PPSA UPDATE – RECENT DECISIONS

2 August 2017 City Insolvency Discussion Group

1. Thank you for allowing me to speak this morning on the topic of recent updates involving the *Personal Property Securities Act 2009* (Cth) (***PPSA***). The presentation largely involves an analysis of decisions coming out of the Federal Court of Australia and the Queensland, New South Wales and Western Australian Supreme Courts and their appellate jurisdictions which have been published over the course of, roughly, the last twelve months and which may have relevance to insolvency practitioners.

2. A number of these decisions relate to the extension of the period to register a security interest and the factors the Court will have regard to in determining whether to exercise its discretion to fix a later date to register a security interest under both the *Personal Property Securities Act 2009* and the *Corporations Act 2001* (Cth). This may be particularly critical in circumstances where the claimed interest is a Purchase Money Security Interest (**PMSI**) which, pursuant to the provisions of the *PPSA*, enjoys 'super-priority' over other security interests.

3. The cases which we will look at are:-

   a). *In the matter of Duke Contracting Australia Pty Ltd* [2017] NSWSC 767 (14 June 2017, Brereton J out of the Supreme Court of New South Wales);

   b). *Alleasing Pty Ltd, in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 656 (9 June 2017, Davis J out of the Federal Court of Australia);

   c). *In the matter of Accolade Wines Australia Limited and Ors* [2016] NSWSC 1023 (25 July 2016, Brereton J out of the Supreme Court of New South Wales);

   d). *NFT Specialised in Tower Cranes LLC v Machforce Pty Ltd* [2017] WASC 95 (4 April 2017, Strk AM out of the Supreme Court of Western Australia);

   e). *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] NSWCA 8 (6 February 2017, Batthurst CJ, Beazley P, Ward JA out of the New South Wales Court of Appeal);

   f). *Credit Suisse AG, Sydney Branch v Springsure Property Holdings Pty Ltd (in liquidation) (receivers and managers appointed)* [2017] QSC 142 (30 June 2017, Bond J out of the Supreme Court of Queensland);

4. First, it may be useful to refresh the priority rules under the *PPSA.* They can be summarised as follows:

   i). a perfected interest takes priority over an unperfected security interest;

   ii). priority between two *perfected* security interests is determined in favour of the earlier perfected security interest over the later perfected security interest;

   iii). priority between two *unperfected security interests* is determined in favour of the earlier *attached* security interest;

   iv). a Purchase Money Security Interest (**PMSI**) will prevail over other perfected security interests provided that it has been effectively registered within specified timeframes set out in section 62 of the *PPSA.*

5. Pursuant to section 21 of the *PPSA*, "*Perfection"* of a security interest can be achieved in some circumstances by possession or control of the collateral or by registration on the Personal Property Securities Register. The benefit of perfection by registration is:-

a). the timing of the perfection can be readily ascertained and, in turn, determining the order of priority is simplified; and

b). the security interest survives the bankruptcy or insolvency of the grantor and, consequently, can be enforced against a liquidator/administrator/trustee.

6. For a PMSI to enjoy the super-priority afforded under the *PPSA* it is necessary that it specifically identifies that the security interest is a PMSI (Section 62(2)(c) and section 62(3)(c)) and that, depending on the type of collateral, the PMSI is registered within a specified period as set out in section 62 of the *PPSA.*

7. The periods are as follows:-

Type of Collateral	Tangible Property	Intangible Property
Inventory	Security interest to be registered *before* grantor takes *possession* of collateral.	Security interest to be registered *before* the PMSI attaches to the inventory.
Not Inventory	Security interest to be registered **within 15 business days** of the grantor taking possession of the collateral.	Security interest to be registered within 15 business days of the grantor taking possession of the collateral or the creation of the PMSI.

