

Slowly does it: developing Personal Securities Law in Australia

Bluwaters Power 1 Pty Ltd v The Griffin Coal Mining Company Pty Ltd
[2019] WASC 438 (**Bluwaters**)

*BMW Australia Finance Limited v @Civic Park Medical Centre Pty Ltd as trustee for
@Civic Park Medical Centre Unit Trust* [2019] FCA 999 (**Civic Park**)

*In the matter of Beechworth Land Estates Pty Ltd (admins apptd) and Griffith Estates Pty Ltd
(admins apptd); Cussen and of Beechworth Land Estates Pty Ltd v Douglas Estate Holdings
Pty Ltd and Others* [2019] NSWSC 1129 (**Beechworth**)

Case notes with references to some recent related cases on the PPSA

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A. Introduction – Slow and Steady

1. The *Personal Property Securities Act 2009* (Cth) (**PPSA**) is a relatively new priority regime. It was introduced just over 7 years ago this year. The case law is still in its formative stages.
2. Development in significant case law has been incremental at best in recent years. In this seminar we survey some of the more interesting cases and review some practical issues that have arisen in practice:
 - (a) a brief recap of the purpose, scope and key concepts of the PPSA relevant to reviewing developments in the law;
 - (b) the breadth of a “security interest”: do step-in rights require registration on the PPSR? The decision in *Bluwaters*;
 - (c) PMSIs – traps where the debtor is the trustee of a trust: extension of time to register in the decision in *Civic Park*;
 - (d) Administrators’ Lien over interests in land and proceeds of its sale: the decision in *Beechworth*;
 - (e) Inventory security: issues of priority and vesting in relation to processing raw materials

B. A Recap of Basic Concepts

A security interest

3. The PPSA defines a security interest in section 12(1) which states:

A security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

Personal property is any property other than land.

4. Section 12(2) contains an extensive list of example transactions that are within the definition.

5. The definition is broad and covers most of traditional security transactions, such as legal and equitable mortgages, fixed and floating charges and assignments. However, it also extends to transactions which, at common law, were not regarded as constituting a charge over personal property:

- retention of title clauses (Romalpa Clause);
- hire purchase agreements;
- conditional sale agreements;
- leases (whether or not PPS leases); and
- flawed asset arrangements.

6. Further, section 12(3) of the PPSA states that particular interests are security interests whether or not the relevant transaction secures payment or performance of an obligation. These include:

- the interest of a factor in an account;
- consignment arrangements; and
- leases of personal property for a term exceeding 12 months (or three months for motor vehicles, boats or aircraft).

Extension of Time to Register

7. It is very important to register a security interest in accordance with the requirements of the PPSA, particularly with regard to time limits and the form of application. If a security interest is not validly registered within time limits set by the PPSA, the secured party may lose priority or may lose the interest completely. While the Court has a discretion to order an extension of time for registration, the ability of the Court to grant extensions is limited and uncertain. Practitioners should not assume that an extension of time will be available on application to the court.

8. Section 588FL of the *Corporations Act 2001* (Cth) (Act) provides that a security interest granted by a company (which is perfected *only* by registration) must be registered on the PPSR either within 20 business days after the security agreement giving rise to the security interest comes into force, or otherwise earlier than 6 months of the grantor entering liquidation or administration.
9. If registration does not occur within that time, the security interest will lose priority as against a perfected security interest and will be at risk of vesting in a liquidator or administrator of the company under section 267 of the Act, and so the interest holder losing the benefit of the security.
10. Where an insolvency event has occurred, as long as the original registration was made on the PPSR prior to the insolvency event, an application for an extension of time is available. Accordingly, a security interest holder may apply to the Court under section 588FM in order to prevent the security interest from vesting by extending the timeframe for registration.
11. Section 588FM of the Act affords the Court the power to grant an extension of time if the Court is satisfied that the failure to register the collateral earlier:
 - (a) was accidental or due to inadvertence;
 - (b) is not of such a nature as to prejudice creditors; or
 - (c) is otherwise just and equitable to do so.

Properly Describing the Grantor – ACN and ABN numbers

12. It is very important to register a security interest in accordance with the requirements of the PPSA, particularly with regard to time limits and the form of application. That is particularly so with regard to use of an ABN or ACN in appropriate cases. As noted above, if a security interest is not validly registered within time limits set by the PPSA, the secured party may lose priority or may lose the interest completely. While the Court has a discretion to order an extension of time for registration, the ability of the Court to grant extensions is limited and uncertain. Practitioners should not assume that an extension of time will be available on application to the court.
13. Whether a party is required to refer to the ABN or ACN of the grantor in the registration turns on the capacity of the grantor in the underlying security agreement. In summary, by reason of section 153 of the PPSA and Schedule 1.3, 2 and 3 of the Regulations:
 - (a) if the grantor entered the agreement as a trustee of a trust which holds an ABN – the registration should be recorded over the ABN of the trust.
 - (b) if the grantor entered the agreement in its corporate capacity (ie. not as a trustee) – the registration should be recorded over the ACN of the company.

