



The Hastie Group Ltd. (liquidators appointed), and its related entities, fell into external administration on 28 May 2012.

Five years later, the liquidators commenced proceedings in the Federal Court pursuing a receivables case¹ and a bank guarantee case² against various major Australian and foreign construction companies (Head Contractors). In total, the liquidators sought to recover approximately AU\$120 million for the benefit of creditors. However, the wind has been taken out of the liquidators' sails, over a decade after Hastie's collapse, in a comprehensive judgment delivered by Middleton J on 2 November 2022.³

Significant Matters Canvassed

The trial in the main proceedings throughout March to May 2022 was only concerned with the liability issue of whether the applicant companies and their liquidators were entitled, in principle, to the recovery of the property in question, and to the rights they asserted as against the Head Contractors. His Honour was not concerned to determine the quantum issue. The proceedings were very complex and hard fought, and included various interlocutory disputes (and judgments) involving over 20 separate plaintiffs and, at one point, 30 separate defendants. His Honour's judgment is comprehensive and justifiably covers the complex contractual and factual background to the claims, as well as the novel legal points taken primarily by the plaintiff liquidators.

Those points concerned, amongst other things:

- Evidentiary onuses in external administration contexts
- Reliance on statutory provisions by external administrators when faced with incomplete records (or undisclosed contracts)
- The power (or obligation) of external administrators to insist on proof of debt processes as a precondition to claims
- The nature and timing of claims when creditors seek recourse to statutory setoff provisions as defensive measures
- Whether liquidators serve as trustees
- Proprietary rights to the proceeds of performance bonds or guarantees, and the application of statutory moratoriums against recourse to same
- The limitations on actions vesting in external administrators, and whether concise statements are capable of sufficiently pleading claims to avoid statutory bars

It is well beyond the scope of this note to consider, sensibly, each of those points. However, we have set out below our preliminary insight while noting that His Honour's judgment addresses each of those points, and others, in detail. The implications of the decision should be closely considered by the relevant stakeholders, particularly as distress levels in the construction sector (but more broadly) remain constant.

¹ *Hastie Group Ltd (In Liq) v. Multiplex Constructions (Formerly Brookfield Multiplex Constructions Pty Ltd)* (No. 3) [2002] FCA 1280 (**Hastie No. 3**), [4].

² *Ibid.*

³ *Ibid.*

The Two Cases

In the receivables case, the Hastie entities and liquidators alleged that the Head Contractors failed to pay to the Hastie entities the cumulative sum of AU\$60 million in “receivables” owing as at 28 May 2012.

In the bank guarantee case, the plaintiffs alleged that, after the appointment date, the Head Contractors impermissibly drew the cumulative sum of AU\$63.5 million against performance bonds that were taken out by the Hastie entities and provided to each of the Head Contractors as an alternative to the retention of monies from progress payments under their respective subcontracts.

The plaintiffs further alleged that:

- The monies owed in receivables, and the monies drawn down by the Head Contractors against the performance bonds, were each property of the Hastie entity that performed the work under the subcontract and provided the bank guarantee or performance bond
- The liquidators sought to recover those monies to apply them in satisfaction of the liabilities of each of the Hastie entities, in accordance with Chapter 5 of the Corporations Act 2001 (Cth) (Act).

The Head Contractors’ Contentions

The Head Contractors’ respective positions against the receivables case and bank guarantee case were broadly aligned. In respect of the alleged receivables, the Head Contractors contended, first, that no valid receivables were ever owing under the relevant subcontract. Second, if a receivable is owing, they are entitled to set off that amount (pursuant to s 553C of the Act) against monies owed by the Hastie entity to the respective respondent, under the relevant subcontract, by reason of the loss and damage it has suffered by the Hastie entity’s being unable to complete the works under the subcontract. Third, they contended that the value of their claims against the relevant Hastie entity was greater than the amount of the unpaid receivables alleged, and the amount of the guarantee proceeds held by them.⁴

In respect of the bank guarantee case, the Head Contractors denied the plaintiff had any “proprietary rights” in the proceeds of the respective guarantees. Accordingly, their position was that the plaintiffs’ recourse to various provisions of Chapter 5 of the Act was unmeritorious and not applicable.⁵

Importantly, after the appointment date, the Head Contractors each declined or refused to pay the amounts allegedly owing as at that date to the Hastie entities.

