roe legal services
newsletter

October 2016

New Consultant at Roe Legal Services

Roe Legal Services would like to welcome Ian Compton, who joins us as a Consultant. Ian has over 20 years experience in commercial property legal services and related areas. Ian was admitted into practice in 1996 followed by extensive experience in a wide range of commercial property areas with a number of national firms in senior positions.

In 2012, Ian joined as a partner in the specialised commercial property practice of Warren Symington Ralph based in Fremantle and in late 2016 Ian returned to practising in Perth by joining Roe Legal Services as a consultant.

Roe Legal Services congratulates Ian on his appointment.

Case Note

Re Clout (In his capacity as liquidator of Mainz Developments Pty Ltd) (2016) NSWSC 1146

The recent decision of Robb J in Re Clout follows the recent line of decisions from the NSWSC questioning the appropriateness of using time based methods in a Court's assessment of a liquidator's reasonable remuneration (see for example *Re Independent Contractor Services (Aust) Pty Ltd (In Liq) (No 2)* [2016] NSWSC 106). Importantly, the NSWSC continues to re-affirm the lien which a liquidator holds in respect of the care, preservation and realisation of an asset (commonly called a Universal Distributing lien after the judgement of Dixon J (as he then was) in *Re Universal Distributing Co Ltd (in liq)* [1933] HCA 2; (1933) 48 CLR 171.

However, in re-affirming the Universal Distributing lien, Robb J added some important observations which are of particular relevance to smaller liquidations:

1 First, the expenses claimed under the lien must have been reasonably incurred and necessary to effect the realisation of the property, and the burden of proving that those expenses were reasonable rests with the liquidator (at [164]);

2 Second, there needs to be a clear basis for a court to decide which claimed amounts of remuneration and expenses directly relate to the care, preservation and realisation of the property (at [115]-[117]);

3 Third, the provisions of the *Corporations Act 2001* (Cth) (Act) which empower the court to fix or determine the liquidator's remuneration do not apply to the liquidator's expenses. The liquidator's right to indemnification out of the property realised for the liquidator's expenses is governed by the general law relating to a trustee's right of indemnity out of trust assets (at [120] to [122]);

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Transitional registrations on the PPSR

If you, or any of your clients have any security interests registered on the Personal Properties Security Register ("PPSR") which were migrated across from a previous register (for example the ASIC Register of Company Charges or the Vehicle Securities Register) you would likely have benefited from the system of automatic migration from those registers to the PPSR. For the past nearly five years if those registers failed to register certain required information that was required under the Personal Properties Securities Act ("PPSA") and not the previous legislation, then those registrations, despite their defects, were deemed to be effective thanks to the *Personal Property Securities (Migrated Security Interest and Effective Registration) Determination 2011* ("PPS Determination"). The PPS Determination provides, essentially, that if a registration was valid on a previous register, and it was migrated across to the PPSR, any defects under the PPSA caused by the migration did not render the migrated registration ineffective.

However, this protection no longer applies after 31 January 2017. On the migration of the security interests, all migrated registrations were given an end date of either their end date in their previous registration, or 31 January 2017, whichever is earlier.

What this means, is that if there are any old, forgotten security interests which were subject to the migration, they will cease to be effective on after 31 January 2017 if their defects are not rectified (by, usually, re-registering or amending the interest with the correct details). This obviously has the potential to catch some people out who would be left without a valid security registration.

