PA e-bulletin

In this Issue
15 December 2006

Piper Alderman Legal Update

WELCOME TO THE LATEST EDITION OF THE PIPER ALDERMAN E-BULLETIN. THIS EDITION FOCUSES ON THE WORK OF THE COMMONWEALTH ATTORNEY GENERAL'S CONSULTATIVE GROUP INTO PERSONAL PROPERTY SECURITIES REFORM OF WHICH BRISBANE BASED PIPER ALDERMAN PARTNER CRAIG WAPPETT IS A MEMBER, RECENTLY RELEASED ASIC POLICY DISCUSSION PAPERS PROPOSING CHANGES TO THE REGULATION OF FINANCIAL SERVICES AND VARIOUS RECENT COURT DECISIONS IN OUR PRACTICE AREAS

Personal Property Securities Law Reform update: Discussion paper released on PPS Register

The Commonwealth Attorney General has released the first of three discussion papers on personal property securities law reform, entitled "Registration and Search Issues" which focuses on the proposed PPS Register. Corporate partner, Craig Wappett, a member of the Personal Property Securities Review Consultative Group formed by the Attorney-General, discusses.

The paper looks at the proposed single, national PPS Register including the contents, design, administration and searching capabilities of the register, and issues relating to the transition to one register.

The introduction of a PPS Register is complex. Consideration is being given to issues such as: what can be registered; interaction with or replacement of existing registers; procedures to keep the register up to date; privacy laws; compensation for error on the register; systems design and technical specifications; electronic and hard copy accessibility; interaction with existing laws such as the Uniform Consumer Credit Code and the Corporations Act; and transitional arrangements, such as data migration or re-registering, to move from existing securities registers regimes.

Although, the introduction of a PPS Register will have short term implementation and transitional costs, its medium and long term benefits will significantly outweigh these.

The key benefit is that a PPS Register will allow prospective lenders and purchasers of personal property, including intellectual property and other intangible property, to easily and cheaply verify in real time whether property is encumbered before they deal with it.

This will provide lenders, borrowers and their advisers certainty and confidence to proceed with financing transactions.

It will reduce costs to assess borrowers and ensure lenders' security, which will mean net material benefits to the community, as was identified in the report released earlier this year by Access Economics on the costs and benefits of reform.

The Commonwealth Attorney General intends to release two more discussion papers on personal property securities law reform: one on the priority rules for resolving competing claims and certain enforcement and insolvency related issues; and one on the rules relating to financial assets — such as futures contracts and securities (for example, shares in a corporation).

The proposed reforms are similar to laws already in place in the United States, Canada and New Zealand.

John Fairfax Publications v Birt: Protecting employers' interests by restraint of trade clauses

Dispute resolution associate Leonora Roccisano discusses this recent Supreme Court of NSW decision in which Fairfax sought injunctive relief to enforce restraint of trade clauses in an employment contract with Mr Birt, who had been employed by Fairfax as General Manager Sales Development, Real Estate and Motors New South Wales, and had moved to the role of Publisher, City Publications, for City Weekly, Central and 9 to 5, with a rival publishing company.

Mr Birt's contract of employment with Fairfax contained various restraints, including a non-compete clause and a restraint relating to enticing any employee, agent or customer of Fairfax from Fairfax. The contract also

stressed that an obligation of confidentiality about Fairfax, its products and clients continued after the cessation of employment.

The Court held that it was seriously arguable that the clause restraining Mr Birt from revealing confidential information was valid, even though much of the information initially sought to be protected by Fairfax did not meet the definition of "confidential information" because Fairfax had failed to take measures to assert or maintain the confidentiality of information contained in items such as customer lists and pricing and discount arrangements. The Court found that Mr Birt impliedly conceded that such information was confidential as he had agreed not to disclose such information for a period of three months from the commencement of his new employment. This, combined with his occasional access to internal readership and circulation survey data and responsibility for some business developments, meant that Fairfax could potentially restrain him from disclosing:

> Strategy, commercial business information and tactical plans about the conduct of Fairfax's business operations;

> Details of Fairfax's physical delivery of print media in the Sydney metropolitan area;

> Details of the costs to Fairfax of print media advertising in the Sydney metropolitan area;

> Fairfax's marketing and planning activities relating to print media; and

> Internal readership and circulation survey data in respect of publications within the Sydney metropolitan area.

The Court also held that it could be seriously argued that a clause restraining Mr Birt from being employed by any company which is in competition with Fairfax was valid.

