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Rent and Damages for Conversion – Controllers Liable – Warning!

Summary

The Supreme Court of NSW held in *Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd* [2009] NSWSC 571 (26 June 2009) that agents for a mortgagee in possession (“**controllers**”) were personally liable to pay rent accruing under an agreement entered into by the failed company prior to the controllers’ appointment. The controllers were also liable for conversion for selling the goods. The controllers took possession of the plaintiff’s scaffolding which had been commingled with scaffolding from other sources.

Facts

Rildean hired scaffolding from companies including the plaintiff (“**RMD**”) and on-hired them to building sites. Rildean granted a fixed and floating charge to Navmost. Navmost appointed the defendants as agents for Navmost, the mortgagee in possession, on 18 July 2002 (“**date of appointment**”). The controllers took possession of Rildean’s property. The Court then wound up Rildean and appointed a liquidator on 25 July 2002. Creditors sought the return of scaffolding. The controllers appointed a building consultant who concluded that determination of ownership was difficult, if not impossible, and the quantity claimed exceeded the number in the controllers’ possession. He recommended that the scaffolding be auctioned with the proceeds distributed to claimants in proportion to the quantities claimed. A creditor (TJF) commenced proceedings for a declaration that the scaffolding was not Rildean’s property. The proceedings were terminated when TJF went into receivership. The controller’s solicitors then formed the view that Rildean was in a position to sell the scaffolding. RMD objected to the proposed sale and threatened to commence legal proceedings if the equipment was not returned. The controllers sold the scaffolding, and the proceeds were paid into Rildean’s account. The funds have remained apart from withdrawals to pay for legal costs and disbursements.

RMD commenced proceedings for delivery up of the scaffolding, damages, and unpaid hire charges. The issues for determination included:

- whether it was possible to identify RMD’s scaffolding due to commingling of scaffolding from different sources, and as identifying colours may have been painted over.
- whether Rildean held any RMD scaffolding on the date of appointment. There was conflicting evidence on whether scaffolding was lost, or returned to other companies.

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Possession

The Court found Rildean held 26,731 items of RMD scaffolding on the date of appointment as there was no evidence RMD scaffolding was lost. Accordingly, the controllers took possession of RMD scaffolding upon appointment.

Liability for rent and other amounts

Section 419A *Corporations Act* imposes liability for “rent and other amounts” on a controller for property used by the company under a pre-existing agreement. If the controller gives a notice to the owner “that specifies the third party property and states that the controller does not propose to exercise rights in relation to that property” within 7 days, the controller is not liable.

The controllers did not give notice as they could not specify the third party property. The controllers were liable for rent unless excused under s419A(7).

The plaintiffs argued the controllers could have given a notice which did not admit possession of goods. Justice Hulme found there was force in that submission. However, it was difficult in practice for the controllers to determine what property they should not exercise rights in relation to. The notice ceases to have effect once the controllers exercise rights (s419A(5)).

Excused?

The Court did not excuse the controllers from liability as they continued to use the plaintiff’s scaffolding to generate revenue, but without recompensing the plaintiff. The Court acknowledged the controllers had difficulties determining competing claims from different companies.

Commingling

“Confusio” is commingling that destroys the separate identity of goods, such as where milk from different sources is mixed together. “Commixtio” is “no more than the mixing together of similar goods which does not render identification and separation impossible”.

The Court found that RMD’s scaffolding had been intermingled with scaffolding from other sources without RMD’s authority. Therefore, the plaintiff is entitled to an amount of scaffolding equivalent to the number and description of items claimed.

Conversion

In August 2002, the controllers licensed the use of scaffolding to Action Construction Services (“ACS”). In 2004, the controllers sold the scaffolding to ACS.

The Court found that the license agreement did not transfer proprietary rights to ACS. However, the licence agreement constituted an act of conversion.

Conversion is the “*wrongful act of dealing with goods in a manner inconsistent with the owner’s rights with the intention of denying the owner’s rights or asserting a right inconsistent with them. One of those rights is possession...*” ACS was given a right of control over the property which was inconsistent with RMD’s right to immediate possession. The 2004 sale agreement was a further act of conversion.

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The subjective intention or knowledge of the controllers is irrelevant. It is not a defence to say they were unaware of the true ownership or that it was an innocent mistake. It was not necessary for controllers to physically interfere with the goods for the agreements to amount to conversion.

Summary of findings

The controllers were liable:

- under s 419A for rents and other amounts payable by Rildean from 25 July 2002.
- for conversion of the plaintiff's property by the licence agreement and sale agreement with ACS.

There was a hearing in December 2009 on the quantification of damages and judgment was reserved.

Comment

Where controllers take possession of property which may contain commingled third party property, the controllers ought obtain directions or declarations from the Court before exercising rights in relation to potential third party property, to avoid personal liability.

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