Assignment of Benefit of Contract by Proprietor to Financier - Financier May be Liable as Principal.

Holland-Stolte Pty Ltd v Bill Acceptance Corporation Ltd and Princess Theatre Holdings Pty Ltd - Supreme Court of Victoria, Appeal Division, unreported, Fullagar, Brooking and TadgellJJ, 30March1992.

Brief Facts

By a project management agreement entered into in February 1989, the proprietor employed the project manager, Holland-Stolte Pty Ltd, to refurbish the Princess Theatre. The financier, Bill Acceptance Corporation Ltd, provided funds for the project.

By a July 1989 deed of assignment, the proprietor assigned to the financier, as security for the moneys advanced, its interest in the project management agreement and its remedies and powers under it. Clause 6 stated that the financier was not by the deed to assume the proprietor's obligations under the project management agreement.

There was a further tripartite agreement also of July 1989, which was described in these proceedings as "ill-drawn". This agreement made express provision for the liability of the financier by means of novation. It contemplated a deed of novation whereby the financier would comply with the proprietor's obligations under the project management agreement. No such deed was entered into. By clause 7, the financier appointed the proprietor its agent to exercise any rights assigned to the financier. There was a proviso for automatic revocation of this authority upon default by the proprietor. By clause 8, notwithstanding the assignment, the project manager was to perform its obligations under the agreement to the proprietor as agent for the financier until an event of default and notice to the project manager to perform directly to the financier. No such notice was given.

Project Manager's Claim

Amongst other actions, the project manager alleged against both the financier and proprietor that, acting as agent for the financier, it incurred liabilities in respect of the works for which it was not reimbursed and the financier was liable to the project manager for all liabilities or, alternatively, for liabilities incurred from the date of the tripartite agreement. The project manager sought a declaration that, by virtue of the tripartite agreement, the financier was the principal under the project management agreement.

The financier and proprietor both sought summary judgment. Judgment was given for the financier and proprietor. The project manager appealed.

Summary Judgment

BrookingJ said the judge exercised the power given by Supreme Court Rule 23.03 to give judgment for the financier and proprietor on the basis they had a good defence on the merits. This power may be exercised only where the action is absolutely hopeless; *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62.

BrookingJ said the question to be decided was whether the judge was wrong in taking the view that the project manager's action was absolutely hopeless.

Assignment of Liability to pay Contract Consideration

BrookingJ considered whether, if the proprietor (as agent for the financier) required the project manager to perform the project management agreement, the financier had assumed (as the proprietor's principal) the obligation to pay the project manager. He considered authorities on assignment by purchasers of contracts for the sale of goods and of standing agreements for the supply of goods.

Pursuant to these authorities, the assignee of goods under a "CIF" contract must pay for the goods against the shipping documents and the assignee under a long term contract must pay for the goods when they are received. A benefit conferred by one clause cannot be separated and assigned without regard to all clauses of the instrument.

BrookingJ distinguished between assigning a debt, whether presently payable or payable in the future, and assigning the benefit of performance of a contract where the contract requires the party who has the benefit of that performance to pay for it subsequently.

BrookingJ pointed out the Supreme Court of the United States had accepted that, were a long term contract for supply of goods on credit assignable, the assignee would have to pay for the goods and the assignee's liability to pay would replace that of the assignor.

Further, that the Full Court of the Supreme Court of New Zealand appeared to accept that, were a contract assignable, the liability of the assignee would be substituted for that of the assignor.

BrookingJ referred to the American texts of **Corbin** on **Contracts**, and **Williston** on **Contracts** 3rd Ed. on assignment of the purchaser's right to buy goods and its duty to pay for the goods.

Distinction - Novation and Clauses 7 and 8

BrookingJ noted the judge at first instance was principally influenced by the argument that, if clauses 7 and 8 had the result that the financier was liable, there was no point in the express provisions concerning novation. BrookingJ distinguished between the consequences of novation and the situation under clauses 7 and 8. BrookingJ

said clauses 7 and 8 arguably did not require by their own terms that the financier allow the works to be completed, as would be the case with novation. Moreover, that it would be debatable whether liability imposed on the financier by continued performance of the project management agreement was added to or substituted for the liability of the proprietor. Additionally, BrookingJ noted the situation which, arguably, arises under clauses 7 and 8 did not support the view that the financier should be liable for the outstanding obligations of the proprietor, whereas novation would make the financier so liable.

Brooking J's Conclusion

BrookingJ concluded the project manager should have both referred to these authorities and submitted that, where what was assigned was not a debt but the benefit of the contract, if it was to have the benefit of performance, the assignee must furnish in return the consideration for which the contract provided.

If summary judgment for the financier was to be upheld, one must be able to say the project manager's claim against the financier, based on the agreement, was hopeless. In construing the tripartite agreement, particularly clauses 7 and 8, in the light of the relevant decisions and texts, BrookingJ was unable to say the project manager's claim against the financier was hopeless.

TadgellJ agreed with BrookingJ and added that Rule 23.03 is a direct descendant of Order 14A of the Rules of Court. The exercise of jurisdiction under Order 14A was reserved for actions which were "absolutely hopeless". The exercise of jurisdiction under Rule 23.03 should be similarly reserved. Tadgell J said this proposition "holds good whether you subscribe to the view that the defendant will fail unless hopelessness is readily discernible, or whether you concede that it suffices that the defendant demonstrate it even after thorough, and perhaps protracted, investigation and argument".

TadgellJ considered the action against the financier was not in either category. The claim depended upon the implication of a term in the arrangements between the parties that the financier pay the project manager for a benefit to the financier that the project manager provided. These arrangements were not straightforward; the tripartite agreement was only one of a series of agreements and its express meaning was not clear, let alone what it implied.

The inability to gather from evidence the circumstances of the execution of the tripartite agreement precluded the conclusion that making the alleged implication in favour of the project manager was hopeless or that there were valid grounds for a conclusion that the agreements absolutely prohibited making the alleged implication.

FullagarJ agreed with Brooking and TadgellJJ.

The financier's case was not of the overwhelming strength required by Rule 23.03. Appeal allowed. The financier's application was dismissed with costs.

Commentary

If a financier, having accepted an assignment of the proprietor's rights under a building contract, allows the project manager to incur liabilities in respect of the contract works, it now appears the financier may be held liable to pay for the works.

- **Patricia McKenzie, Senior Associate, Allen Allen & Hemsley, Solicitors.**