Fairfax's attempt to restrain Mr Birt from approaching any employee, agent or customer of Fairfax with a view to enticing them away, was found to be potentially valid only to the extent that it related to employees. The Court found the "staff connection" was a protectable interest as it constituted an intangible benefit which may give Fairfax a business value and thus comprises part of its goodwill. Fairfax was reasonable in restraining Mr Birt from enticing employees as it was readily foreseeable that, in his leadership position, he might acquire influence over the staff that reported to him and it was a likely prospect that those employees would follow him to his new position.

However, it was found that while an employer may have a "staff connection" with its employees that is capable of protection, no real connection between Fairfax and its agents could be identified. The Court also found that Fairfax's interest in restraining any approach to customers was adequately protected by the confidentiality clause.

This case highlights the importance of ensuring restraint of trade clauses included in employment contracts are reasonable in their operation and proportionate to the interest they seek to protect, those interests being in accordance with public policy and legitimately protectable. It also highlights the onus on an employer to protect its protectable interests, such as confidential information, by taking its own measures to protect that information in its day-to-day business.

Mitigation in a claim for contract damages

Trade and transport lawyer, John Zerilli discusses the recent New South Wales Court of Appeal Decision in Castle Constructions Pty Limited v Fekela Pty Limited which dealt with the question whether the duty to mitigate loss may require a purchaser to proceed with a contract which they have validly elected to avoid.

In *Castle Constructions* mortgagees of a hospital site exercised a power of sale. Castle contracted to purchase the site. The vendor failed to complete, but they expressed a willingness to complete at a later time. The purchaser terminated the contract, having by then decided that the property could not profitably be redeveloped. The purchaser rejected offers from the vendor to complete at a later date and eventually brought proceedings seeking a declaration that it had validly terminated and was entitled to damages for loss of profits on the abandoned redevelopment. The real issue centred around the claim for damages.

Damages are limited to reasonably contemplated losses caused by a breach and of those losses, losses which could reasonably have been avoided are not recoverable. This is the principle of the duty to mitigate.

The Trial Judge found that what had caused the purchaser's loss was not the vendor's breach, but rather the purchaser's decision not to proceed with the contract. Sensing a bad deal, the purchaser had seized the opportunity to exit the transaction and thereby had caused their own loss. The Trial Judge found they were not entitled to damages.

The Court of Appeal by majority agreed with the Trial Judge.

On the issue of causation the majority of the Court of Appeal found that it could not be reasonably anticipated by the vendor that the purchaser was acquiring the land for development purposes and therefore anticipated development profits were on the facts of this case not recoverable.

Those findings effectively disposed of the Appeal but the majority went on to consider whether it was reasonable for an innocent party to be required to mitigate their damage by accepting a new offer of performance from the wrongdoer. The majority held on the facts that the purchaser had unreasonably failed to mitigate the loss it sought to prove by not completing the original contract according to its terms when the vendor had offered to do so. Mitigation required the purchaser to accept late delivery of the contractual product.

This apparent departure from orthodox contract jurisprudence is understandable when one considers the position adopted by the purchaser. The purchaser simultaneously propounded the unreasonableness of completing the contract given its speculative prospects of success and then claimed, risk free, the total profits, speculative as they admittedly were, that might have materialised 18 months later. Even if the purchaser was right in its mitigation reasoning, it would have made more sense to have quantified a profit figure reflective of the risks inherent in the venture. But it made no attempt to discount or conservatise the future values it touted as representing its expectation loss so as to reflect the risk involved.

The case serves as a caution to parties in land transactions who, having validly terminated, might suppose their right to damages is unfettered in the absence of alternative properties. One might have to accept the product originally bargained for on slightly different terms.

This is an edited version of a casenote published in (2006) 80 ALJ 796.

ASIC updates organisational competences and general obligation requirements for AFS licensees

Corporate partner, James Dickson and lawyer, Marissa Bendyk explain two recently released ASIC consultation papers which seek to update policy statement 164 "Licensing: Organisational Capacities", which provided financial services licensees with guidance as to ASIC's expectations.

The policy statement has been separated into two policy statements that ASIC intends to release in May 2007.

Consultation paper 1 – Updating [PS164]: Meeting the general obligations

This consultation paper, which includes a draft policy statement, narrows the scope of current policy statement 164 by removing policy on organisational competence and focusing on guidance to licensees on meeting their obligations under section 912A(1) of the Corporations Act. Specifically, the proposed policy statement covers:

> complying with the general obligations;

> key compliance concepts that apply to all of the general obligations;

> what ASIC looks for when it assesses compliance measures;

> what ASIC looks for when it assesses risk management systems;

> what ASIC looks for when it assesses compliance measures for monitoring, training and supervision of representatives; and

> what ASIC looks for when it assesses the adequacy of human and technological resources.

