Federal Court of Australia

One Corporate Trust Services Ltd v MLSP Assets Pty Ltd in its capacity as trustee for the MLSP Assets Trust [2022] FCA 555

|  |  |
| --- | --- |
| File number: | VID 233 of 2022 |
|  |  |
| Judgment of: | **BEACH J** |
|  |  |
| Date of judgment: | 12 May 2022 |
|  |  |
| Catchwords: | **CORPORATIONS –** securities – general security deed – collateral being all present and after acquired property- grantor acting in capacity as trustee – security under general security deed – securing of obligations under loan note subscription agreement – registration under the *Personal Property Securities Act 2009* (Cth) – incomplete registration requirements – failure to perfect security interest – financing statement failing to disclose the identity of the grantor by reference to the ABN of the trust – grantor now in voluntary administration – extension of time applied for under s 588FM of the *Corporations Act 2001* (Cth) – triggering of “later time” under s 588FL(2)(b)(iv) – extension sought for a time prior to critical time – orders made |
|  |  |
| Legislation: | *Corporations Act 2001* (Cth) ss 588FL, 588FM  *Personal Property Securities Act 2009* (Cth) s 153(1)  *Personal Property Securities Regulations 2010* (Cth), Sch 1, Pt 1, cl 1.5 |
|  |  |
| Cases cited: | *Commonwealth Bank of Australia v HM Aircraft Holdings Pty Ltd* (2021) 152 ACSR 63; [2021] FCA 447  *Kaizen Global Investments Limited v Australia New Agribusiness & Chemical Group Limited (in liq)* [2017] FCA 431 |
|  |  |
| Division: |  |
|  |  |
| Registry: |  |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Number of paragraphs: | 40 |
|  |  |
| Date of hearing: | 12 May 2022 |
|  |  |
| Counsel for the Plaintiff: | Ms C F Gobbo |
|  |  |
| Solicitor for the Plaintiff: | King & Wood Mallesons |
|  |  |
| Solicitor for the Defendant: | Clayton Utz |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | VID 233 of 2022 |
|  |  | |
| BETWEEN: | ONE CORPORATE TRUST SERVICES LIMITED (ACN 163 307 800)  Plaintiff | |
| AND: | MLSP ASSETS PTY LTD IN ITS CAPACITY AS TRUSTEE FOR THE MLSP ASSETS TRUST  Defendant | |

|  |  |
| --- | --- |
| order made by: | BEACH J |
| DATE OF ORDER: | 12 May 2022 |

THE COURT ORDERS THAT:

1. The time for service of this originating process be abridged to 3 May 2022.
2. The documents contained in confidential exhibit MS-2 to the affidavit of Michael Sutherland sworn 2 May 2022 and any copies of that exhibit provided to and retained by the Court, are to be treated as confidential on the electronic court file and are not to be accessed for inspection without the order of a Judge or Judicial Registrar of the Court, and any application to inspect the exhibit is to be referred to a Judge or Judicial Registrar with five business days’ notice thereof to be provided to the solicitors for the applicant.
3. Pursuant to s 588FM and for the purposes of s 588FL(2)(b)(iv) of *the Corporations Act 2001* (Cth), 11.59 pm on 19 April 2022 is fixed as the time for the applicant to register on the Personal Property Securities Register, PPSR Registration number 202204190055340.
4. If, within 6 months of 19 April 2022:
   1. a winding up of the defendant occurs; or
   2. the current administrators of the defendant, Scott Langdon and David Osborne, determine that it is appropriate; or
   3. a replacement administrator is appointed to the defendant under ss 436A, 436B or 436C of the Corporations Act; or
   4. a further administrator is appointed to the defendant under ss 436A, 436B or 436C of the Corporations Act; or
   5. the defendant executes a deed of company arrangement,

liberty is reserved to any liquidator, administrator or deed administrator appointed to the defendant to apply to discharge or vary order 3.