Re Duke Contracting Australia Pty Ltd [2017] NSWSC 767

8. The first authority which we wish review today is the recent decision of Brereton J in *Re Duke Contracting Australia Pty Ltd* [2017] NSWSC 767 which was published on 14 June 2017. The facts of the matter are as follows:-

a). Komatsu Australia Corporate Finance Pty Ltd (**Komatsu**) provides finance to purchasers of its mining and earthmoving equipment – equipment is distributed by sister company, Komatsu Australia Pty Ltd, using finance leases, commercial hire purchases, equipment loans and lease rentals;

b). Komatsu entered a master chattel mortgage (**Master Mortgage**) with Duke Contracting Australia Pty Ltd (**Duke**) in its own right and in its capacity as trustee of the Duke Trust (**Trust**);

c). The arrangement involved Komatsu would advance money to borrower for the purpose of acquiring equipment and other items which may be included under a chattel mortgage (which would form part of Master Mortgage) and Duke and the Trust would grant a security interest to Komatsu in the equipment.

d). On 27 April 2014, Duke and the Trust requested a loan, secured by a mortgage, to finance the acquisition of a Komatsu Crawler Excavator (**Crawler**) which Komatsu agreed to advance.

e). Komatsu paid the loan moneys direct to the supplier on 7 May 2015 and acquired a security interest in the Crawler, which was a Purchase Money Security Interest.

f). On 17 April 2014, Komatsu registered a financing statement on the PPSR in respect of its interest in Crawler, the interest was lodged against Duke's ACN but Komatsu did not register the Trust's ABN.

g). In the interim period Komatsu introduced a new registration procedure requiring that trust's ABN's was to be used for registration in addition to the trustee company's ACN in accordance with the requirements of the *PPSA.*

h). On 31 July 2014, Komatsu lodged two further registrations against Duke's ACN and the Trust's ABN stating they were PMSIs. The registrations **were not made within 15 business days of Duke and Trust taking possession of the Crawler;**

i). On 20 March 2017 Duke went into voluntary administration and Duke's administrators notified Komatsu that the security interest had not been properly effected.

j). As Duke's administration occurred in excess of 6 months after registration, Komatsu's security interest **did not vest** in Duke. However, as the registration did not occur within 15 business days (as provided by section 62(3)(b) of the *PPSA*) Komatsu did not enjoy the priority that a perfected PMSI would have over other secured creditors.

k). Komatsu, then, sought an order, pursuant to section 293(1)(a) of the *PPSA*, to extend the number of business days required to perfect the PMSI for the purposes of section 62(3)(b) of the *PPSA.*

l). Section 293(1) and 293(2) of the *PPSA* provides that the Court may extend the number of business days in a period specified in section 62(3)(b) if satisfied that it is *just and equitable to do so even if the period has expired.*

m). Section 293(3) of the *PPSA* provides that the Court must take into account:-

i). whether the need to extend the period arises from accident, inadvertence or some other *sufficient* cause;

ii). whether extending the period would prejudice the position of any other secured parties or the other creditors;

iii). whether any person has acted, or not acted, in reliance on the period having ended.

n). Duke's administrators did not oppose leave being granted pursuant to section 440D of the *Corporations Act 2001* (Cth) to proceed against a company in administration.

o). Provided the security interest has been perfected prior to the insolvency event, administration does not prevent an extension of time (section 588FL of the *Corporations Act 2001* (Cth).[1]

p). As section 62(3) of the *PPSA* only affects priorities between secured creditors there is no reason that external administration would preclude an order extending the period for registration being made;

q). ***Inadvertence****.* Komatsu's failure was inadvertent – 1. Komatsu and its officers were ignorant of the requirement to register against the Trust's ABN and 2. Komatsu's officers were ignorant of the requirement to register a PMSI within 15 days and the consequences which would flow from that failure.

r). ***Prejudice****.* Prejudice under section 293(3)(b) of the *PPSA* to be distinguished from prejudice under 588 FM(2)(a)(ii) of the *Corporations Act 2001* (Cth). The tests can be distinguished:-

i). Section 588FM(2)(a)(ii) is directed at prejudice to creditors and shareholders from the "failure to register the collateral earlier". Test = compare the position of creditors

[1] *Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* (2003) 135 FCR 206
Cf Re OneSteel Manufacturing Pty Limited (administrators appointed) [2017] NSWSC 21

if an extension is granted with their position if there had been an effective timely registration;

ii). Section 293(3)(b) is directed at prejudice arising from "extending the period" which puts the focus on an order an extending the period. Test = compare the position if an extension is granted against their position if no extension is granted.[2]

s). Unsecured creditors would not be prejudiced – Komatsu's security interest is not liable to vest in Duke.[3]

t). The only secured creditor who would be potentially affected would be the NAB who had an AllPAP with registration date 1 July 2014 (after initial defective registration but before perfected registration).

