JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

Volume 17, Number 3

September 2006

ARTICLES

Fixed and floating charges over book debts: Reception of Spectrum Plus in Australia – *Mark Louie*

In *National Westminster Bank Plc v Spectrum Plus Ltd* [2005] 2 AC 680; [2005] UKHL 41, the House of Lords characterised a charge over book debts as a floating charge. This is a landmark decision, both for the House of Lords' discussion of the contentious issue of the proper characterisation – fixed or floating – of this common security device and for the profound impact it will have on practices in the banking and finance industry. Moreover, from an Australian perspective, the decision potentially upsets decades-old understanding and practice. This article discusses the nature of charges over book debts, describes the development of case law relating to the proper characterisation of these charges, and examines in detail Spectrum Plus and its potential application in the Australian context. The article concludes that compelling arguments exist against the decision being received into Australian law. 161

Banks, unconscionability and economic duress – a small step towards deregulation? – *Peter Gillies*

A bank extended credit to a company, taking security as it proceeded. The circumstances were unexceptionable. Nonetheless, the trial judge found that the bank had engaged in unconscionable conduct within the meaning of the general law, and had exercised economic duress. These findings were reversed on appeal. This article examines this decision – *Australia and New Zealand Banking Group v Karam* (2005) 64 NSWLR 149; [2006] ATPR 42-089 – and canvasses the scope of these doctrines, and examines a core issue: the extent to which economic pressure can ground a remedy in reliance upon these doctrines. This decision and the antecedent decision of the High Court in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 clarify the obligations on banks, commercial lessors and other service providers conventionally considered to have market power when dealing with small businesses and individuals. The decision in *ANZ v Karam* is also directly relevant to the interpretation of the unconscionable conduct provisions in the *Trade Practices Act 1974* (Cth) and the *Australian Securities and Investments Commission Act 2001* (Cth) which import the general law doctrine of unconscionability. 177

Managed investment schemes – winding up and stakeholder entitlements: Part I – *Matthew Broderick*

Managed investment schemes, regulated under Ch 5C of the *Corporations Act 2001* (Cth), are commonplace these days, especially as Australia enjoys record wealth and investment. The recent collapse of the Westpoint group has drawn attention to the prudential requirements of operating managed investment schemes and the statutory protections that are lacking in unregistered schemes. The winding up of unregistered schemes is an emerging area of the law that is likely to expand as the Australian Securities and Investments Commission continues in its statutory role to shut down unregistered schemes

to protect investors. The focus of this article is the winding up of unregistered managed investment schemes and the entitlements of stakeholders, particularly investors. Part I of this article reviews the legislative provisions and the structural changes introduced under the *Managed Investments Act 1998* (Cth); examines the definition of a "managed investment scheme"; and considers the grounds for winding up an unregistered scheme. Part II will address the court's powers in a scheme winding up, choice of liquidator, financial product laws, corporate governance, distribution of assets and the winding up of registered schemes. Part II will appear in the next issue of this Journal. 186

BANKING LAW AND BANKING PRACTICE

Electronic signatures 201

Law of agency and liability for conversion of a cheque 204

TAX AND STAMP DUTY

New capital gains tax regime for non-resident taxpayers 208

INSOLVENCY LAW AND MANAGEMENT

Breaking down the walls around discretionary trusts 214

CAPITAL AND FOREIGN EXCHANGE MARKETS

New Euromarket global note and standard market protocol for international bearer debt 217

RECENT PUBLICATIONS 220

TOKYO

Bank agency business 224

CANADA

Directors' civil liability to investors in primary and secondary markets in Canada 228

NEW ZEALAND

Guarantees and undue influence in New Zealand: An update 231

Corrigendum

Please note that in Sean Mitchell's article "The Elecktrim litigation: Consequences for the capital markets" (2006) 17 JBFLP 81 at 81, the text "€" should read "Euro".

Guidelines for Contributors

Submission and licence agreement instructions

All contributions to the journal are welcome and should be sent, with a signed licence agreement, to the Production Editor, *Journal of Banking and Finance Law and Practice*, Lawbook Co., PO Box 3502, Rozelle, NSW 2039 (mail), 100 Harris St, Pyrmont, NSW 2009 (courier) or by email to jbflp@thomson.com.au, for forwarding to the Editor. Licence agreements can be downloaded via the internet at http://www.thomson.com.au/support/as_contributors.asp. If you submit your contribution via email, please confirm that you have printed, signed and mailed the licence agreement to the attention of the Production Editor at the mailing address noted above.