1. A copy of these orders be served as soon as practicable on the defendant and MLSP Holding Pty Ltd.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(ex-tempore)

BEACH J:

1. The plaintiff, One Corporate Trust Services Ltd (the Security Trustee), seeks an order pursuant to s 588FM of the *Corporations Act 2001* (Cth) to fix a later time for the purpose of s 588FL(2)(b)(iv) and ancillary orders, which reflect the late perfection of its security interest in collateral held by the defendant.
2. The defendant as the grantor of the relevant security, which I will come to in a moment, is MLSP Assets Pty Ltd as trustee for the MLSP Assets Trust.
3. I note that on 5 May 2022 joint and several voluntary administrators were appointed to the defendant. In representing the defendant, they do not oppose the present application.
4. I also note that on 6 May 2022 the Security Trustee appointed joint and several receivers to the defendant. Neither the administrators nor the receivers have identified any substantial creditors of the defendant other than the Security Trustee and Norddeutsche Landesbank Girozentrale, the latter being described in the material before me as Nord LB or the Agent although I will only use the former description. Nor have they identified any person who may potentially be prejudiced by the granting of the relief sought.
5. Now as counsel for the Security Trustee succinctly put it, the application before me arises in a context where deficient financing statements resulted in ineffective registration of the Security Trustee’s security interest. Now its imperfect interest has now been perfected by a new registration on 19 April 2022. But nevertheless, the security interest remains vulnerable to the operation of s 588FL in the absence of an order being made under s 588FM, thereby triggering s 588FL(2)(b)(iv).
6. Let me say something concerning the background to this morning’s application.
7. The Security Trustee was appointed as such pursuant to a Security Trust Deed dated 30 May 2017. The Security Trustee’s role includes acting in accordance with instructions issued by Nord LB in terms of and under various instruments being:
8. first, a Loan Note Subscription Agreement dated 28 April 2017 as further amended between, inter alia, MLSP Finance Pty Ltd (the Borrower), Nord LB and the defendant;
9. second, the Security Trust Deed between, inter-alia, the Security Trustee and Nord LB, each of whom were described as a “Beneficiary”;
10. third, a General Security Deed dated 30 May 2017 between, inter-alia, the Security Trustee and the defendant;
11. fourth, a ADI Account Control Deed dated 30 May 2017 between the Borrower, Commonwealth Bank of Australia and the Security Trustee; and
12. fifth, a letter agreement dated November 2020 between, inter-alia, the Borrower and Nord LB.
13. On 28 April 2017, the Loan Note Subscription Agreement was entered into for the provision of $35,000,000 for the purposes of refinancing an existing facility and for the partial financing of investment costs. The term of the Loan Note Subscription Agreement expires on 30 May 2022.
14. Under and having regard to the terms of the General Security Deed, specifically cll 1 and 2, and the other documents I have referred to, the defendant granted a security interest over all its present and after-acquired property in favour of the Security Trustee as security for the performance of its obligations under the Loan Note Subscription Agreement in its capacity as trustee of the MLSP Assets Trust (the Trust). This interest arose on and from the date of the General Security Deed.
15. On 30 May 2017, three ALLPAAP security registrations numbered 201705300059290, 201705300062818 and 201705300064475 were lodged on the Personal Property Securities Register against the ACN of the defendant, the name of the corporate trustee, and the name of the Trust in respect of the security interest granted pursuant to the General Security Deed. The registrations were lodged by the then solicitors for Nord LB.
16. On 14 April 2022, Nord LB and the Security Trustee issued a notice of event of default to MLSP Finance Pty Ltd in relation to subsisting events of default under the Loan Note Subscription Agreement, the letter agreement and the ADI Account Control Deed.
17. Subsequently, the Security Trustee issued a control notice pursuant to the Loan Note Subscription Agreement stipulating that the Security Trustee took control and operation of the project accounts and replacing the authorised signatories on those accounts.
18. On 14 April 2022, as part of conducting a security review of the defendant on behalf of Nord LB and the Security Trustee, PPSR searches using the defendant’s ACN, ABN and the ABN of the Trust were undertaken which revealed the following.
19. First, such searches revealed that there were three ALLPAAP (with exceptions) registrations disclosing security interests granted over commercial property in favour of the Security Trustee (as secured party) by the defendant, namely, registration 201705300059290 entered on 30 May 2017 naming as one of several grantors, the defendant as “MLSP Assets Pty Ltd as Trustee for MLSP Assets Trust”, registration 201705300064475 entered on 30 May 2017 naming as grantor the defendant as “MLSP Assets Pty Ltd as Trustee for MLSP Assets Trust” and registration 201705300062818 entered on 30 May 2017 naming the defendant as grantor by reference to the defendant’s ACN.
20. Second, such searches revealed that the collateral the subject of the security interest was described in each of these registrations as:

[a]ll present and after-acquired property except any property of the grantor which is not subject to the General Security Deed dated on or about 30 May 2017 in favour of the secured party (as amended, supplemented or novated from time to time) or not from time to time subject to a security agreement in favour of the secured party.

1. Third, the search results disclosed no security interest registered in favour of the Security Trustee against the Trust ABN. So it was apparent that the PPSR registrations were not made against the ABN of the Trust.
2. Now where a security interest in respect of commercial property is registered against a grantor in its capacity as trustee of a trust and the trustee is a body corporate, the security interest is not perfected unless the financing statement recording the registration discloses the identity of the grantor by reference to the ABN of the trust; see s 153(1) of the *Personal Property Securities Act 2009* (Cth) and Sch 1, Pt 1, cl 1.5 of the *Personal Property Securities Regulations 2010* (Cth).
3. So, as is apparent, the original registrations did not perfect the Security Trustee’s security interest created by the General Security Deed over collateral held by the defendant in its capacity as trustee of the Trust. The relevant financing statements were defective, therefore registration with respect to the collateral was not effective, and therefore the security interest in the collateral was imperfect.
4. As a result of this deficiency being identified, on 19 April 2022 a new ALLPAAP registration was filed on behalf of the Security Trustee against the Trust ABN. As a result the security interest granted by the defendant in its capacity as trustee of the Trust has now been perfected.
5. I should also note at this point that the search results disclosed that no entity other than the Security Trustee has registered a security interest granted by the defendant, either in its personal capacity or in its capacity as trustee of the Trust.
6. Let me turn to the statutory provisions and relevant matters.
7. Section 588FL provides:

*Scope*

(1) This section applies if:

(a) any of the following events occurs:

(i) an order is made, or a resolution is passed, for the winding up of a company;

(ii) an administrator of a company is appointed under section 436A, 436B or 436C;

(iii) a company executes a deed of company arrangement under Part 5.3A;

…

(b) a PPSA security interest granted by the company in collateral is covered by subsection (2).

(2) This subsection covers a PPSA security interest if:

(a) at the critical time, or, if the security interest arises after the critical time, when the security interest arises:

(i) the security interest is enforceable against third parties under the law of Australia; and

(ii) the security interest is perfected by registration, and by no other means; and

(b) the registration time for the collateral is after the latest of the following times:

(i) 6 months before the critical time;

(ii) the time that is the end of 20 business days after the security agreement that gave rise to the security interest came into force, or the time that is the critical time, whichever time is earlier;

(iii) if the security agreement giving rise to the security interest came into force under the law of a foreign jurisdiction, but the security interest first became enforceable against third parties under the law of Australia after the time that is 6 months before the critical time—the time that is the end of 56 days after the security interest became so enforceable, or the time that is the critical time, whichever time is earlier;

(iv) a later time ordered by the Court under section 588FM.

*Vesting of security interest in company*

(4) The PPSA security interest vests in the company at the following time, unless the security interest is unaffected by this section because of section 588FN:

(a) if the security interest first becomes enforceable against third parties at or before the critical time—immediately before the event mentioned in paragraph (1)(a);

(b) if the security interest first becomes enforceable against third parties after the critical time—at the time it first becomes so enforceable.

