Pty Limited... owes Westpac under the Westpac Facility has been assigned to Gallop... for valuable consideration.”

- [24] While that form of assignment can be regarded as forming part of the context to be considered, it should be seen as a “shorthand” description of the transaction rather than an attempt to accurately capture all aspects of the assignment.

Conclusion

- [25] The nature of the transaction, the use of the phrase “in connection with”, and the declaration of intent in the recital referred to above – notwithstanding the absence of a reference to the judgment – lead to the conclusion that clause 3.1.1 is sufficiently wide to capture the judgment and, thus, assign to Gallop the benefit of that judgment.

³ [1914] AC 71 at 82.

- [26] It was argued for Mr Clark that leave should not be granted while Gallop is pursuing the action against him based on the guarantee. As is noted above, Gallop has accepted that it cannot continue that action. There is no other reason to deny Gallop leave.
- [27] I grant leave to Gallop to commence enforcement proceedings upon Gallop discontinuing its action against Mr Clark.