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Update

Property Finance

March 2010

Power to Sell trumps all? Secured Creditor may sell personal property free of subsequent registered Charges

St George Bank Limited v Perpetual Nominees Limited & Anor [2010] QSC 57 has applied the power of a mortgagee conveying land pursuant to a power of sale free of subsequent encumbrances to the exercise of a power of sale over personal property secured by a charge. Senior Associate Melanie Hunter and Lawyer Carolyn Gill report.

It has long been established that a mortgagee who exercises a power of sale over land may convey the land the subject of the mortgage to a purchaser, free of the interest of any subsequent mortgagees or covenant chargees [1]. In contrast, the position of chargees exercising their power of sale over the assets and undertakings of a company secured by way of a charge has not been as clear. However, the recent Queensland Supreme Court decision of *St George Bank Limited v Perpetual Nominees Limited & Anor* [2010] QSC 57 suggests that the position of chargees (in respect of personal property) and mortgagees (in respect of real property) in the exercise of a power of sale is identical.

In this case, St George Bank Limited (**St George**), Perpetual Nominees Limited (**Perpetual**) and LJK Nominees Pty Ltd (**LJK**) all held securities over the Sheraton Mirage Resort and Spa on the Gold Coast, which was owned and operated by SP Hotel Investments Pty Ltd (**SP Hotel**). Relevantly, these securities were as follows:

- St George held a first registered mortgage over the land and a first registered fixed and floating charge over the assets and undertaking of SP Hotel;
- Perpetual, as custodian of the MFS Premium Income Fund, held a second registered mortgage over the land and a second registered fixed and floating charge over the assets and undertaking of SP Hotel; and
- LJK held a third registered mortgage over the land and a third registered fixed and floating charge over the assets and undertaking of SP Hotel.

St George and Perpetual also entered into a priority deed, which confirmed the priority of the St George securities up to $78 million.

SP Hotel defaulted under the St George facility and St George appointed receivers and managers to the company. On 9 November 2009, St George served notice of exercise of power of sale on SP Hotel and on 23 November 2009, St George entered into land and business sale contracts with Pearls Australasia Mirage 1 Pty Ltd (**Purchaser**) to sell the hotel, at a price of $62 million.

St George was unable to proceed with settlement of the business sale contract as Perpetual and LJK declined to provide releases under their fixed and floating charges. As a result St George applied to the Supreme Court for a determination that the exercise of its power of sale as first registered chargee would ensure that upon completion, the Purchaser would take the personal property and undertakings of SP Hotel free from any interest of Perpetual and LJK.

Section 86 of the Property Law Act 1974 (Qld) (**the Act**) enables a mortgagee exercising their power of sale to convey land to the purchaser free of any subsequent interests. However, there is no similar statutory provision relating to the power of sale of personal property secured by a registered charge. Notwithstanding this, the court:

- accepted that the charge was an "instrument of mortgage" within the meaning of the Act and that the power of sale contained in the Act was implied into it;
- found that the exercise of a power of sale by an equitable chargee was no different to the exercise of the same power by an equitable mortgagee; and
- held that provided that a chargee has the power to convey charged assets and it may convey assets pursuant to a power of sale free of the interests of subsequent chargees.

As St George was the first registered chargee and had properly complied with the notice provisions, the court made a declaration that its conveyance of the property and undertaking of SP Hotel to the Purchaser would be free of any interest of Perpetual or LJK under their respective securities.

It remains to be seen whether this decision will be adopted by courts of the other States and Territories or whether its application will be limited to its specific facts. However, in the interim, holders of subsequent securities should be mindful that the first registered mortgagee / chargee may not require the release of subsequent securities to proceed with a power of sale in respect of personal property.

For further information on how to better protect the interests of subordinated security holders and important drafting consideration in the relevant documentation to address these situations, please contact us to discuss.

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Endnotes

[1] See s86 Property Law Act 1974 (QLD); s59 Real Property Act 1900 (NSW); s77 Transfer of Land Act 1958 (VIC); s81 Land Titles Act 1980 (TAS); s110 Transfer of Land Act 1893 (WA); s49 Law of Property Act 1936 (SA); s91 Law of Property Act (NT) and s95 Land Titles Act 1925 (ACT).

