

News with Clout

Restructuring Insolvency and Turnarounds

PPSR REVISITED

We are now in our fourth year under the new regime and it is clear, asset and security law will never be the same again. The old rule that possession is nine tenths of the law has never been truer in the security and finance context. In this regard there are a few gaps but generally on an insolvency appointment if the charge has not been perfected at the date of appointment the assets vest in the insolvent entity. **If in doubt, register.**

As you will know registration is only part of the picture but the final clincher. To back track a bit there must be a contract between the grantor (the borrowing entity offering the security) and the secured creditor. This has changed little over the decades we have been practicing. New securities in need of registration include:

- Retention of title
- Consignment
- Hires of longer than 3 months.

The contract creates the intention to attach the security interest which is then perfected by either appropriate registration or possession or both.

Then of course we have the issue of who comes first. A Purchase Money Security Interest (PMSI) is top of the pile. As you have no doubt gathered this is like the old fixed charge. But there must clearly be money provided for the purchase of the asset. This would appear now to include ROT and consignment. Next comes ALL Present and After Acquired Property (ALLPAP) Charges who outrank each other on date of registration.

To digress slightly again, from the case law it still does not matter what you call the charge, how it works will determine its nature.

Remember under the PPS Act there is now the provision to enable tracing of debtors or cash arising from the sale of assets subject to ROT or consignment.

Now as mentioned previously if the registration has not occurred, or was done outside the relevant time frame of 20 business days of the charge coming into existence, and within 6 months of the date of an insolvency appointment, then the assets purported to be subject to the charge vests in the insolvent entity.

All is not lost however because Section 588FM provides grounds for the secured party to make application to court if the failure was an accident, inadvertent or there was some sufficient cause or is not prejudicial to the position of creditors or shareholders or that it was just and equitable.

To address this, the court wants evidence of solvency at the time of the security agreement, whether any other secured creditor perfected their security from the 20 day point till actual registration.

This is all fertile ground for litigation.

As ever we welcome all your enquiries on restructuring, insolvency and turnarounds!



NEWS WITH CLOUT

Offering Corporate & Personal Solvency Solutions

The partners and staff wish to advise that the Mid North Coast office has a new postal address being:

PO Box 4453

Coffs Harbour Jetty NSW 2450

Apart from Formal Insolvency Services at Clouts we also Offer:-

Orchestrating Informal Arrangements with Creditors

Monitoring Businesses in Workout Situations

Conducting Negotiations with Secured & Unsecured Creditors

Business Risk Minimisation Reviews

Forensic Accounting Assignments

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Small Business Courses

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