

**P**ractitioners have been warned in recent times of the dangers of failing to stamp a document to be used in litigation.<sup>1</sup>

The impetus for this warning is two Supreme Court of Queensland decisions, *Hoggett v O'Rourke*<sup>2</sup> (*Hoggett*) and *Caxton Street Agencies Pty Ltd v Korkidas*<sup>3</sup> (*Caxton Street*), which hold that an unstamped, dutiable instrument cannot be relied upon as founding a pleading and that a pleading so founded may be struck out.

### **Burnitt v Pacific Paradise Resort Pty Ltd**

In the recent decision of *Burnitt v Pacific Paradise Resort Pty Ltd*<sup>4</sup>, McGill DCJ declined to follow the reasoning in *Hoggett* and *Caxton Street*.

The defendant applied for an order that the statement of claim be struck out pursuant to UCPR r171 as disclosing no reasonable cause of action. The attacked pleading sought specific performance of an unstamped contract of sale. After the application was filed, the plaintiff stamped the contract. McGill DCJ, in deciding the issue of costs, examined whether, but for the late stamping, the application to strike out would have succeeded and held that it would have failed. He wrote that:

1. *Duties Act*, s487(1)(a) does not render an unstamped, dutiable instrument intrinsically invalid. It only makes it unenforceable. Once properly stamped, the instrument will be enforceable from the time when it would have become valid but for s487.

2. A statement of claim is struck out for disclosing no reasonable cause of action only if it is so clearly untenable that it cannot possibly succeed: *General Steel Industries Inc v Commissioner for Railways*.<sup>5</sup>

3. So long as there is a possibility that the duty will be paid prior to trial then the test laid out in *General Steel* cannot be satisfied.<sup>6</sup>

4. As there was a possibility that the duty would have been paid prior to trial, the application to strike out would have failed.

Let us look at each of these elements in turn.

### **The construction of s487**

Section 487 provides that,

(1) Unless an instrument is properly stamped, it –

(a) is not available for use in law or equity or for any purpose; and

(b) must not be received in evidence in a legal proceeding, other than a criminal proceeding.

(2) However, a court may receive the instrument in evidence if –

(a) after it is received in evidence, the instrument is given to the commissioner as

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required by arrangements approved by the court; or

(b) if the person who produces the instrument is not the person liable to pay the duty, the name and address of the person so liable, and the instrument, is given to the commissioner as required by arrangements approved by the court . . .

The key words are in s487(1)(a).

McGill DCJ undertook a careful analysis of the authorities before reaching the conclusion summarised in point 1 above.

Expressed shortly, the *Hoggett* and *Caxton Street* approach is that the wording in s487(1)(a) is so wide as to prevent reliance upon the instrument in any form, including a pleading, until the duty is paid. The procedure in s487(2) applies only to the receipt of the document into evidence, not its use in a pleading.

### **The test on a strike out application**

As stated above, the application in *Burnitt* was to strike out under r171 so the test was that identified in point 2 above.

McGill DCJ wrote that recasting such an application as one for summary judgment will not change the outcome ordinarily because UCPR r293(2)(a) permits judgment only if the court is satisfied 'the plaintiff has no real prospect of succeeding'. The word 'prospect' looks to the future and thus, like the strike out test, requires consideration of whether or not the duty might be paid prior to trial. On this analysis, the defendant could not have improved its position by bringing a summary judgment application.

### **Will the duty be paid?**

The *Burnitt* approach requires consideration of whether the plaintiff can and will pay the duty prior to trial. This is usually within the sole knowledge of the plaintiff, yet the defendant carries the onus of proof. The defendant can invite the court to draw an inference adverse to the plaintiff based on the failure to

lodge for stamping.

The court may more readily draw such an inference if the defendant has given the plaintiff ample notice of the strike out application and its grounds. The drawing of the inference is aided when, as is normal, the plaintiff is a party to the pleaded instrument and is thus subject to a statutory obligation to lodge the instrument for stamping<sup>7</sup> and pay the duty.<sup>8</sup>

A plaintiff's failure to tender, by the hearing, an undertaking or evidence about when and how it will lodge the instrument for assessment and why the instrument has not been previously stamped would obviously assist the defendant.

Experience will show how readily different judges will conclude from such evidence that there is no possibility of the duty being paid.

### **Conclusion**

*Burnitt* highlights a rival approach to that adopted in *Hoggett* and *Caxton*. The quality of the judgment in *Burnitt* gives it a persuasive weight that means that the conflict between it and the two single judge Supreme Court decisions cannot be resolved simply by reference to their relative standing in the court hierarchy. *Burnitt* sends a clear message to practitioners that a failure to stamp may not, without more, be sufficient for an application to strike out or summary judgment. Until the conflict between the approaches is resolved, such applications are best set up so as to allow the court to infer that the dutiable instrument will not be stamped prior to trial. ■

#### **Notes**

- 1 The Use of Unstamped Instruments in Litigation (2003) 23 (8) Proctor 26; End of an Era: Stamp Duty Objections are not only being Taken, but have become Fatal (2001) 21 (4) Qld Lawyer 103.
- 2 [2002] 1 Qd R 490.
- 3 [2002] QSC 210.
- 4 [2004] QDC (Unreported 30 June 2004).
- 5 (1964) 112 CLR 125 at 130.
- 6 [2004] QDC at para. 6.
- 7 *Duties Act*, s19. See also s482.
- 8 *Duties Act*, s17.

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