Instead, each Head Contractor:

- Elected to terminate or suspend performance of their respective subcontracts

- Stated that they had or would incur costs and expenses to have other providers perform the services the Hastie entities now could not perform, and asserted an entitlement to setoff against the amount sought by the relevant Hastie entity
- Either retained the bank guarantee provided by the relevant Hastie entity despite a request for its return, or took recourse against same⁶

Key Determinations

The scope of His Honour’s determinations is significant. The reasons for those determinations are naturally complex and warrant close inspection to determine specific implications from the viewpoints of different stakeholders. In general terms, however, the following key determinations arose from His Honour’s judgment:

- The Head Contractors were each entitled to the benefit of the application of setoff pursuant to the principles set out in s 553C in the winding up of the Hastie entities. Importantly, that entitlement is not dependent on any precondition of lodging a proof of debt in the winding up, or on the determination of the liquidators as to the application of s 553C setoff in respect of the relevant claims, as was contended by the liquidators.⁷
- By operation of the various contractual instruments in relation to the bank guarantees and performance bonds, the Head Contractors were conferred proprietary interests in not only the physical guarantee instruments, but, more importantly, the proceeds of the guarantees drawn down (once those proceeds were received).⁸ Conversely, the Hastie entities did not possess proprietary interests in relation to the guarantees that relevantly affected, or somehow defeated or impaired, the proprietary interests of the Head Contractors in the proceeds of the bank guarantees drawn down. Any proprietary interests or rights of action that the Hastie entities once possessed as choses in action were of no consequence or utility for the purposes of the Hastie entities’ claims against the Head Contractors.⁹
- The Head Contractors are not otherwise restrained from retaining the guarantee proceeds by virtue of ss 555 and 556 of the Act, or Chapter 5 of the Act generally. As such, they are entitled to retain the guarantee proceeds, subject to the final accounting of the respective claims of the Hastie entities and the Head Contractors.¹⁰

His Honour made various other important findings, including as to the scope and statutory intentions of Chapter 5 of the Act. Importantly, the liquidators’ contention that, as at the appointment date, each Hastie entity (and its liquidators) served as trustees, was rejected.

⁴ Hastie No. 3, [6].

⁵ Ibid, [8].

⁶ Ibid, [15].

⁷ Ibid, [98].

⁸ Ibid, [99].

⁹ Ibid, [100].

¹⁰ Ibid, [103].

His Honour determined that contention was premised on a fallacy¹¹, such that His Honour observed that the High Court¹² had rightly determined that:

“Excessive significance should not be attributed to statements in nineteenth century British cases, decided at a time of endeavours to ‘flesh out’ the developing body of statute law [on companies] by use of principles derived from a range of sources in the general law. These sources included the law of agency, partnership, bankruptcy, and trusts. It later was recognised that some of those endeavours miscarried. One was the attribution to directors of the character of trustees of the assets of the company, and another the treatment of a company in liquidation as trustee of its assets for distribution among creditors.”¹³

His Honour determined that the references in the jurisprudence to a company in liquidation, or a liquidator, as “trustee” was an analogy to describe the effect of the insolvency statute in operation under the Act (and its earlier incarnations).¹⁴ Further, that:

“All that was intended to be conveyed by the use of the expression ‘trust property’ and ‘trust’ in these and subsequent cases...was that the effect of the statute was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, viz., that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons.”

Accordingly, His Honour found that, per *Linter*, the Hastie entities were not trustees of property for creditors, and nor were the liquidators.¹⁵

Implications for Key Stakeholders

His Honour is yet to make final orders in the proceedings. Nonetheless, the decision on the liability issues raises potentially significant implications for key stakeholders. The liquidators in Hastie were not only challenged by well-resourced and well-represented Head Contractors, but the nature of their claims were such that their position changed over time. In fact, each Head Contractor complained about the impermissible and unfair departure by the liquidators from the agreed common issues, the pleadings and the relief originally sought in their second further amended originating process.¹⁶ His Honour was not impressed by “recasting of issues” but acknowledged that some of those movements arose from concessions and an appreciation by the liquidators of the inherent difficulties with their case.¹⁷

Irrespective of the alleged quantum of claims in unpaid receivables and wrongful recourse to bonds type cases, liquidators may wish to revisit the merits of their position, considering his Honour’s decision. In particular, the contextually novel interpretation of Chapter 5 advanced by the Hastie liquidators warrants close inspection.

In contrast, head contractors, project sponsors or joint venture partners in infrastructure and contraction projects will not be disturbed by His Honour’s findings. That said, there are significant lessons that can also be drawn by them from, without limitation, the structure, terms and enforceability of some of the specific contracts in question, and the strategy employed by the Head Contractors in Hastie, both before and after the appointment date. Finally, funders and proponents of the type of claims considered by His Honour may wish to carefully revisit their case theories and claim merits in light of the judgement, and the seemingly imbedded uncertainty in the sector (and broader market).

Contacts



Masi Zaki
Partner, Restructuring
T +61 2 8248 7894
E masi.zaki@squirepb.com



Kate Spratt
Associate, Restructuring
T +61 2 8248 7841
E kate.spratt@squirepb.com



¹¹ Ibid, [159].

¹² See, *Sons of Gwalia Ltd. v. Margaretic* (2007) 231 CLR 160 at [37] per Gummow J and *Federal Commissioner of Taxation v. Linter Textiles Australia Ltd. (In liq)* (2005) 220 CLR 592 (*Linter*) at 611 [48]-[49] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ.

¹³ *Franklin’s Selfserve Pty Ltd. v. Federal Commissioner of Taxation* (1970) 125 CLR 52 at 69–70 per Menzies J.

¹⁴ *Hastie No. 3*, [160].

¹⁵ Ibid, [161].

¹⁶ Ibid, [30].

¹⁷ Ibid, [31].