Interests excluded from the operation of the PPSA

14. Liens can entitle a creditor to detain goods hostage in their possession until payment has been received, and in some cases to assert this right in priority to secured creditors with security perfected under the PPSA.
15. As a general rule a perfected security interest has priority over all other unperfected security interests in the same collateral, under section 66 of the Personal Property Securities Act (PPSA).
16. However, this is not always the case. Under sections 8, 71 and 93 of the PPSA, a common law or a statutory lien over goods lives outside the PPSA priority regime and has priority over all security interests in those goods if:
 - (a) the materials/services provided which gave rise to the lien were provided in the ordinary course of business;
 - (b) no other Act prevents the lien from having priority; and
 - (c) the holder of the lien did not know that a security agreement relating to those goods prohibited the creation of the lien.
17. Examples of statutory liens include the unpaid seller's lien under the *Sale of Goods Act 1908*, and the carrier's lien under the *Carriage of Goods Act 1979*. Common law liens can be 'general' or 'particular'. A 'general' lien allows a person to retain possession of goods until all sums payable by the owner of the goods are satisfied, and not just sums payable in respect of work performed on those goods held hostage.

Priority afforded to Administrator's Liens

18. Section 443D of the Act affords a right of indemnity to an administrator in certain circumstances, but excludes assets covered by a PPSA retention of title interest, where perfection of that interest has occurred. Section 443F provides a statutory lien over the company's property to secure the indemnity afforded by s443D. An equitable "preservation" lien may also be asserted based on case law, where fees and disbursements are incurred directly related to realising or maintaining assets.

PMSIs

19. Making sense of the purchase money security interest (PMSI) priority provisions in the PPSA can be difficult.
20. A PMSI is a security interest arising where credit advanced by the security holder is used to purchase the collateral, hence a "Purchase Money" security interest. Examples are retention of title stock, or specific asset finance.
21. The PPSA gives PMSIs "super-priority" over other general security interests.

22. For example:

- a bank may lend money to a company and this gives rise to a security interest in all of the Company's property. This is a General Security Interest, otherwise known as an All Present and After Acquired Property (AllPAAP) interest. It is what used to be known as a debenture charge or a fixed and floating charge.
- a delivery of stock subject to retention of title is a PMSI. This PMSI will rank first over that stock, even though the AllPAAP security interest over all of the property of the company was created earlier.

23. The rationale is that the earlier secured party should not benefit by having priority over assets of the grantor that would not have been acquired other than with the assistance of the subsequent financier. If the subsequent PMSI secured party did not have the super-priority, they may not have advanced the money or assistance necessary for the grantor to acquire the collateral and develop their business further.

C. Case Notes

Bluewaters

24. This case is an interesting demonstration of the wide meaning of "security interest".
25. The plaintiff companies (**Bluewaters Power**) operate a coal fired power station in Collie, WA. The coal to feed the station is sourced from an adjacent coal mine, operated by the defendant (**Griffin Coal**).
26. In the past, Bluewaters Power had been a wholly owned subsidiary of Griffin Coal. It ceased to be shortly after Griffin Coal went into administration in 2010. As a consequence, the coal supply agreements between Griffin Coal and Bluewaters Power were amended to introduce "step in rights" in favour of Bluewaters Power.
27. In substance, these rights entitle Bluewaters Power to take over the operation of the coal mine should the supply of coal be adversely affected in certain defined circumstances. On the occurrence of a "step in event", Bluewaters Power can elect to enter the coal mine and take possession of all of its plant, material, equipment, documents and other information as it reasonably considers necessary to operate, maintain and manage the coal mine until the step in event is remedied.
28. At the time of the creation of the step in rights, Bluewaters Power omitted to make any registration on the PPSR in respect of the coal supply agreements. The director of Bluewaters Power gave evidence that the companies had not understood that there was any requirement to register and had not been so advised by their transaction lawyers.

29. The proceeding was an application by Bluewaters Power to extend the time for registration of the coal supply agreements pursuant to section 588FM.
30. The Court found that the step in rights under the coal supply agreements gave rise to a security interest under the PPSA (see paragraphs 21 to 30). The basis of the decision was that the step in rights enable Bluewaters Power to take possession of personal property (amongst other things) for the purposes of securing performance by Griffin Coal of their obligations to supply coal under the coal supply agreements. Accordingly, the step in rights are an:

...interest in personal property provided for by a transaction that, in substance, secures performance of an obligation

