

Major PPSA decision in the WA Court of Appeal

John Bennett & Liam Williams | October 2018 | Commercial Disputes & Transactions

Summary

Millions of dollars, set-off and application of the *Personal Property Securities Act 2009* (Cth) (PPSA) were all at stake in the recent WA Court of Appeal decision *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (In Liquidation) (Receivers and Managers Appointed)* [2018] WASCA 163. In addressing the issues, the Court provided important PPSA lessons and principles for creditors and insolvency practitioners.

Background

Forge contracted with Hamersley to construct power stations in the Pilbara Region of Western Australia. After starting this work, Forge entered into a General Security Agreement (GSA) and a terms deed with ANZ. The GSA was registered on the Personal Property Securities Register.

About six months later receivers were appointed to Forge by ANZ after Forge appointed voluntary administrators. The administrators were then appointed liquidators about a month after that.

Hamersley claimed approximately \$185 million from Forge for breach of contract. Forge in turn, by the Receivers, claimed from Hamersley about \$17.4 million for unpaid work and approximately \$35.2 million plus US\$24.8 million for allegedly wrongful calls on performance securities (collectively 'Forge's Claims').

Appeal Decision

The main contest between the parties was whether Hamersley was entitled to set-off its claims against Forge and prove for the balance in the liquidation of Forge under section 553C of the *Corporations Act 2001* (Cth) ('Section 553C').

The WA Court of Appeal (the 'Court') held that:

1. Hamersley's claims were set-off against Forge's Claims under Section 553C.
2. Even if Section 553C did not apply, Hamersley was not precluded from asserting contractual or equitable rights of set-off.
3. Under section 80(1)(a) of the PPSA, ANZ's rights as the transferee of an account constituted by Forge's Claims were subject to the terms of the contracts and any equity, defence, remedy or claim arising in relation to them (including a defence by way of a right of set-off).

The PPSA issues

In coming to this decision, the Court addressed these issues arising under the PPSA:

- Whether Forge's Claims were 'accounts' within the meaning of the PPSA.
- If Forge's Claims were accounts, whether those accounts were circulating assets under sections 340(1)(a) and 340(5)(a) of the PPSA.
- Whether Section 553C may operate concurrently with the PPSA.
- Whether attachment of a security interest under section 19 of the PPSA destroys the mutuality element required by Section 553C.
- Whether section 80(1) of the PPSA applies to assignments by way of charge.

The PPSA lessons and principles from the decision

In addressing the issues, the Court provided the following important PPSA lessons and principles for creditors and insolvency practitioners:

- Trade creditors may invoke set-off against their monetary obligations (accounts) to a company in liquidation if the accounts are circulating assets to which a security interest has attached under the PPSA.
- Forge's Claims were accounts and circulating assets within the meaning of the PPSA.

- The time for determination of the character of the assets is the date of commencement of the winding up.
- The PPSA regulates whether there is control of the asset and consequently whether the asset is a circulating asset
- Attachment of a security interest does not affect the nature of the asset as a circulating asset.
- Set-off under Section 553C operates concurrently with the PPSA.
- Attachment of a security interest to debts owed to the company in liquidation does not necessarily destroy mutuality.
- A significant difference between a PPSA security interest and a fixed charge is that the PPSA accommodates payments received by the grantor by its debtors (which is collateral) being used for the benefit of the grantor whereas a fixed charge under the general law does not.
- Section 80 of the PPSA, which provides (among other things) that the right of transferees of accounts are subject to a defence by way of a right of set-off, extends to assignments by way of security.

It is unclear from the decision though whether set-off is available if the accounts are not a circulating asset due to a secured party controlling those accounts.

Please feel free to contact us if you would like to discuss the Court's PPSA reasoning in more detail.

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