

JULY 2013

PERSONAL PROPERTY SECURITIES UPDATE

PPS CASES START TO FLOW

This update highlights recent and upcoming developments relating to the *Personal Properties Securities Act 2009* (Cth) ("**PPSA**"). We also examine some of the key issues dealt with by recent case law relating to the PPSA including the common questions and circumstances which are arising from a lack of familiarity with the PPSA or as a consequence of the operation of the PPSA.

Some of the case law is well known (and to that extent, we merely highlight the outcome of the relevant case), however, the most recent judgment of the NSW Supreme Court (*In the matter of Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors*) ("**Maiden Civil Case**") provides useful insight into the operation of the PPSA and particularly the most confronting aspect of it, being that ownership/title to an asset will not in all circumstances protect the owner against the rights of third parties.

RECENT AND UPCOMING DEVELOPMENTS

End of transitional period

The transitional period provided for by the PPSA expires on 30 January 2014. As a result, any security interest which is a transitional security interest but which was not migrated to the Personal Properties Securities Register ("**PPSR**") at the commencement of the PPSA, will need to be registered on the PPSR prior to that date.

To the extent that such registration is not effected, the priority position of that security interest will be adversely affected as the transitional security priority rules will no longer apply. In addition, by not being registered on the PPSR, should the grantor enter into administration, liquidation or execute a deed of company arrangement, the security interest will vest in the administrator or liquidator. Consequently we strongly recommend that a review be undertaken of any transitional security interests held by a party and if it has not

previously been either migrated to the PPSR or registered on the PPSR, such registration be effected as soon as possible and in any event no later than 30 January 2014.

In addition to the abovementioned adverse consequences of not doing so, where the financiers of a company have included PPS covenants in the company's finance facility documents, failure to register such transitional security interests on the PPSR may lead to a breach of such covenants.

The upcoming expiry of the transitional period marks a significant new chapter in the evolution of the PPSA and one which needs to be carefully considered.

Adoption of Cape Town Convention

The Federal Government has recently passed legislation which will have the effect of Australia becoming subject to the Cape Town Convention which provides for an international system for registration and priority of security interests in aircraft. Once effective (anticipated to be in early 2014), the registration of security interests over aircraft may not be required under the PPSR. We nonetheless recommend that searches be undertaken on both the international registry and the PPSR until the system is fully operational.

Many other PPS countries already exclude aircraft from the operation of their PPS legislation.

Review of PPSA

The PPSA provides that the relevant Minister must cause a review of the PPSA to occur within three years of 30 January 2012. We understand that review is to occur well in advance of 30 January 2015 and will involve consultation with relevant stakeholders.

This will provide interested parties with a good opportunity to seek amendments to the PPSA.

ISSUES DEALT WITH BY RECENT CASE LAW

Does a transitional security interest always provide protection in a priority dispute with subsequently registered post PPS security interests?

The PPSA provides for specific priority rules in relation to transitional security interests.

Transitional security interests are those security interests which were in place prior to the commencement of the PPSA and extend to such matters as retention of title arrangements, leases and hire purchase agreements.

Although the general rule is that the priority position of such a transitional security interest (as applicable under the previous law) will continue up until the end of the transitional period (refer above), in order for such rules to provide priority over any post PPSA registered security interest, the pre PPSA security interest must be regarded as being perfected.

Although the PPSA itself deems such security interest to be perfected, this is subject to the regulations. The regulations provide that in circumstances where a transitional security interest was registrable under a transitional register (being a register on which such security interest could be registered prior to the commencement of the PPSA) which dealt with priorities, the transitional security interest must (other than in certain limited circumstances) have been registered on that transitional register to enjoy the priority position provided for in the PPSA transitional priority rules.

In the Maiden Civil Case (referred to above), although there was a lease entered into prior to the commencement of the PPSA, the lessor under that lease had not registered the arrangement on the relevant Northern Territory transitional register and, as a result, it was not a perfected transitional security interest. Consequently, the lessor was defeated by a general security agreement registered on the PPSR subsequent to the commencement of the PPSA and the lessor's title and ownership of the leased assets were held irrelevant in determining such priority dispute.

The judgment contains a helpful summary of the operation of the relevant provisions of the PPSA and NZ and Canadian case law. It also highlights the nature of the interest of a lessee under a lease which constitutes a security interest and indicates that such interest is capable of creating or feeding a security interest over the relevant asset in favour of a third party.

As a result, it is very important that if a secured party is relying on a transitional security interest, that security interest must have been registered on

the relevant transitional register (to the extent it was applicable) so as to avoid the above outcome. Unfortunately, most transitional registers are no longer open (having been closed on the commencement of the PPSA) and failure to have registered the transitional security interest on that register cannot be remedied. Consequently, the holder of such transitional security interest will need to register it on the PPSR as soon as possible (although, this will not necessarily avoid the above result if another security interest over the same assets has already been registered on the PPSR).

Difficulties in establishing relevant security interests as a result of multiple registrations on the PPSR

The first case on the PPSA in Australia was the case of *Carson, In the matter of Hastie Group Limited (No. 3)*, which was handed down in July 2012.

This case demonstrated the length to which a party may need to go to in order to ensure that it is able to deal with assets the subject of security interests registered on the PPSR. The case involved a PPS search by administrators of the Hastie Group, which indicated 995 registrations noted against the relevant Hastie companies. For various reasons, it was not possible to ascertain which assets the various security interests noted on the register extended to.