Letters to the Editor

By submitting a letter to the editor of this journal for publication, you agree that Thomson Legal & Regulatory Limited, trading as Lawbook Co., may edit and has the right to, and may license third parties to, reproduce in electronic form and communicate the letter.

Manuscript

- Manuscript must be original, unpublished work that has not been submitted for publication elsewhere.
- Personal details (name, qualifications, position) for publication and a delivery address, email address and phone number must be included with the manuscript.
- Manuscript must be submitted electronically via email or on disk in Microsoft Word format.
- Manuscript should not exceed 15,000 words for articles or 3,000 words for section commentary or book reviews. An abstract of 100-150 words is to be submitted with article manuscripts.
- Proof pages will be sent to contributors. Authors are responsible for the accuracy of case names, citations and other references. Excessive changes to the text cannot be accommodated.
- Contributors of articles receive 25 free offprints of their article and a copy of the part in which the article is published. Other contributors receive a copy of the part to which they have contributed.
- This journal complies with the Higher Education Research Data Collection (HERDC) Specifications for peer review. Each article is, prior to publication, reviewed in its entirety by a suitably qualified expert who is independent of the author.

Style

1. **Levels of headings should be clearly indicated (no more than four levels).**
2. **Cases:**
   - Case citation follows case name. Where a case is cited in the text, the citation should follow immediately rather than as a footnote. Give at least two and preferably all available citations, the first listed being the authorised reference.
   - Australian citations should appear in the following order: authorised series; Lawbook Co./ATP series; other company series (ie CCH, Butterworths); media neutral citation.
   - "At" references should only refer to the best available citation, eg: *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 34; 66 ALJR 408; 107 ALR 1.
   - Where only a media neutral citation is available, "at" references should be to paragraph, eg: *YG v Minister for Community Services* [2002] NSWCA 247 at [19].
   - For international cases best references only should be included.
3. **Legislation should be cited as follows:**
   Trade Practices Act 1974 (Cth), s 51AC. The full citation should be repeated in footnotes.
4. **Books should be cited as follows:**
   Macken JJ, O'Grady P, Sappideen C and Warburton G, *The Law of Employment* (5th ed, Lawbook Co., 2002) p 55.
   - In footnotes do not use ibid or op cit. The following style is preferred:
     4. Austin RP, "Constructive Trusts" in Finn PD (ed), *Essays in Equity* (Law Book Co, 1985).
     5. Austin, n 4, p 56.
5. **Journals should be cited as follows:**
   Odgers S, "Police Interrogation: A Decade of Legal Development" (1990) 14 Crim LJ 220.
   Wherever possible use official abbreviations not the full name for journal titles.
   - In footnotes do not use ibid or op cit. The following style is preferred:
     6. Sheehy EA, Stubbs J and Tolmie J, "Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations" (1992) 16 Crim LJ 220.
     7. Sheehy et al, n 6 at 221.
6. **Internet references should be cited as follows:**
   Ricketson S, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co., subscription service) at [16.340], http://www.subscriber.lawbookco.com.au viewed 25 June 2002. Underline the URL and include the date the document was viewed.

For further information visit http://www.thomson.com.au/legal/ or contact the Production Editor.

SUBSCRIPTION INFORMATION

The *Journal of Banking & Finance Law & Practice* comprises four parts a year.

Customer service and sales enquiries:
Tel: 1300 304 195 Fax: 1300 304 196
Web: www.thomson.com.au/legal/p_index.asp
Email: LRA.Service@thomson.com

Editorial inquiries:
Tel: (02) 8587 7000

HEAD OFFICE
100 Harris Street PYRMONT NSW 2009
Tel: (02) 8587 7000 Fax: (02) 8587 7100

THOMSON
LAWBOOK CO.
ISSN 1034–3040

Typeset by Lawbook Co., Pyrmont, NSW

Printed by Ligare Pty Ltd, Riverwood, NSW