

PPSA: Missing the Registration Boat

Daniel Turk and Millie Garvin | June 2017 | Commercial Disputes & Transactions

Summary

Secured parties who have failed to register their interest in time will be at risk if there is insolvency of the grantor within 6 months of the PPSA registration.

Generally, registration must be within 20 business days of the security agreement (depending on the type of interest).

The Court has the power to extend the time for registration retrospectively.

A recent case has shown that the Court will be reluctant to extend the time for registration of PPSA interests when the application for extension is made after an insolvency administration.

It is therefore crucial that creditors who may have registered late, obtain Court orders protecting their interest before any insolvency administration.

Kaizen Global

In its recent decision in *Kaizen Global*,¹ the Federal Court of Australia highlighted the importance of a creditor registering its security interest within time and without delay, in considering an application to fix a later time for registration of a share mortgage on the PPSR pursuant to section 588FM of the *Corporations Act 2001 (Cth)* ('the Act').

Facts

- On 10 December 2015, Kaizen Global Investments Limited ('Kaizen') and Australia New Agribusiness & Chemical Group Limited (In Liq) (ACN 142 976 065) ('ANB') entered into a loan agreement whereby Kaizen agreed to loan \$5 million to ANB ('Loan Agreement').
- As security for the loan, on 11 December 2015, Kaizen and ANB executed a share mortgage for shares ANB held in Australia Venus Resource Pty Ltd ('Share Mortgage').
- The time for registration was 12 January 2016, being 20 business days after the Loan Agreement was entered into.
- Kaizen was advised of the requirement to register on 10 March 2016.
- The Share Mortgage was not registered on the PPSR until 12 April 2016.
- Eight days later on 20 April 2016, ANB was placed into administration and then later wound up on 23 August.
- On 20 September 2016, Kaizen applied to the Court to fix a later time for registration of the Share Mortgage on the PPSR to 12 April 2016.

The Court dismissed Kaizen's application due to the delay. Whilst it held that Kaizen had a valid basis for its application because its failure to register the Share Mortgage was due to inadvertence under section 588FM(1)(a) of the Act, Kaizen was unable to explain to the Court's satisfaction why it had delayed for so long before registering the Share Mortgage on the PPSR, particularly as it had become aware of the need for registration on 10 March 2016. Therefore the Court declined to exercise its discretion to fix a later time for registration of the Share Mortgage.

The Court also considered it relevant that ANB was in liquidation at the time of the application. As such, were it to fix a later time for registration, the funds available for distribution to unsecured creditors in ANB's liquidation would be reduced and there would be prejudice to the position of ANB's unsecured creditors.

Accordingly, Kaizer lost its security when ANB went into administration as its security interest was deemed to have vested in ANB.

Implications

The need for a creditor to register a PPSA security interest as soon as possible after its creation is of paramount importance. As *Kaizen Global* has demonstrated, any delay in the registration of a security interest particularly when it involves a potentially insolvent debtor company, can be disastrous for the creditor who may lose its security and be unable to remedy the situation through Court order.

Creditors should thus ensure that they register their security interests as soon as possible.

¹In the Matter of *Australia New Agribusiness & Chemical Group Limited (In Liq): Kaizen Global Investments Limited v Australia New Agribusiness & Chemical Group Limited (In Liq)* [2017] FCA 431 (28 April 2017)

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