The administrators wanted to ensure that they dealt with assets in such manner as would not defeat the rights of secured parties which had valid security interests in those assets or lead to claims against the administrators in respect of their dealings with the assets.

The Court allowed the administrators to establish their ability to deal with the assets by authorising the placement of advertisements in national papers (which the administrators used in addition to emailing secured creditors to the extent possible), as well as authorising the administrators (subject to the proper advertising of their proposed course of action) to sell the assets and deal with the proceeds of such sale. The proceeds were required to be kept in an escrow account for a period of three months after further notification to the possible relevant secured creditors of the sale of the assets. It was only after the expiry of that period and the lack of

claims by the secured creditors against the proceeds, that the administrators were then entitled to apply the funds received.

The Court agreed to make the required orders on the basis that it was satisfied that there had been:

"Genuine and substantial difficulties in identifying those items of plant and equipment that might be subject to a security interest and other claims and that the administrators have taken a number of steps to attempt to clarify that situation as best they can."

In our view, the above circumstances can be minimised by ensuring that complete and accurate descriptions of the relevant collateral the subject of a registration are included in the registration on the PPSR. Unfortunately, the information contained on the PPSR is often incomplete or not accurate, which makes it difficult to identify which assets are subject to which security interests noted on the register.

A failure to register a security interest may not be fatal in insolvency

In *Crossmark Asia v Retail Adventures* (2013) (judgment handed down on 23 January 2013), the NSW Supreme Court essentially held that if a holder of a security interest (which had not been perfected by registration) terminates the security interest before the administration of the grantor and enforces the security interest prior to that time, the absence of registration of the security interest will not result in it being vested in the administrator. As the security interest was not in place prior to administration (having been terminated) the vesting provisions were not relevant.

The case indicates that if a security interest is enforced prior to the administration, the lack of registration will not result in the vesting provisions of the PPSA adversely affecting the ability of the secured party to enforce the security interest. The case demonstrates the importance of keeping abreast of the financial position of counterparties and acting before administration or liquidation occurs.

Delays in registration on the PPSR can be cured but may be subject to conditions

In order to perfect the security interest by registration, such registration must occur within

certain timeframes set out in the *Corporations Act* and the PPSA.

In the matter of Cardinia Nominees Pty Ltd, there was confusion as to whose responsibility it was to register a security interest on the PPSR. As a result, the security interest was only registered on the PPSR after the 20 day period within which registration is required to occur under the *Corporations Act* (in order to avoid vesting in an administrator or liquidator). The NSW Supreme Court agreed to an extension of the period in which registration could occur on the basis that the delay was inadvertent and that the period of time after the 20 day period in which registration occurred was short.

The Court, however, held that the extension was not to prejudice the rights of any secured party that had registered its security interests prior to registration of the delayed security interest.

In addition, as the financial position and solvency of the grantor was "somewhat incomplete", the Court held that the extension was conditional on no liquidator or administrator or deed administrator or unsecured creditor applying to have the relevant security interest released or discharged within six months from the date of registration.

The case demonstrates the importance of:

- registering the security interest created by a company within 20 business days of its creation (or in the case of a PMSI, in accordance with section 62 of the PPSA);
- being clear as to whose responsibility it is to register the security interest (although this is normally not an issue as a secured party will attend to registration); and
- when applying for an extension to register outside the required time, the Court should be given clear evidence of the solvency, profitability and financial position of the grantor (to avoid a conditional court order as was the case in this matter).

When is an asset a fixture (and thereby excluded from the operation of the PPSA)?

In the matter of Cancer Care Institute of Australia Pty Limited (Administrators Appointed), the NSW Supreme Court determined (on 4 February 2013),

that two linear accelerators (being medical equipment) were a fixture.

The importance of this case is not only in that it provides a good summary of the law as to when an item of equipment may be a fixture but also that it includes a statement that non registration of the security interest over the relevant equipment on the PPSR was indicative that the equipment was a fixture (to which the PPSR therefore did not apply). We do not necessarily agree that this is a strong factor in considering whether an item of equipment is a fixture, as the other factors referred to in the case (being consistent with those in previous cases dealing with the issue) are far more important.

In addition to the above, the case also raises the possibility that if a security interest is registered on the PPSR in respect of an asset which is not clearly a fixture, such registration may be treated as evidence that the asset is not a fixture.

MORE INFORMATION

For more information, please contact:

SYDNEY



Peter Faludi
Special Counsel
T +61 2 9286 8159
Peter.Faludi@dlapiper.com



Hugo Thistlewood
Partner
T +61 2 9286 8474
Hugo.Thistlewood@dlapiper.com



Neil Campbell
Solicitor
T +61 2 9286 8297
Neil.Campbell@dlapiper.com

BRISBANE



Michael Gill
Special Counsel
T +61 7 3246 4116
M.Gill@dlapiper.com

MELBOURNE



Monique Stella
Partner
T +61 3 9274 5409
Monique.Stella@dlapiper.com



Caroline Monks
Special Counsel
T +61 3 9274 5085
Caroline.Monks@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 28, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.

For further information, please refer to www.dlapiper.com

Copyright © 2013 DLA Piper. All rights reserved.

121519681

This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.