…

(7) In this section:

***critical time***, in relation to a company, means:

(a) if the company is being wound up—when, on a day, the event occurs by virtue of which the winding up is taken to have begun or commenced on that day under section 513A or 513B; or

(b) if the company is under administration or is subject to a deed of company arrangement—when, on a day, the event occurs by virtue of which the day is the section 513C day for the company…

…

1. Section 588FM provides:

(1) A company, or any person interested, may apply to the Court (within the meaning of section 58AA) for an order fixing a later time for the purposes of subparagraph 588FL(2)(b)(iv).

(2) On an application under this section, the Court may make the order sought if it is satisfied that:

(a) the failure to register the collateral earlier:

(i) was accidental or due to inadvertence or some other sufficient cause; or

(ii) is not of such a nature as to prejudice the position of creditors or shareholders; or

(b) on other grounds, it is just and equitable to grant relief.

(3) The Court may make the order sought on any terms and conditions that seem just and expedient to the Court.

1. Section 588FL(2)(b)(ii) incentivises the desirability for a PPSA security interest to be registered within 20 business days of the security agreement that gave rise to the security interest coming into force. But a later time may be fixed as provided for by s 588FL(2)(b)(iv) if an application is made under s 588FM(1) and the relevant extension order granted.
2. If the PPSA security interest is registered within that 20 days or such later time as so fixed under s 588FL(2)(b)(iv), it prevails over the interests of unsecured creditors even if the grantor within six months of registration goes into liquidation or administration. But if it is not registered within the 20 business days or the time as so extended, then the security interest vests in the grantor for the benefit of creditors if the grantor goes into liquidation or administration within six months of registration.
3. Let me turn to s 588FM that is a remedial provision that has been liberally applied.
4. As to the question of “accidental”, the concept can embrace just the occurrence of a physical act or omission or it could embrace a situation where, although the physical act or omission itself might not be accidental, it was committed or omitted without any corporate delinquency or knowing disregard of the relevant statutory requirements. That latter possibility of course shades into inadvertence.
5. As to the question of inadvertence, this concept includes a failure to advert to or understand the requirement forregistration within the relevant period or to fully appreciate its prescriptive requirements, or an innocent error in failing to register or adequately register throughignorance of the consequences of not doing so.
6. As I said in *Commonwealth Bank of Australia v HM Aircraft Holdings Pty Ltd* (2021) 152 ACSR 63; [2021] FCA 447 at [64], inadvertence can include an active but incorrect consideration of a requirement, a failure to turn one’s mind to the requirement or a failure to appreciate the true significance of non-compliance with a requirement, so long as such a failure is not intended to flout or is recklessly indifferent to proper compliance.
7. Let me say something about prejudice. Now an extension order under s 588FM can operate to the detriment of unsecured creditors if the grantor goes into liquidation or administration within six months of the security interest being perfected, because it avoids the consequence that the security interest would otherwise vest in the grantor for their benefit. But the relevant prejudice to other creditors that I need to consider is that which may arise from the delay in registration of the security interest or the delay in its perfection rather than from the making of the order. Thus, the length of delay prior to registration or its perfection is a relevant factor for the exercise of my discretion under the extension provision.
8. The relevant type of prejudice for the purpose of s 588FM(2)(a)(ii) is whether another creditor would have changed its position in dealing with the grantor had it known of the security interest in question that was registered late. Of course in the case before me there was purported registration on the PPSR. But the problem was that it was deficient. In those circumstances it is difficult to see how any other creditor could have changed their position in apparent reliance on the deficiency.
9. Further, an extension under s 588FM would not generally be granted if there was a danger that the claims of unsecured creditors would not be met owing to the insolvency of the grantor. But the interests of unsecured creditors can be protected. Where a s 588FM order is sought, it is the usual course to only make such an order on the condition that any future administrator or liquidator has leave to apply for the discharge or modification of the order should the grantor go into external administration within six months. In the present case, the defendant is under administration so this needs to be tailored to accommodate the present reality. Indeed, anterior to that question is the point that the grantor’s present financial state is a matter going to my discretion whether to make a s 588FM order at all.
10. Let me turn then to the present case.
11. Now s 588FM confers a discretion on the Court to fix a later date if satisfied that any one of the three limbs of s 588FM(2) are satisfied. The Security Trustee submitted that I can be satisfied that it is appropriate to make the orders sought on the basis of any of the grounds provided for by s 588FM(2). I agree with the Security Trustee’s position.
12. The evidence shows that the failure to register was through inadvertence to record the ABN of the Trust. It was not deliberate or conscious. This is a not a case where an informed holder of a security has deliberately flouted the statutory requirements of registration. So, s 588FM(2)(a)(i) is satisfied, providing a basis to exercise my discretion in making an order under s 588FM.
13. Further, I consider that the failure to perfect registration is not of such a nature as to prejudice the position of creditors or shareholders (s 588FM(2)(a)(ii)). Any person conducting a search of the grantor’s ACN or its name or the name of the Trust in the PPSR would have seen the original registrations and would thereby have been aware of the existence of the Security Trustee’s security interest in the collateral. Further, the evidence shows that at the present time it would seem that the only substantial creditors of the defendant are the Security Trustee and Nord LB. On that basis, no relevant prejudice can have been suffered or would be suffered by my granting the relief sought. Further, the evidence shows that the Security Trustee has moved expeditiously in April 2022 since becoming aware that its security interest had not been perfected. There has been no significant delay in perfecting its security interest upon becoming aware of the deficiency or in then making the application before me this morning.
14. Now I am dealing with the present application after the “critical time”, which is of course the date of appointment of the voluntary administrators. But relevantly, the period of extension sought is through to 19 April 2022 which is before the critical time. I have power to extend now. But the question is whether the present voluntary administration or indeed the receivership is a discretionary factor against extension. In other words, is the intervening insolvency against the favourable exercise of my discretion in the present case? I do not think so. In *Kaizen Global Investments Limited v Australia New Agribusiness & Chemical Group Limited (in liq)* [2017] FCA 431, Moshinsky J discussed the relevant principles at [68] to [87]. I should set out what he synthesised at [87]:

In light of the above, I consider the following principles to be applicable to the exercise of the discretion in s 588FM(2) in circumstances where, subsequent to registration but before the Court is called upon to exercise the discretion, the mortgagor company has gone into liquidation or administration or has become subject to a deed of company arrangement:

(a) An order pursuant to s 588FM(2) fixing a later time for the purposes of s 588FL(2)(b) can be granted after the occurrence of one of the events identified in s 588FL(1) (namely, the company going into liquidation or administration or becoming subject to a deed of company arrangement).

(b) Section 588FM(2) confers a broad judicial discretion informed, at least at one level, by what is “just and equitable”; as such, it is to be read liberally for the purpose intended by the statute in question and is not to be constrained or limited by glosses or implications not found in the relevant statute.

(c) Generally, the principles developed in relation to the exercise of the discretion in former s 266(4) have continuing relevance in relation to the discretion in s 588FM to fix a later time for the purposes of s 588FL(2)(b).

(d) In circumstances where the company has gone into liquidation or administration or become subject to a deed of company arrangement, there is no rule of law that constrains the exercise of the broad discretion conferred on the Court by s 588FM(2) to cases in which “exceptional circumstances” can be found.

(e) A determination that it is appropriate to grant relief in such circumstances will require the identification of factors of sufficient significance to outweigh the adverse impact on unsecured creditors of the grant of relief.

(f) Consistently with established practice, an order fixing a later time in the case of an insolvent company or a company in liquidation is not lightly made and then generally upon conditions designed to minimise the risk of any unfair prejudice to any creditor.

[citations excised]

1. Applying those principles here, there is no relevant prejudice. And the factual scenario before me is quite different to that addressed by Moshinsky J. There is no good reason to refuse relief in the case before me. Particularly is that so where I will make an order providing that the present administrators and any future administrator or liquidator has leave to apply for the discharge or modification of the order if certain contingencies arise concerning external administration.
2. Finally, I consider that in all the circumstances it would be otherwise just and equitable (s 588FM(2)(b)) to allow the application.
3. I will make the orders sought.

|  |
| --- |
| I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Beach. |

Associate:

Dated: 13 May 2022