

CONSTRUCTION LAW BULLETIN

BUILDER RESERVES OWNERSHIP

At issue in a recent Supreme Court of Appeal decision¹ was whether a builder's reservation of ownership of equipment to be supplied in terms of a building contract was effective.

The relevant facts were:

- Fisher Foods SA (Pty) Ltd ("Fisher Foods") called for tenders for the construction of a factory in Kempton Park and the supply of certain items of equipment.
- Club Refrigeration CC ("Club") submitted a lump sum price of R10,9m to execute the building work and supply the required equipment and recorded in its tender the following:

"All items of equipment remain the property of Club Refrigeration

¹ A D Pellow NO & Another v Club Refrigeration CC, Case No 469/03. Judgment delivered 29/9/04.

CC until they are paid for in full."

- Club stipulated that the contract would be governed by the JBCC Principal Building Agreement.
- Fisher Foods accepted Club's tender subject to receipt of the signed JBCC agreement.
- The project was financed by the IDC which as security for its loan bonded all of the movable assets of Fisher Foods including the equipment to be supplied by Club.
- Club duly carried out the contract. However, a short while after completion of execution of the works and before Club had been paid the final amount due to it, Fisher Foods was placed into liquidation.

Following the liquidation of Fisher Foods, a controversy inevitably arose between the three parties as to who owned the items of equipment supplied by Club.

If they were owned by Club, it was entitled

to remove them as it was common cause they were movables and had not acceded to the building.²

If ownership had passed to Fisher Foods, then the IDC would be entitled to the proceeds of the sale of the equipment by the liquidators by virtue of its notarial bond.

Of lesser moment, to all but the liquidators, was the fact that if ownership in the goods had passed to Fisher Foods, the liquidators would be entitled to a fee on the proceeds of the sale of the goods.

Club applied to the High Court for an order declaring it to be the owner of the goods. The IDC decided not to participate in the proceedings which were contested only by the liquidators of Fisher Foods.

The first point raised by the liquidators was that the provisions of section 84(1)³ resulted in ownership of the equipment passing to the company in liquidation.

The court dismissed this argument on the basis that where goods are supplied in terms of a building contract, they are not the subject of a sale as contemplated in the relevant section of the Insolvency Act. A building contract is a contract distinct from a sale contract and is a contract of *locatio conductio operis*, namely a contract for the supply of work and materials.

The liquidators then raised further arguments as follows:

² In which case ownership would have passed by law to Fisher Foods.

³ Section 84 deals with the sale of goods in terms of an instalment sale contract and provides that if goods have been sold to an insolvent subject to a reservation of ownership clause, upon insolvency ownership is nonetheless transferred to the insolvent estate leaving the seller with a claim for payment secured to the extent of the proceeds of the goods in question.

- That because the JBCC agreement applied, there could be no reservation of ownership provision included because the JBCC agreement records that it is the sole agreement between the parties and it makes no provision for such a reservation. The court rejected this argument on the basis that the condition contained in the Club tender reserving ownership formed part of the contract between the parties which included the JBCC agreement. The JBCC agreement itself defines the contract to comprise the general conditions and documents identified in the schedule to the agreement which in turn made reference to the Club tender.
- That because the contract was a lump sum contract there was no mechanism for determining what portion of the contract price related to the equipment and therefore it could not be determined which items of equipment had been paid for and which not. The court rejected this argument as well and referred to the fact that clause 31 of the JBCC agreement makes provision for payments to a contractor of a reasonable estimate of both the value of work executed and the value of materials and goods supplied. As the liquidators had not proved that they had paid for the goods, the onus being on them to do so, the argument had to fail. In other words, despite the contract being a lump sum contract, the contract itself provided a mechanism for allocating payments made between work done and equipment supplied. Had this not been the case, the liquidators' argument might well have won the day.

In the result the court upheld Club's claim and confirmed that it was entitled to be treated as the owner of the equipment concerned.

DELICTUAL LIABILITY OF BUILDER

In a recent Australian case⁴ the High Court of Australia refused to hold a builder liable for a pure economic loss claim made by a successive owner attributable to latent defects.

The question posed by the court and answered in the negative was as follows:

“The question in this appeal is whether it is a principle of the Australian law of torts⁵ that those involved in the design or construction of commercial premises owe a duty to subsequent purchasers of the premises to take reasonable care to ensure that the building is free from defects, so as to prevent pure economic loss to those purchasers.”

The court took the view that it was up to a purchaser of a building to protect himself against latent defects in his contract with the seller. The court also noted that the purchaser:

- could retain an expert to inspect the building and advise on its structure;
- can take cession from the seller of the seller’s right of recourse against a builder relevant to defective work and materials.

The decision by the Australian court is in sync with the decision of our Supreme Court of Appeal⁶ in which the court

declined to uphold a claim for pure economic loss against an engineer at the instance of a successive owner where the building had turned out to be unsuitable for its intended purpose. However, our courts have upheld claims by successive owners for defective building work where physical damage to the property has been occasioned by the defective work.⁷

A cession of the type mentioned would be particularly appropriate where, as is most often the case, a seller sells voetstoots.

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⁴ Woolcock Street Investments (Pty) Ltd v CDG (Pty) Ltd HCA 16 (April 1 2004).

⁵ Delict in South African law.

⁶ Lillicrap, Wassenaar & Partners v Pilkington

Brothers (SA) (Pty) Ltd 1985(1) SA 475 A.

⁷ Paul Leatham Humphrys NO v Henry John Barnes – See Cox Yeats Construction Law Bulletin March 2004.