u). If no order made fixing later date then NAB's interest prevails. If order made fixing a later date, then Komatsu's interest prevails.

v). Prejudice is not irrelevant but it is not conclusive either – otherwise an order would never be made in any case where it mattered – if an order is made fixing a later date there will almost always be prejudice. Prejudice will be of significant chiefly where it is coupled with *reliance*.

w). **Reliance**. Reliance is where a third party has dealt with the grantor in the belief that there was no perfected PMSI that would trump its interest.[4]

x). Finding that NAB likely searched Duke's ACN as well as the Trust's ABN and discovered Komatsu' initial registration which was expressly stated to be a PMSI. Further, Brereton J finds that a financier is generally primarily concerned with other AllPAP registrations so as to ascertain whether the grantor has granted security to any other lender over all their assets (*this appears to be Brereton J's conclusion as to lending practice and does not appear to have been supported by any evidence*);

y). NAB had been joined as a defendant and served and, having reviewed its position, stated that it did not intend to appear or make submissions. Accordingly, the Court can readily conclude that the prejudice to, and reliance by, NAB would justify refusing to extend the time. Accordingly, orders made extending the period pursuant to section 293(1)(a) of the *PPSA*.

9. **Take Home Message:-** Critical that when registered a security interest on the PPS Register, to include the ABN of any business which an entity conducts on behalf of a trust. The *Corporations Act* 2001 (Cth) and the *PPSA* apply different tests to determining the prejudice which may flow from fixing a later date to register. While it is possible to obtain an extension where it can be established that the failure to register within time was inadvertent and there has not been significant prejudice to other parties. However, Koatsu may have been somewhat fortunate that NAB did not appear or make submissions as to its reliance on and, had NAB opposed the orders, there may well have been a different result.

***In the matter of OneSteel Manufacturing Pty Limited (administrators appointed)* 118 ACSR 307.**

10. We turn now to Brereton J's decision in Re *OneSteel Manufacturing Pty Ltd* (administrators appointed) (2017) 118 ACSR 307.

[2] *Re Accolade Wines Australia Limited* [2016] NSWSC 1023 at 27.
[3] Duke's administrators did not appear or advance any evidence or submissions as to prejudice to unsecured creditors.
[4] *Re Accolade Wines Australia Limited* [2016] NSWSC 1023 at [30].

The facts of the matter are:-

11. Alleasing Pty Limited (**Alleasing**) was in the business of asset financing and leasing.

12. OneSteel Manufacturing Pty Limited (**OneSteel**) operated Iron Knob mines in South Australia.

13. On 16 October 2014, Alleasing and OneSteel entered into a master lease agreement. Upon the parties entering to rental schedules from time to time, the master lease would apply with respect to the particular goods which were the subject of the schedule.

14. One such rental was a "Crusher" which lease was effective from 1 May 2015 for a period of 6 years with a quarterly rental payment of $1,008,321.00.

15. A third party, Striker Australia Pty Limited (**SAPL**), designed, assembled, constructed and commissioned the Crusher which had been funded ($23,329,764.00) by Alleasing at OneSteel's request.

16. From 1 July 2015 (and pursuant to a separate rental schedule) Onesteel commenced renting from Alleasing spare parts for the Crusher for a term of six year at a quarterly rental of $5,924.00.

17. The spare parts had also been funded by Alleasing at OneSteel's request. Consequently, there were two rental agreements, one for the Crusher and the other for the parts, and Alleasing had a PMSI in relation to both items.

18. It was common ground between the parties that the Crusher lease and Parts lease were both PPS leases within the meaning of section 13 of the *Personal Property Securities Act 2009* (Cth) (***PPSA***). On 17 October 2014, Alleasing registered a financing statement in respect of the Crusher and on 7 July 2015 it registered a financing statement in respect of the Parts.

19. BGC Contracting Pty Ltd (**BGC**) held a security interest over "all present and after acquired personal property" (**BGC AllPAP**) of OneSteel which was registered on 11 July 2014.

