

Defending preference claims & unperfected security interests - all is not lost

Trenfield & Ors v HAG Import Corporation (Australia) Pty Ltd [2018] QDC 107

Millie Garvin & Daniel Turk | August 2018 | Commercial Disputes & Transactions

Summary

Creditors with unperfected security interests may still succeed in defending liquidators' unfair preference claims on the basis that payments received are in relation to a secured debt.

In *Trenfield & Ors v HAG Import Corporation (Australia) Pty Ltd* [2018] QDC 107, the Qld District Court considered a preference claim in which the defendant, HAG Import Corporation (Australia) Pty Ltd ('HAG'), asserted that all payments alleged to be preferential by the liquidators were in respect of a secured debt. The court was therefore required to examine whether HAG's debt was secured (either in full or in part), the value of its security and the extent of recoverable preferences.

The court subsequently ruled that, in determining the security value, the court will value the security based on what security assets are available at the time of the payment.

Background

A chronology of key events is as follows:

Date	Event
August 2011	Credit application executed by Lineville Pty Ltd (In Liquidation) ('Lineville') and accepted by HAG which included standard terms and conditions and security ('2011 Terms')
April 2013	HAG's new terms and conditions as agreed including security ('2013 Terms')
3 May 2013	HAG registered its interest on the PPSR over Lineville as a transitional security interest
June to July 2013	Payments of approximately \$700,000 made by Lineville to HAG
16 December 2013	Lineville placed into administration (relation-back day)
12 March 2014	Lineville wound up

The liquidators of Lineville instituted proceedings against HAG for about \$700,000 for recovery of the payments made in the period June 2013 to July 2013 ('Payments') on the basis that they were unfair preferences pursuant to section 588FA of the *Corporations Act 2001* (Cth) (the 'Act').

HAG defended the claim by asserting that it was secured at the time of each of the Payments and therefore the debt was not unsecured (being payment of an unsecured debt, a required element of an unfair preference claim under section 588FA(1)(b) of the Act).

The liquidators claimed that HAG's interest was not in fact secured as its transitional PPSR registration was not valid to protect its 2013 Terms because the 2013 Terms were not 'transitional'.

Issues

1. Was HAG's registration on the PPSR valid?
2. Was HAG a secured creditor?
3. If the debt was secured, how was the security to be valued?

Was the Registration valid?

HAG's PPSR registration was not valid because it was a transitional registration and the relevant security agreement was not transitional. Any sale and purchase of goods was on the terms and conditions set out in the 2011 Terms up to 23 April 2013 (when the 2013 Terms came into effect) and thereafter, the 2013 Terms. Transitional registrations are invalid in respect of non-transitional interests (those dated post 30 January 2012) under section 337A of the PPSA.

Upon the appointment of the administrators, the security interest held by HAG under the 2013 Terms vested in the administrators (pursuant to section 267 of the PPSA) because it was not properly registered as a non-transitional interest on the PPSR.

Was the debt still secured?

The court held that HAG was still a secured creditor even though the PPSR registration was not valid to protect the 2013 terms. Although unperfected, the securities were still valid because of the equitable charge over HAG's goods in the 2011 Terms and both the equitable charge and the retention of title clause in the 2013 Terms. Hence, the debts were not unsecured debts at the time of the Payments because, for the purposes of section 588FA of the Act, an equitable charge is security and a ROT clause gives the supplier a security in the goods.

How was the security valued?

The basis on which the security is to be valued, and the value of the security at the relevant time, is to be determined by reference to its wholesale (rather than retail) value, being the price at which HAG supplied the goods to Lineville.

From a natural reading of section 588FA(2) of the Act, which states that a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security, the time to determine the value of the goods is the date at which each of the Payments was received, not the date of the winding up.

In applying these principles, the court calculated that the amount paid in respect of unsecured debt by HAG to Lineville was \$473,291 as follows:

Date	Debt	Stock Value	Unsecured Portion	Payment	Preference
21 June 2013	\$703,634.07	\$286,587	\$417,047.07	\$100,000	\$100,000
27 June 2013	\$603,634.07	\$251,019	\$352,615.07	\$100,000	\$100,000
1 July 2013	\$503,634.07	\$230,343	\$273,291	\$400,000	\$273,291
5 July 2013	\$103,634.07	\$218,787	(-)115,152.93	\$40,765.51	Nil
12 July 2013	\$55,861.60	\$198,564	(-)142,702.40	\$55,533.21	Nil
TOTAL					\$473,291

The Payments received by HAG from Lineville after 1 July 2013 were unable to be recovered by the liquidators because the entirety of these Payments were made in respect of a secured debt.

The court adopted an approach consistent with 2 Court of Appeal decisions which were authorities for the proposition that if the total debt exceeds the value of the security, any particular payment made is to be applied first toward the unsecured debt.

Implications

As HAG's case has shown, even if registration of the relevant security interest is defective, at least for the purposes of defending an unfair preference claim, suppliers may still succeed in avoiding or minimising the payments they are liable for under section 588FA of the Act as unfair preferences. The value of the security is determined at the time of each preference payment.

For more information,
please contact:



Millie Garvin
Senior Associate
T: 02 8257 5754
M: 0417 497 459
millie.garvin@turkslegal.com.au



Daniel Turk
Partner
T: 02 8257 5727
M: 0408 667 220
daniel.turk@turkslegal.com.au