
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountants

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CAN PPSR SECURITY REGISTRATION ERRORS BE CORRECTED?

Overview

The *Personal Properties Securities Act 2009* (“PPSA”) and the *Corporations Act 2001* (“the Corps Act”) have strict registration and priority requirements for security interests. Those requirements include obligations to register within set times. In the recent case of *In the matter of Accolade Wines Australia Ltd* [2016] NSWSC 1023 (“the *Accolade Wines* case”) Justice Brereton, of the Supreme Court of New South Wales, sets out when a Superior Court may vary those obligations.

Legislation

Both the Corps Act and the PPSA have registration time deadlines for personal property securities on the Personal Property Securities Register (“PPSR”). Section 588FL(2) of the Corps Act requires registration no less than six months prior to a formal insolvency event, such as the appointment of a Liquidator, Voluntary Administrator or Deed Administrator, or within 20 business days of the security agreement which created the security interest or a later time Ordered by the Court.

The failure to register within those time periods means that the security interest vests pursuant to Section 267 of the

PPSA in the company and thus becomes part of the company’s property for the benefit of general creditors when a Liquidator, Voluntary Administrator or Deed Administrator is appointed. This is not the case if a controller (such as a Receiver and Manager) or a Provisional Liquidator, is appointed. Section 62(3) of the PPSA provides that a purchase money security interest (“PMSI”) over non-inventory property registered within 15 business days, after the grantor takes possession of the goods, has priority over other security interests. Section 14 of the PPSA defines a PMSI to include, amongst other things, a lease of goods under a PPS lease and goods sold on consignment or pursuant to retention of title arrangements. A PPS lease includes a lease or bailment of goods for a term of more than one year.

Section 588FM of the Corps Act allows a Court to extend the time for registration of securities under the Corps Act.

Section 293 of the PPSA allows the Court to extend time to register PMSIs, if it is just and equitable to do so. However, the Court must take into account whether the need to extend the time arises as a result of accident or inadvertence and whether extending the period would prejudice the position of other creditors.

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Facts of the *Accolade Wines* case

The Plaintiffs were leasing and asset financing companies who leased goods for more than one year to the Accolade Wines group of companies. Hence the leases were PPS leases. The Plaintiffs registered those security interests on the PPSR against the Australian Business Numbers (“ABNs”) of Accolade Wines. However, the PPS Regulations required registration of PMSIs against the Australian Company Numbers (“ACNs”) to be effective. Thus any person who only searched the PPSR under the ACN of the grantor would not have noted the existence of the PMSI. There were prior and some subsequently registered security interests over all present and after acquired property (“All PAPs”).

Evidence was given that it is common practice of financiers to conduct triple searches against the PPSR for a grantor’s ACN, ABN and name. Thus, if subsequent All PAP financiers had performed triple searches they would have noted that the Plaintiffs had registered PMSIs. The Plaintiffs had registered their interests through an electronic portal which allowed lodgement by ACN or ABN, without identifying the requirement for ACN registration.

The Plaintiffs applied to the Court for Orders to extend the times for registration under the Corps Act pursuant to Section 588FM and under the PPSA pursuant to Section 293. The applications were made ex parte. The grantors and financiers were given notice of the application, but failed to appear at the hearing.

There were no subsequently registered PMSIs over the same assets financed by the Plaintiffs. Further, there was no evidence to show that any of the grantors were likely to become insolvent within six months of the application.

Findings

Justice Brereton held that:

1. The grantors should have been joined as parties. The All PAP holders would be affected by the application, as the invalid registrations meant they had priority over PMSIs. The Court Ordered that the All PAP holders could make an application to the Court to vary or set aside the Orders, within 28 days of being given notice.
2. Inadvertence for the purposes of Section 588FM and Section 293 meant a failure to understand the requirement for registration, within the specified time and was an innocent error. His Honour determined that, based on the facts, this was the case.
3. In an application under Section 588FM, the relevant prejudice must be considered having regard to the delay in registration, rather than from prejudice in making the Order. In a solvent company, unsecured creditors are in no different a position had the registration been effective. However, the delay in effecting registration is relevant. The shorter the delay, the less likely that financiers are dealing with the company on the basis that its collateral was unencumbered.
4. Relevant to the exercise of discretion under Section 588FM is whether there is evidence the grantor may be subject to an insolvency administration within six months. The Plaintiffs’ securities were only over specific leased assets. It was likely subsequent All PAP financiers performed triple searches and that their priority was not affected by an Order fixing a later time for registration.
5. Unlike Section 588FM where prejudice is referable to the failure to register the collateral earlier, under Section 293 prejudice is referable to the extension of the period for registration. Thus, one compares the

position of creditors if the extension is granted, with their position if an extension is not granted. The fact that All PAP holders may lose priorities if an extension was granted was relevant but not conclusive. Prejudice is only of significance if there is reliance on the absence of registration by a third party provider. That could not be the case for earlier All PAP holders and if an Order was not made they would gain a windfall arising from inadvertence. In this case it was likely that subsequent All PAP holders did perform triple searches and generally were unconcerned about registrations against specific collateral, compared to registrations over all the grantors' assets, when making a decision to provide finance.

6. The time for registration of the securities was Ordered to be the date of application to the Court.

Lessons and conclusions

- Financiers would be prudent to ensure security registrations on the PPSR are made against an ACN, ABN and grantor's name, and within the statutory time periods for that registration to occur. If the grantor is the trustee of a trust, the security interest should also be registered under the ABN of the trust.
- If there is uncertainty as to whether a financier has correctly registered under the PPSR, searches should swiftly be undertaken to ascertain the

situation. If there are errors, applications to the Court should be made under the Corps Act and the PPSA to extend times for registrations.

- Professional advisers who incorrectly have registered PPSR securities on behalf of clients should consider notifying their professional indemnity insurers. They should also correctly lodge registrations immediately, even without an extension Order, to reduce the possibility of third parties searching the PPSR and thereafter relying on the absence of registrations to provide finance.
- Insolvency practitioners may re-examine their searches to see if there are ACN registrations which are ineffective. They could assert the creditor is unsecured. The creditor then has an onus to obtain extension Orders from the Court after the grantor's insolvency. A Liquidator might then argue that as security enforcement by a purportedly secured creditor may be invalid, there may be a claim for damages.
- For financiers whose security interests arose prior to January 2012 and were subject to registrations under either the ASIC register of charges, or the REVS systems, a review of the accuracy of records transferred to the PPSR system is long overdue, particularly in respect of assets registered by serial numbers such as motor vehicles, watercraft, aircraft and some types of machinery.

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