20. Section 153 of the *PPSA* requires a financing statement to contain the grantor's details as prescribed by the regulations. Schedule 1, clause 1.3 of the *Personal Property Securities Regulations 2010* (Cth) (***Regulations***) provides that, where the grantor is a body corporate, then the prescribed details are the ACN of the grantor.

21. The combined effect of s.153 of the *PPSA* and c. 1.3, Sch1 of the *Regulations* is that the ACN of OneSteel was required to be included in the financing statement.

22. Alleasing's employees did not understand that the ACN had to be used and, instead, registered the PPS leases by reference to OneSteel's ABN.

23. While in many instances the last 9 digits of an ABN may correspond with the entity's ACN, however this is not always the case.

24. Section 164(1) of the *PPSA* provides that a registration describing particular collateral is ineffective **if, and only if,** there is:-

    a). a seriously misleading defect in the registration; or

    b). a defect mentioned in section 165 of the *PPSA.*

25. Section 165(b) provides that a registration is defective if (where goods are not capable of a search of the register by serial number) no search of the register by reference only to the grantor's details required by section 153 of the *PPSA* would disclose the registration.

26. On 7 April 2016, voluntary administrators were appointed to OneSteel. On 10 June 2016, the administrators informed Alleasing that they considered the registrations to be defective and ineffective and that, by virtue of section 267 of the *PPSA,* the security interest had vested in OneSteel.

27. On 14 June 2016, Alleasing lodged new financing statements for the Crusher and the Parts.

28. On 17 June 2016, Alleasing amended the original registrations to include OneSteel's 9 digit ACN.

29. Alleasing sought the following orders:-

    a). a declaration that security interest has been validly perfected and have not vested in OneSteel;

    b). alternatively, pursuant to section 588FM of the *Corporations Act 2001* (Cth), an order fixing the registration time of its security interest as the date on which the second registrations were lodged and an order under section 293(1)(a) of the *PPSA* extending the period for registration referred to in section 62(3)(b) of the *PPSA;* and

    c). a declaration that section 267 of the *PPSA* is invalid to the extent it operates to vest Alleasing's security interest in OneSteel as it is an acquisition of property otherwise than on just terms.

30. Alleasing's contentions:-

    a). no defect in original registrations;

    b). if there was a defect, it did not render the registration ineffective;

    c). in any event, a vesting under section 267 would be ineffective as it would be an acquisition of property other than on just terms with section 252B of the *PPSA* expressly providing that the *PPSA*'s terms do not apply insofar as they would have the effect of being an acquisition of property that was not on just terms;

    d). alternatively, the time for registration of the second registrations should be extended.

31. OneSteel's administrators contend that there was no effective registration and Alleasing's interest vested in OneSteel.

32. The PPS Registrar intervened to make submissions relating to the operation of the PPS Register.

33. By virtue of section 153(1) of the *PPSA* and item2(c) of the table (as the Crusher was not consumer property) the grantor's details were required to be included in registration. For a body corporate, the grantor's details are its ACN.

34. Alleasing submissions were essentially that "data" in section 153 was included in the financing statement. That is, the ABN was used which included the 9 digit ACN so the 'data' was there. Brereton J concluded that they are two different numbers used by different agencies. An 11 digit sequence is not the same as a 9 digit sequence included within it (at 16).

35. A search of ACN alone would not reveal the registrations. Accordingly, the registrations were defective (at 21)

36. Pursuant to section 164(1) of the *PPSA*, a defect will only cause a registration to be ineffective if (**and only if**) the defect is seriously misleading or it is a defect mentioned in section 165(b). It is not necessary that someone is actually misled (s. 164(2) of the *PPSA*).

37. Section 165 has several categories of defects, however, so far as is relevant here section 165(b) provides where the collateral is not required to be described by serial number then the registration is defective if a search of the grantor's details (required by section 153 of the *PPSA*) would not reveal the registration. Consequently, as OneSteel's ACN was not used the registrations were defective.

38. Alleasing contend that section 165(b) is not engaged as searches through B2G interfaces would reveal registration if only the ACN was used.

