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Update – Assessment of damages for conversion and rent in *Rapid Metal Developments*

Summary

As we reported in our recent FocusPaper, 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 hire charges accruing under an agreement entered into by the failed company prior to the appointment. They were also liable for conversion. The controllers of Rildean had taken possession of RMD’s scaffolding, which had been comingled with scaffolding from other sources.

Judgment on damages was handed down 10 February 2010. We provide an update on that judgment.

Hire charges

In *Rapid Metal Developments (Aust) Pty Ltd v Rildean Pty Ltd* (No. 3) [2010] NSWSC 7, the Court held that the controllers were liable to pay hire charges to RMD from 25 July 2002 to 3 December 2004 (the date of conversion – when the controllers completed the sale of scaffolding to a third party). This totalled \$1,358,257.16 plus GST. The controllers submitted that they ought to be liable for only 25 July to 8 August 2002 (\$22,470.30 plus GST) on the basis that they only “used” the property during that period. They argued that they were not using the scaffolding after that period as they licensed the scaffolding to a third party. The Court found that the RMD scaffolding was still being used by the controllers for the benefit of Rildean.

Value of the scaffolding not returned as at 3 December 2004

Clause 22(b) of the contract stated that at the end of the period of hire, Rildean is responsible for replacing all “lost or damaged goods at RMD’s ruling list prices at the time of replacement or repair.”

The controllers submitted:

- Clause 22(b) was a personal covenant given by the company and the controllers were not bound by clause 22;

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- This amount was not “rent or other amounts payable by the corporation under the agreement...” under s.419A(2); and
- The scaffolding had not been “lost or damaged”, it had been converted.

The judgment rejected the submissions. The controllers conceded that if they were liable under s.419A(2), then the sum should be assessed in accordance with clause 22(b), that is, “at RMD’s ruling list prices at the time of replacement or repair.”

Interest on hire charges

The Court awarded interest under the contract on unpaid hire charges from 25 July 2002 to 3 December 2004.

Damages in conversion

Given the finding of conversion, the controllers conceded that they are liable to damages to the value of the goods, calculated as at the date of conversion (3 December 2004). The Court held that damages should be assessed based on the position the plaintiff would have been in if no tort had been committed. This could result in a different quantum of damages for conversion on the one hand, and damages from an assessment under s.419A and clause 22(b) of the contract on the other.

The Court noted that if the controllers had returned the goods to RMD, RMD was in a position not only to hire out the goods, but also sell them at the prevailing list price. In this case, the quantum of damages for conversion was identical to the quantum due under s.419A(2) and clause 22(b).

Conclusion

The controllers were liable for:

- Hire charges (incl GST) from 25 July 2002 to 3 December 2004;
- Interest on unpaid hire charges under the contract from 25 July 2002 to 3 December 2004;
- Value of the equipment not returned (incl GST) at RMD’s list prices as at 3 December 2004 (being damages for conversion, as well as damages under clause 22(b) for lost goods);
- Interest under s100 of the Civil Procedure Act on the above from 3 December 2004 to 10 February 2010 (date of judgment); and
- The plaintiff’s costs of proceedings.

The assistance of Peggy Wong, Solicitor, of Addisons in the preparation of this article is noted and greatly appreciated



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