ASIC has not altered its policy on the abovementioned topics from that currently expressed in policy statement 164, but its newly proposed policy statement aims to provide further clarity as to ASIC's expectations and how they must be satisfied. To achieve this, the proposed policy statement has been drafted with a focus on plain English, ensuring references to Australian Standards are up to date and including references to international principles where they relate to specific issues in the industry and are able to be used as a guide to compliance with licensees' obligations, specifically when assessing the effectiveness of:

> licensees' measures relating to outsourced functions;

> licensee compliance measures; and

> licensees' risk management systems.

Consultation paper 2 – Updating [PS164]: Organisational competence

The proposed policy statement accompanying this consultation paper seeks to combine part of current policy statement 164 with other guidance ASIC offers on organisational competencies in various other policy statements and ASIC documents so that it is addressed in a single document. It aims to reduce confusion and create greater consistency when assessing organisational competence.

Its effect is that consistent organisational competence requirements will be applied to all licensees, regardless of the type of licence and financial services provided.

The proposed policy statement offers five options for demonstrating that a licensee has the appropriate knowledge and skills.

Further, the proposed policy statement gives guidance to the effect that licensees who operate registered schemes or unregistered schemes (including IDPS & MDA services), or who provide custodial services, need knowledge and skill in

relation to both the provision of the financial service and the investment and operational issues of all of the kinds of assets under management or, if relevant, the business operated by the relevant scheme.

Options to renew when a lessee is in default

Property and projects lawyer, Alex Keen, explains the decision of Mineaplenty Pty Ltd v Trek 31 Pty Ltd which decided whether a lessee of a caravan park had validly exercised a first option to renew under a five year lease.

The lessee sought a declaration that it was entitled to further five year term or alternatively relief from provisions of the *Conveyancing Act 1919* (NSW) which would otherwise disentitle a lessee from exercising an option to renew in circumstances in which the lessor has given formal notice of the lessee's breach of the lease. The lessor claimed that the lease had expired and the lessee was in default of its obligation to pay rent, and was therefore not entitled to exercise the option to renew.

Over the course of the lease, the lessor served a number of notices on the lessee in respect of failures to pay sums required, including a security deposit and water rates.

On 31 July 2005 the lessee wrote to the lessor's director personally, stating that it wished to exercise its option. On 16 September 2005 the director contacted the lessee to inform them that in order to validly exercise the lease option, the letter must be addressed to the lessor's company. The lessee sent a new letter by facsimile that day. The final day to exercise the option was 30 September 2005. The lessor then sought to preclude the lessee from exercising the option, claiming a variety of breaches of lease covenants.

The Court found that the first letter exercising the option, despite having been addressed to the lessor's director personally, was a valid exercise of the option. The notice contained a clear unequivocal intention to exercise the option, and thus the fact it was personally addressed was not fatal. Furthermore, a notice of option to renew can be given to an authorised agent of the lessor (the lease expressly stated that "lessor" includes servants and agents) and looking at the circumstances of the case, including that the lessee and the director often spoke personally, the director did have authority to receive such notice. As the first notice had been validly served, the lessor could not rely on the breaches by the lessee to avoid the option to renew as no *Conveyancing Act* notice had been served within time such as would extinguish the lessee's option to renew.

Piper Alderman Lawyers

Sydney
Level 23
Governor Macquarie Tower
1 Farrer Place
Sydney NSW 2000
DX 10216, Sydney Stock Exchange
Phone: + 612 9253 9999
Facsimile: + 612 9253 9900

Melbourne
Level 24
385 Bourke Street
Melbourne VIC 3000
DX 30829, Collins Street
Phone: + 613 8665 5555
Facsimile: + 613 8665 5500

Brisbane
Level 9
239 George Street
Brisbane QLD 4000
GPO Box 3134
Brisbane QLD 4001
DX 105, Brisbane
Phone: + 617 3220 7777
Facsimile: + 617 3220 7700

Adelaide
167 Flinders Street
Adelaide SA 5000
GPO Box 65
Adelaide SA 5001
DX 102, Adelaide
Phone: + 618 8205 3333
Facsimile: + 618 8205 3300

Email: enquiries@piper-alderman.com.au

www.piper-alderman.com.au