39. Section 170 of the *PPSA* limits the searches which may be undertaken to those authorised by section 171 and 172 of the *PPSA.* Section 171 of the *PPSA* does not authorise a search other than grantor's details as required by section 153 of the *PPSA*.

40. Section 302 of the *PPSA* sets out what is an approved form. The *Personal Property Securities (Approved Form) Instrument 2013* (Cth) approves searches via official PPS website and through a computer to computer interface such as a B2G provider.

41. A search by ACN, the only authorised search, would not reveal the original registration. The B2G interface searches other databases to acquire ABN's etc. The B2G then uses the additional information to conduct other searches of the Register. It is not a search of the Register using ACN only.

42. A search would not have revealed the registrations and so were ineffective pursuant to both section 165(1)(b) and 165(b) of the *PPSA.*

43. Even if Brereton J's conclusion is wrong, the registration was seriously misleading as a user who adopted the official PPSR website and searched ACN would not have discovered the registration.

44. Alleasing relied on NZ decision *Rabobank New Zealand Ltd v Stockco Ltd* [2011] 13 TCLR 191 (**Rabo NZ**) where a financing statement which had the names of a married couple (as opposed to the partnership which operated the farm) was not seriously misleading as the husband was known to the outside world as the person who operated the farm. Rabo NZ has received criticism in *Polymers International Ltd v Toon* [2012] NZHC 1897 where Polymers registered a financing statement under the NZ PPSA which did not have the debtor company's unique incorporation number. Asher J held that, where a registry returns only an exact match as to what is entered, the preferable approach is ask whether the error would prevent the registration from being disclosed in a properly formatted search. If yes, then the defect was seriously misleading.

45. Brereton J agrees with Asher J approach which construction furthers the purpose the *PPSA.* Here, a search of the ACN, being a properly formatted search of OneSteel, would not have revealed the registration.

46. OneSteel's administrators were, in fact, aware of the registration. It is not necessary that someone is actually misled (section 164(2) of the *PPSA*).

47. Section 267 of the *PPSA* provides that unperfected security interests vest in the grantor immediately prior to the grantor's winding up, administration or bankruptcy. As the interest was unperfected, it vested in OneSteel.

48. Section 252B provides, relevantly, that a provision of the *PPSA* will not apply to the extent that it would result in the ***acquisition of property*** other than on ***just terms****. Acquisition of property* is defined to have the same meaning as in paragraph 51(xxxi) of the Constitution. *Just terms* has the same meaning as in paragraph 51(xxxi) of the Constitution.

49. Section 51(xxxi) provides that the Commonwealth has power to make laws for "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".

50. Alleasing argued that if its interest in the Crusher and spare parts vested in OneSteel upon its insolvency, then the effect would be the acquisition of property other than on just terms (being only able to prove in the liquidation as an unsecured creditor).

51. Brereton found that section 267 does not affect an acquisition at all – it prescribes a consequence, in certain circumstances, of a lease entered into subject to the *PPSA*. That is, when Alleasing entered the Master Lease, to which the *PPSA* applies, there was the possibility that its interest would vest in OneSteel, in certain circumstances, *if Onesteel did not perfect its interest*.

52. Brereton posits Alleasing's argument is "synthetic and unreal" – it enlarges Alleasing's rights above what it had in fact and in law.

53. In any event, it is not an acquisition within the meaning of section 51(xxxi) – this section of the Constitution operates indirectly to reduce the content of other legislative power. The power is aimed at curtailing the acquisition of property for a relevant Commonwealth purpose – it is unlikely to apply to a third party acquiring rights.

54. If property can be acquired (under section 267 of the *PPSA*) it is not for a purpose for which the Commonwealth has power to make laws. It is for the *grantor's* own purpose.

55. The *PPSA* is designed to govern the adjustment of competing rights, claims or obligations and is not readily capable of legitimate characterisation as acquisition of property under section 51(xxxi) of the Constitution. It modifies rights that parties may have had in property.

56. Brereton J considers LeMiere J's decision in *White v Spiers Earthworks Pty Ltd* (2014) 99 ACSR 214 is "plainly correct" which decision supports the proposition that section 51(xxxi) of the *Constitution* has no application to vesting of an unperfected security interest in a grantor upon the grantor's insolvency.

