

The importance of perfection and effective registrations under the PPSA

Liam Williams & John Bennett | February 2017 | Commercial Disputes & Transactions

Summary

Property with a value of \$23,329,764 was leased by a lessor to a lessee. The lessor then lost that property altogether when the lessee had administrators appointed to it. The recent court decision in *OneSteel*¹ reiterates that effective registrations under the *Personal Property Securities Act 2009* ('PPSA') are vital.

The leases giving rise to the PPSA security interests

On about 16 October 2014, Alleasing Pty Limited ('Alleasing') and OneSteel Manufacturing Pty Limited ('OneSteel') entered into a master lease agreement. Under this agreement, OneSteel leased from Alleasing a crushing and screening plant ('crusher lease') and the crusher's parts ('parts lease'). Both the crusher lease and the parts lease were PPS leases² and therefore OneSteel had granted to Alleasing security interests as defined in the PPSA.³ On 17 October 2014, Alleasing registered on the Personal Property Securities Register ('PPSR') with respect to these security interests ('original registrations').

The importance of perfection and effective registrations for priorities under the PPSA

Security interests are property interests.⁴ The holder of a property interest can assert it against the whole world. Therefore, Alleasing's security interests gave it a priority status.⁵ Under the PPSA, a secured party attains the strongest possible priority status by perfecting its security

interest. Perfection does not necessarily guarantee the security interests will always trump other competing interests. However, it offers 'the best protection a secured party can aspire to.'⁶ An effective registration can perfect a security interest.⁷ Registrations are only ineffective when they have a 'seriously misleading defect' or a defect mentioned in sections 165 or 337A of the PPSA.⁸

The defect in the original registrations

Alleasing needed to state OneSteel's ACN in the original registrations.⁹ Alleasing provided OneSteel's ABN instead. As Alleasing did not need to describe the crusher and parts by serial number in the registrations, the original registrations would be ineffective under section 165(b) if no search of the PPSR by reference only to OneSteel's details was capable of disclosing the registrations.¹⁰

The appointment of administrators to OneSteel

An ineffective registration leaves an unperfected security interest. A major risk with unperfected security interests is that they will vest in a debtor company upon the appointment of an administrator.¹¹ OneSteel appointed administrators on 7 April 2016. On 10 June 2016, the administrators claimed the crusher and the parts on the basis that Alleasing's security interests were defective and ineffective. In response, Alleasing lodged new financing statements for the crusher and the parts on 14 June 2016 ('second registrations'). Three days after, Alleasing also amended the original registrations to include the ACN of OneSteel. Alleasing then filed court proceedings against the administrators on 11 August 2016.

The Court's decision on the original registrations

The Court found that the original registrations were ineffective. A search of the PPSR by OneSteel's ACN by the administrators upon appointment would not reveal the original registrations. The Court also held that the use of the ABN was a seriously misleading defect. These findings are consistent with the legal position accepted before the decision in *OneSteel*¹² and thus are unsurprising.

Alleasing's attempts to cure its security interests with the second registrations

Under section 588FL of the *Corporations Act 2001* (Cth) ('Corporations Act'), security interests perfected by registration can also vest in a debtor company if the registration was less than 6 months before appointment of a company administrator. To avoid this, the secured party must register within 20 business days after the agreement providing the security interest came into force. Failing this, the secured party must apply to the court to extend the time for registration under section 588FM of the Corporations Act. Alleasing applied for such an extension for the second registrations.

Section 588FM applications usually result in an enquiry as to whether the late registration was due to accident, inadvertence or some other sufficient cause, or not of such a nature as to prejudice the position of creditors or shareholders, or if on other grounds it is just and equitable to grant relief.¹³ The Court had previously granted an extension under section 588FM on these grounds where the secured party registered the ABN instead of the ACN as required.¹⁴ However, this was in circumstances where no administrators had been appointed and the secured party had perfected by registering afresh. The secured party in that case (who also happened to be Alleasing) also provided evidence that it was the practice of lawyers acting for creditors to run searches on the PPSR against the name of a party, its ACN and its ABN.¹⁵

The issue in *OneSteel* instead was whether the second registrations 'were perfected by registration, and by no other means'.¹⁶ Alleasing submitted that this requirement meant 'is capable of being perfected'. The Court rejected

this and held that section 588FM applies only to stop security interests belatedly perfected by registration from vesting under section 588FL. The Court ruled that section 588FM does not immunise unperfected security interests from vesting under section 267 of the PPSA. Therefore relief under section 588FM was not available.

PPSA sections 252B and 267 - unconstitutional acquisitions of property

Section 252B stops PPSA provisions from operating to the extent they result in an unconstitutional acquisition of property otherwise than on just terms.¹⁷ Alleasing argued that section 252B applied to the vesting provisions in section 267 of the PPSA. The Court rejected this argument and found that a previous court decision holding that section 267 does not effect an acquisition of property under the *Constitution*¹⁸ was 'plainly correct'. The Court in *OneSteel* also went further by deciding there is no 'acquisition' under section 267 at all.

Implications with the decision in OneSteel

The main lesson in *OneSteel* is that section 588FM of the Corporations Act is not a 'cure' for unperfected security interests. Therefore, if a secured party's security interest is unperfected upon the appointment of administrators to the debtor, section 588FM will not rescue the security interest from vesting.

The best way of avoiding these consequences is by ensuring that the registrations comply with the PPSA and its Regulations from the outset. In particular, secured parties must ensure that the grantor's (debtor's) details in the registration are accurate and compliant. Of course, secured parties may expect that mistakes in registrations will occur on account of human error. For this reason, secured parties should regularly audit registrations and if need be apply to the Court to extend the registration time before any question of administrators arises.

¹ *In the matter of OneSteel Manufacturing Pty Limited (administrators appointed)* [2017] NSWSC 21 (31 January 2017).

² PPSA s 13.

³ PPSA ss 12(1), 12(2)(i) and 12(3).

- ⁴ Ronald Cuming, Catherine Walsh, Roderick Wood, *Personal Property Security Law* (Irwin Law, 2nd ed, 2012) 297.
- ⁵ Samantha Traves, *Commercial Law* (LexisNexis Butterworths Australia, 2nd ed., 2009) 20.
- ⁶ Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths Australia, 2nd ed, 2016) 133.
- ⁷ PPSA ss 21(1)(b)(iii) and 21(2)(a).
- ⁸ PPSA ss 164, 165, and 337A.
- ⁹ PPSA s 153(1) item 2; *Personal Property Securities Regulations 2010* (Cth) Reg 5.5 and Schedule 1 Part 1.3.
- ¹⁰ PPSA s 165(b).
- ¹¹ PPSA s 267.
- ¹² Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths Australia, 2nd ed, 2016) 193-196.
- ¹³ See for example *Re Barclays Bank PLC* [2012] NSWSC 1095 (24 August 2012); *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32 (1 February 2013); *Re Appleyard Capital Pty Ltd* [2014] NSWSC 782 (12 June 2014).
- ¹⁴ *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023 (25 July 2016).
- ¹⁵ *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023 (25 July 2016) [33].
- ¹⁶ Corporations Act s 588FL(2)(a)(ii).
- ¹⁷ *Australian Constitution* s 51 (xxxi).
- ¹⁸ *White v Spiers Earthworks Pty Ltd* [2014] WASC 139 (16 April 2014).

For more information, please contact:



Liam Williams

Partner

T: 02 8257 5784

M: 0418 138 739

liam.williams@turkslegal.com.au



John Bennett

Senior Associate

T: 02 8257 5760

M: 0417 658 724

john.bennett@turkslegal.com.au