Goodridge v Macquarie Bank Limited and Leveraged Equities Limited [2010] FCA 67

Goodridge v Macquarie Bank has determined that when dealing with the assignment of contractual rights and responsibilities – a valid novation requires agreement by both parties to the original agreement, as Senior Associate Julian Lane reports

One method of assigning rights under a contract is through novation: the creation of a new contract that extinguishes and replaces the earlier one. The case of *Goodridge v Macquarie Bank Limited and Leveraged Equities Limited* [2010] FCA 67 is a reminder that for a novation to be valid, both parties to the original contract must agree to the novation.

In this case, Ross Goodridge **(Mr Goodridge)** had a margin loan facility with Macquarie Bank Limited (**the Bank**), which he used to acquire various share market listed investments. By early February 2009, Mr Goodridge owned 5,603,562 units in the Macquarie CountryWide Trust (**the MCW Trust**) through the margin loan facility.

In early 2009 the Bank "sold" about 18,500 margin loans (including Mr Goodridge's) for nearly $1.5 billion to BNY Trust Company of Australia Limited (**BNY**). The next day BNY "sold" the same assets (including Mr Goodridge's accounts) to Bendigo and Adelaide Bank's subsidiary Leveraged Equities Limited (**Leveraged Equities**). Mr Goodridge indicated that he had no knowledge of the "sales" until after they occurred and that he was not a party to them.

On 23 February 2009, Leveraged Equities made two margin calls on Mr Goodridge without giving Mr Goodridge the standard three business days notice to comply. At 2.05pm it demanded a payment of $131,363.67 by 2pm the next day, and at 6.29pm it demanded a payment of $190,201.07 by the close of business the next day. Mr Goodridge was unable to meet these demands so Leverage Equities removed his access to the facility and caused all of his units in the MCW Trust to be sold by 2 March 2009.

Justice Rares found that:

- Mr Goodridge had not defaulted;
- Leveraged Equities had no power to sell Mr Goodridge's MCW Trust units; and
- Mr Goodridge was entitled to have the units in MCW Trust restored to him and to be compensated for any loss he suffered.

Importantly Justice Rares also found that there had been no valid assignment or novation of the Bank's rights to Leveraged Equities. While the agreements between the Bank and BNY, and BNY and Leveraged Equities purported to transfer the Bank's existing legal right to a debt and the supporting security owed by Mr Goodridge, they did not transfer the Bank's continuing obligation to lend to him and assist with the acquisition of further securities on the same terms and condition. His Honour said that the assignment was invalid due to:

- the nature of a margin loan facility; and
- the fact that the debt was not free-standing from an ongoing relationship between the Bank and Mr Goodridge.

His Honour also found that it is not possible for one party to novate an agreement without the knowledge of the other. He said that it was one thing for the Bank to seek to deal with its rights that are assignable rights, without its borrower's involvement but it was another for it to seek to create and impose a new contract between its borrower and a third party in circumstances where the borrower has no participation in or knowledge of the formation of that "agreement".

This case serves as an important reminder to anyone wishing to assign their rights and/or responsibilities under a contract that they may not be able to do so without the consent of the other parties to the contract.

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Newsflash - Octaviar to fight another day

On 12 March 2010, the High Court of Australia granted leave to appeal the Queensland Court of Appeal's decision in *Re Octaviar.*

The leave for appeal was sought on the grounds that:

- The Court of Appeal erred in concluding that a deed identifying a guarantee as a "transaction document" for the purposes of a registered charge did not vary the registered charge by increasing the liabilities secured by that charge within the meaning of section 268 of the Corporations Act 2001 (Cth) (**Act**); or
- In the alternative, the Court of Appeal erred in concluding that the deed did not constitute a new charge within the meaning of section 263 of the Act.

In the interim, in documenting new facility arrangements, consideration must be had to 'octaviar proof' the arrangements and any variations in the facility (and within the charge instrument itself) should be notified to ASIC within 45 days of such change. For further information on this matter or any other property finance matter, please feel free to contact our property finance team.

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