subsidence occurring or alternatively whether it is necessary for damage resulting from a subsidence to have occurred prior to any claimable expenditure being incurred.

Claim history

Wambo lodged a claim for compensation under s 12A of the Act for expenses it incurred in dismantling and removing the conveyor. The Board refused the claim and Wambo Coal commenced proceedings in the Land and Environment Court pursuant to s 12B of the Act.

Section 12A(1)(b)

Section 12A(1)(b) provides that claims may be made under the Act for payment from the Fund of an amount to meet the proper and necessary expense incurred or proposed by or on behalf of the owner of improvements in preventing or mitigating damage to those improvements that, in the opinion of the Board, the owner could reasonably have anticipated would otherwise have arisen or could reasonably anticipate would otherwise arise from a subsidence that has taken place, other than a subsidence due to operations carried on by the owner.

Decision

It was accepted that there must have been actual subsidence before any compensation is payable.

Relying on the Minister's second reading speech when the provision was introduced, the Court concluded that s 12A(1)(b) was intended to provide that the owner of improvements may incur any necessary and proper expense in preventing or mitigating damage to those improvements which the owner could reasonably have anticipated would otherwise have arisen but the claim may not be made until the subsidence has taken place.

To hold otherwise would defeat the purpose of the provision, as explained by the Minister. Also, it avoids absurd results. Therefore, the Court concluded that a proprietor has an entitlement under s 12A(1)(b) of the Act to claim compensation for expense incurred in preventing or mitigating reasonably anticipated damage to improvements and that the expense could be incurred prior to any subsidence occurring. It was not necessary for a subsidence to have occurred prior to the expenditure being incurred but subsidence must have taken place before the claim is made.

PRE-EMPTIVE RIGHTS NOT TRIGGERED*

Lend Lease Real Estate Investments Limited v GPT RE Limited [2006] NSWCA 207 (Spigelman CJ, McColl JA and Basten JA)

Pre-emptive rights – deal with – transfer notice.

The decision at first instance was reported in the Journal at *(2005) 24 ARELJ 263.*

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* Tony J Wassaf, Partner, Allens Arthur Robinson.

Issues

In the Court of Appeal the 2 main issues were:

(1) did the entry into a put and call option deed by GPT with respect to the sale of a 25 per cent interest in the Sunshine Plaza Shopping Centre in Queensland constitute a dealing with its interests contrary to clause 9(a) of the Ownership Agreement; and

(2) did the circumstances leading up to the put and call option deed and the option itself satisfy the provision in clause 9(c) of the Ownership Agreement that GPT wished to deal with its interest and if so, did that require GPT to give a transfer notice pursuant to that clause?

Clauses

Clause 9(a)(1) provided that unless otherwise agreed by the owners, an owner may not deal with its Interest in whole or in part other than as provided in this clause 9.

Clause 9(c) provided that a selling owner wishing to deal with its Interest in whole or in part must serve notice in writing to that effect on the other owner.

The term "deal with" was defined as meaning any sale, assignment, transfer, disposition, declaration of trust, assumption of obligations or other alienation (other than leasing, licensing or granting occupation rights) or granting other like rights and whether affecting legal or equitable interests.

The put and call option deed was expressed to be subject to a condition precedent which was the waiver by Lend Lease of its pre-emptive rights under the Ownership Agreement.

First issue

The Court applied the maxim copulatio verborum – the linking of words indicates that they should be understood in the same sense. It held that the definition of "deal with" requires an alienation of the interest. The words "assumption of obligations" in the definition were read down by the immediate qualificatory words "or other alienation" so that the term "deal with" was interpreted to mean alienation in whatever manner that may occur.

The option had created an equitable interest enforceable by specific performance to prevent any other dealing. But the creation of such an interest, the fulfilment of which is subject to a condition precedent of a waiver by Lend Lease of its pre-emptive rights, is not an alienation and accordingly not a dealing within clause 9(a). It was also stated that the specific restrictions in the option deed against giving a security and against assignment or variation of any lease on the property did not involve anything in the nature of an alienation.

Second issue

The second issue related to clause 9(c) and in particular whether there was an obligation to give a transfer notice. It was concluded that GPT wished to deal with its Interest but that clause 9(c) provided a facultative facility and was not mandatory. That is, it is possible for a joint venturer to wish to deal with its Interest but not to then proceed to give a notice. It was stated that, in any case, the prohibition on dealing in clause 9(a) continues to have effect.

Conclusion

It was therefore concluded that pre-emptive rights were not triggered. The appeal was dismissed.