EQUITABLE SUBROGATION AND "CONTROLLERS" FOR THE PURPOSES OF THE *CORPORATIONS ACT 2001* - CAN A LAWYER BE A "CONTROLLER?"

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Australia Litigation and Dispute Resolution Alert

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In *Bolwell & Anor v NWC Finance Pty Ltd & Ors* [2024] VSC 30, the Supreme Court of Victoria clarified that a lawyer will not be a "controller" of property within the meaning of section 9 of the *Corporations Act 2001* (Cth) (the Act) simply because it was retained to act for a mortgagee exercising their power of sale.

This judgment provides comfort to lawyers as it confirms that they will not assume the obligations of a "controller" under the Act solely by reason of them acting in connection with the sale of real property in an insolvency context.

The court's judgment also set out a helpful analysis of the doctrine of equitable subrogation, which will be of interest to those operating in the lending context.

BACKGROUND

Rock Development & Investments Pty Ltd (in liquidation) (Rock) was the registered proprietor of a property situated in Taylors Hill, Victoria, which was the subject of a first registered mortgage in favour of Bendigo and Adelaide Bank (BAB) and a second registered mortgage in favour of NWC Finance Pty Ltd (NWC).

NWC subsequently "paid out" the amount owing by Rock to BAB, resulting in the discharge of BAB's mortgage.

Rock later went into liquidation and NWC then exercised its power of sale in connection with the Taylors Hill property.

NWC retained Summer Lawyers in connection with the enforcement of its power of sale and the conveyance of the property to the new purchaser. The Taylors Hill property ultimately sold for AU$2.7 million plus GST.

As against NWC, Rock and its liquidator sought:

- A declaration that NWC was not entitled to subrogate to the position of BAB under its mortgage and the amount paid by NWC to BAB did not constitute a recoverable expense under the loan between NWC and Rock;
- An account of the principal, interest, expenses and fees charged by NWC under the loan between NWC and Rock; and
- An order distributing any surplus from the sale of the Taylors Hill property to them.

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As against Summer Lawyers, Rock and its liquidator sought orders requiring it to render accounts pursuant to section 434(1)(b) of the Act in connection with the sale of the Taylors Hill property as well as an order in the nature of an inquiry under section 423(1) of the Act.

Such relief required Rock and its liquidator to first establish that Summer Lawyers was a "controller" for the purposes of the Act, which Summer Lawyers denied.

LAWYERS ACTING FOR MORTGAGEES IN POSSESSION OF PROPERTY - ARE THEY "CONTROLLERS" UNDER THE ACT?

The court held that "…*simply because it was retained as solicitors for NWC*" Summer Lawyers was *not* a "controller" of Rock's property for the purposes of the Act.

Rock and its liquidator failed to establish that Summer Lawyers was in possession of Rock's property for the purposes of enforcing NWC's mortgage, such that it was a "controller" of that property for the purposes of the Act.

Applying the analysis in *Raiffeisen-Boerenleenbank BA v Philips* [2011] SASC 139, the court held that:

- Summer Lawyers was not entitled to legal or de facto possession of Rock's property at any time, nor did it possess or control that property to the point where it could remove the property from Rock; and
- Summer Lawyers did not have legal or de facto capacity to use, occupy, sell or otherwise dispose of Rock's property against its wishes.

The claim against Summer Lawyers was therefore dismissed.

WAS NWC ENTITLED TO BE SUBROGATED IN EQUITY TO THE POSITION OF BAB IN CONNECTION WITH THE LATTER'S DISCHARGED MORTGAGE?

The court held that NWC was subrogated in equity to the rights BAB held under its [discharged] mortgage. The discharging of BAB's mortgage was immaterial in that regard, as was any suggestion that Rock did not know or otherwise agree to the transaction between NWC and BAB.

NWC's payment to BAB of the amount owing to it by Rock was still secured by BAB's mortgage. That is the starting presumption in terms of equitable subrogation, which is rebutted when a contrary intention is established (here, by Rock).

The resultant question was whether NWC engaged in conduct which evinced an intention on its part to not be subrogated to the rights of BAB under its mortgage, such that it was neither inequitable nor unconscionable for Rock to deny NWC's asserted subrogated interest in BAB's mortgage.

Rock (and its liquidator) failed to rebut the starting presumption in favour of NWC.

- NWC's refusal to take an assignment of BAB's mortgage in paying out the sum owing by Rock to BAB did not sufficiently demonstrate any intention on NWC's part to not be subrogated to the rights of BAB under that mortgage.

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Indeed, given NWC already held a registered mortgage (which became the priority mortgage upon the discharge of BAB's mortgage), the court considered that NWC simply did not require the assignment.

- Similarly, the assertion made in a letter sent by NWC's solicitors 11 months after NWC made payment to BAB that the payment constituted recoverable "Enforcement Expenses" or "Other Monies" under NWC's mortgage did not demonstrate any contrary intention at the time of the payment to the effect that NWC wished to treat it as a recoverable "Enforcement Expense" or "Other Monies" under its own mortgage (rather than as an amount secured by BAB's mortgage).
- In any event and perhaps most critically, no evidence was adduced suggesting that NWC had communicated any alleged contrary intention to Rock, or that it was otherwise known to Rock at any relevant time.
- Further, the court considered that the making of a payment to preserve the benefit of an existing security interest lends support to the view that NWC intended to be subrogated to BAB's rights under its mortgage.
- Finally, even if NWC mistakenly considered the payment made by it to BAB was secured by its own mortgage, equitable subrogation was still available to NWC in those circumstances (drawing on the judgment in *Ghana Commercial Bank v DT Chandiram & Anor* [1960] AC 732).

Given NWC was entitled to subrogate to the rights of BAB under its mortgage in connection with the sum paid by it to BAB, there was no surplus monies from the sale of Rock's Taylors Hill property to which any obligation to account could attach.

OTHER MATTERS

The court also held that the sum paid by NWC to BAB *did not* constitute recoverable "Enforcement Expenses" or "Other Monies" under NWC's own mortgage.

The sum paid by NWC to BAB therefore did not form part of the "Amount of Credit" for which Rock was liable to NWC under the terms of the loan agreement between them.

The court also helpfully addressed the principles governing orders for an inquiry under section 423 of the Act.

The judgment can be accessed here.

K&L Gates acted for Summer Lawyers in Bolwell & Anor v NWC Finance Pty Ltd & Ors [2024] VSC 30.

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