Case Note Continued

Re Clout (In his capacity as liquidator of Mainz Developments Pty Ltd) (2016) NSWSC 1146

4 Fourth, the process of fixing the liquidator's remuneration is a process that involves an evaluative assessment of a number of discretionary factors (at [135]). The factors include those set out in section 473(10) of the Act in a court appointed liquidation or in the case of a voluntary liquidation, section 504(2) of the Act;

5 Fifth, a quantification based upon the time expended as against a fixed scale of fees is a rational and objective starting point for the liquidator's claim which can then be assessed in the context of the other factors made relevant by section 473(10) or 504(2) (at [134]);

6 Sixth, having regard to the assets realised and distributions made the court can call in aid and apply ad valorem percentages that appear reasonable in the particular case to assist the court in judging how to achieve proportionality between the liquidator's remuneration and the value to creditors of the work done (at [134]); and

7 Finally, in an appropriate case (more likely where the value of the assets realised are low, or where the remuneration claimed is a substantial proportion of or exceeds the value of the assets realised) the court will adopt an appropriate percentage having regard to the court's experience of other cases as a guide to assessing the appropriate remuneration for the liquidator (at [135]).

It is to be noted however, that in determining the appropriate amount of a Universal Distributing lien, the Court looks at all of the factors, and mere reliance on past decisions to elicit a 'rule' as to how much of a liquidator's remuneration ought to be subject to the lien ignores the other surrounding circumstances and is not of assistance (at [131]). Thus each matter will depend on an assessment of all of the circumstances particular to that matter.

South West Native Title Settlement Update

The South West Native Title Settlement (the Settlement) is said to be the most comprehensive native title agreement proposed in Australian history. It involves the making of a final determination that native title that does not exist in the South West of Western Australia, in exchange for benefits that include payments of $60 million a year over a 12 year period and a land package. It involves around 30,000 Noongar people and covers approximately 200,000 square kilometres.

There are currently two objection processes that are on foot which are effecting the finalisation of the Settlement and registration of the agreements as an Indigenous Land Use Agreements (ILUAs).

1 107 objections have been received by the Native Title Tribunal to the registration of the ILUAs under the Settlement. Comments have been made by SWALSC and the State in relation to these objections. The Tribunal expects to make a decision as to whether or not the agreements can be registered by 30 October 2016.

2 Concurrently, there have been four applications for orders to show cause in the Full Federal Court against the Native Title Registrar, the State, SWALSC and certain Native Title Agreement Group members who had signed the various ILUAs. The applications have been made by persons who are applicants in one or more of the registered Noongar native title claims and who have refused to sign the agreements. They are challenging an earlier decision of the Federal Court in *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412 which found that an agreement which is not signed by all the applicants could be registered as an ILUA. The applications were heard by the Full Federal Court in July 2016 and judgment has been reserved.

The Settlement will not come into effect until both objection processes are finalised.

Roe Legal Services acts for the Harris Family Claim in respect of the Settlement.

Native Title Compensation Claim

The first assessment of compensation for the extinguishment of native title case has been made the Federal Court. In *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 the Ngaliwurru and Nungali Peoples claimed compensation under the Native Title Act for the extinguishment of their non-exclusive native title rights and interests by over 50 separate freehold grants and public works in the Timber Creek townsite in the Northern Territory near the Western Australia border.

Justice Mansfield awarded the following compensation:

- $512,000 - economic value of the native title rights extinguished by the various grants and public works;
- $1,488,261 - interest on $512,000 economic loss; and
- $1,300,000 - allowance for non-economic/intangible loss.

In coming to this award Justice Mansfield made a number of important rulings which will assist in the determination of future claims. He found that:

- The starting point for an assessment of native title compensation is the freehold value of the land;
- The date on which the freehold value is to be assessed is the date on which the relevant freehold grant, or other act which extinguished native title, took place;
- Interest is a proper component of the compensation to be awarded and is to be calculated on the basis of the Federal Court practice directions regarding pre judgment interest (being simple interest at a rate equal to 4% above the cash rate); and
- Native title holders are entitled to an additional amount to reflect the essentially spiritual relationship which Aboriginal people have with country and to translate the spiritual or religious hurt caused by the extinguishment of native title into compensation. This award is in the form of a solatium and can be assessed globally based on the evidence of the native title holders themselves, rather than in respect of each extinguishing act.

The decision has been appealed by the Northern Territory to the full Federal Court.