31. The Court granted Bluewaters Power an extension of time for registration of the security interest.
32. First, the Court found that the failure to register was inadvertent on the basis that:
- (a) Bluewaters Power did not comprehend that the step in rights gave rise to a registrable security interest until shortly before the proceeding was commenced in 2019;
 - (b) they had not been provided with legal advice to that effect, even though a large commercial firm had advised them on the coal supply agreements when they were amended in 2013;
 - (c) at the time of the failure to register, a decision in which step in rights were first identified in case law as giving rise to a security interest (*McCloy v Manukau Institute of Technology* [2013] 3 NZLR 390) had not been decided.
33. Second, the Court was persuaded that it should exercise its discretion in favour of the application, since:
- (a) The Court placed significant weight on the decision of Brereton J in *Re Appleyard Capital Pty Ltd* [2014] NSWSC 782; (2014) 101 ACSR 629 at [28], cited in the *Bluewaters* judgment at [58]. The effect of that passage is that the insolvency or near insolvency of a grantor is not a bar to an extension order. Although there was some evidence that Griffin Coal was in an uncertain financial position, and there was no positive evidence that it was solvent. The Court was satisfied that concerns about the solvency of Griffin Coal could be dealt with by reserving leave to any administrator, liquidator or unsecured creditor to set aside the extension order in future on application (a so called *Guardian Securities* condition after the case where such a condition was first used) (see paragraphs [57] to [60]);
 - (b) although there had been a significant delay in making the application, of six years, the delay was bound up with the failure to comprehend the need to register, and no other factor. Further, there were other AllPAP registrations on the PPSR in favour of the primary secured financier creditors of Griffin Coal, so it was unlikely that any

unsecured creditor searching the register would believe that the collateral offered by Griffin Coal was unencumbered (see paragraphs [61] to [62]).

Civic Park

34. This decision is a demonstration of the ABN/ACN error in registration of a security interest.
35. The plaintiff was BMW Australia Finance Ltd (**BMW**). In October 2017, a liquidator of a borrower company pointed out that the plaintiff's registration in respect of the relevant loan agreement was invalid, as it had failed to state the ABN of the trust in whose capacity the loan had been taken.
36. Subsequently, BMW conducted a review of its lending procedures and identified that it had omitted to provide for registration of loans taken by corporate trustees by reference to the relevant ABN number and had instead been using the trustees' ACN numbers.
37. In this case BMW made an *en masse* application to extend the time for registration of security interests under the affected loan agreements. The application was successful.
38. The Court granted the extension since:
 - (a) BMW had failed to register through inadvertence caused by their own procedures;
 - (b) BMW had filed a financing statement, albeit without the correct identifying number;
 - (c) there was no prejudice arising from the orders, apart from the prejudice necessarily flowing from the effect of restoring the PMSI priority that BMW would otherwise have been entitled to over prior AllPAP holders. Put another way, the only prejudice to AllPAP holders is the loss of a windfall gain arising through inadvertence (citing *Re Accolade Wines Australia Ltd* [2016] NSWSC 1023 at [52]; and
 - (d) such prejudice is a necessary element of any extension application, and so the burden of proving unacceptable prejudice falls on the any AllPAP holder who wishes to contend it.

Beechworth

39. This case was an interesting contest between an administrator's statutory lien under section 443D and a secured creditor, turning on whether proceeds of the sale of land amount to a "circulating asset".
40. The plaintiff, Beechworth Land Estates Pty Ltd (administrators appointed) (**BLE**), was an SPV established to develop land in Beechworth, Victoria for subdivision. When BLE went into administration, 28 lots remained to be sold. These lots were sold by the administrators. Nine other lots were transferred in specie to a secured creditor in reduction of its secured debt.

41. The proceeds of sale of the 28 lots, \$2.9 million, was not enough (together with other funds raised from other assets) to pay the administrators costs, let alone any other claims. A secured
42. The issue of interest for our purposes was the status of the \$2.9 million raised from the sale of the lots. Were the proceeds a “circulating asset” within the meaning of the PPSA? If they were, the administrators’ lien for their costs and expenses would take priority over them, at the expense of secured creditors: that is the effect of section 443E(3)(c) of the Act.
43. The competing contentions, briefly stated, were:
 - (a) The secured creditor held a mortgage over the lots, so the PPSA did not apply since the security was an interest in land, not personal property, noting section 12 specifically excludes interests in land from the definition of “security interest”, and noting that section 8(1)(f) excludes “a creation or transfer of interest in land”;
 - (b) Conceding that an interest under a mortgage in land is not a security interest, nevertheless once the land is sold and converted into cash, the cash itself is personal property and an interest in the proceeds a security interest.
44. The Court held that the proceeds of sale were a circulating asset, entitling the administrators to a declaration to that effect. However, the Court did not decide further issues raised at trial, namely whether the administrators:
 - (a) had breached section 442C(1) of the Act by disposing of the lots without the consent of the secured creditors or leave of the court under section 442C(2);
 - (b) were estopped from asserting the entitlement to the funds in light of conduct of the administrators prior to the sale.

D. Liens – a Practice Note

45. I have recently been required to consider the nature of interests in collateral on the appointment of administrators, for the purpose of identifying which assets may be the subject of vesting under section 267 of the PPSA.
46. In these cases, the companies had significant quantities of goods in their possession for the purposes of processing them, for a fee, for their customers.
47. The issue was whether these goods were the subject of any security interest held by the customers, and whether, if the interests had not been registered on the PPSR, the goods had vested.
48. The answer was that the goods did not vest, because of the nature of the company’s possession of the goods. The goods were not in the possession of the company under a

credit arrangement. The company in each case had the goods purely so that they could be processed, and then returned to the customer or sold at the customer's direction. It followed that the company had an interest in the goods under a contractual lien to secure the company's own processing fees. However, the company did not owe any money to the customers for the purchase or use of the goods in any respect.

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