57. Importantly, section 267 of the *PPSA* is a law with respect to insolvency and the Commonwealth has the power to make laws to vest a bankrupt's property, which are properly laws with respect to bankruptcy **not** the acquisition of property.

58. Section 588FM of the *Corporations Act* 2001 (Cth) provides that a perfected security interest vests in grantor if the grantor is the subject to an *insolvency event* and it was perfected after the later of:-

a). six months before the deemed commencement of the winding up or administration; or

b). the earlier of 20 business days after the security agreement that gave rise to the security interest came into force or the deemed commencement of the winding up or administration; or

c). a later time ordered by the Court under section 588FM of the *Corporations Act 2001* (Cth).

59. Section 588FM of the *Corporations Act 2001* provides that a Court can make an order fixing a later time if the failure to register the collateral earlier 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 on other grounds, it is just and equitable to do so.

60. Alleasing submitted that if original registrations were not effective then the time for subsequent registrations should be fixed to a later date.

61. It was conceded that the failure to register the collateral arose due to accident or omission or inadvertence and that it did not prejudice creditors or shareholders. OneSteel asserted section 588FM of the *Corporations Act 2001* (Cth) was not enlivened as, at the critical time, the interest was not perfected by registration.

62. Brereton J accepted OneSteel's submission and, for the section to apply, the interest must have been perfected at the "**critical time**". Section 588FM only immunises a perfected registration from vesting not an unperfected one.

63. As Brereton J found that vesting occurs from the time immediately before the insolvency event. Alleasing's contentions were dismissed.

64. **Take Home Message**:- Thoroughly review all claimed security interests and whether the registration of the claimed interest has all the mandatory details. Importantly, actual notice of the registration will not overcome an otherwise defective registration particularly if including only the mandatory details in a search of the PPSR would not reveal the security interest. The fact that some software obtains extraneous information from other databases and then runs several searches at once and that, such a search did in fact, reveal the registration does not cure the defect.

***Alleasing Pty Ltd, in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 656**

65. Subsequent to Brereton J's finding in the Supreme Court of New South Wales, Alleasing appealed to the New South Wales Court of Appeal. The parties ultimately settled the appeal but required orders of the Federal Court of Australia to ensure that the settlement agreement could be effected as the provisions of the *PPSA*, arguably,

66. Alleasing Pty Limited (**Alleasing**) applied for:-

a). an order pursuant to section 588FM of the *Corporations Act 2001* (Cth) (***CA***) fixing 12 May 2017 as the 'later time' for the purposes of section 588FL(2)(b)(iv) of the *CA* in respect of the registration of any security interests granted by OneSteel Manufacturing Pty Limited (**OneSteel**) to Alleasing under a new lease agreement; and

b). an order under section 293 of the *Personal Property Securities Act 2009* (Cth) (***PPSA***) extending the period for the purposes of section 62(3)(b) of the *PPSA* to 12 May 2017 in respect of the registration of any purchase money security interests (**PMSIs**) granted by OneSteel to Alleasing under that new lease.

67. Alleasing's proceedings in the Supreme Court of New South Wales were dismissed on 31 January 2017.

68. On 27 February 2017, Alleasing filed a notice of appeal in the New South Wales Court of Appeal and on 23 March 2017 OneSteel filed a Notice of Contention raising additional or alternative grounds upon which the first instance decision should be upheld.

69. Parties since settled the dispute but the settlement could not be effected unless Alleasing obtained orders from the Court granting relief pursuant to section 588FM of the *Corporations Act 2001* (Cth) fixing a later date for the registration of a new security interest pursuant to section 588FL of the *Corporations Act 2001* (Cth).

70. The effect of section 588FL(4) of the *Corporations Act 2001* (Cth) is that where a security interest which arises after the critical time first becomes enforceable against third parties, the interest will vest in the grantor even if registered within 20 business days after the security agreement came into force. Accordingly, the parties sought to fix a later time for the purposes of section 588FL(2)(b) to give effect to the settlement and to avoid the automatic vesting of the interest in OneSteel.

71. Evidence was advanced that if Court did not grant relief, Alleasing could not effect settlement and OneSteel and deed administrators will be obliged to continue litigating the appeal thus exposing OneSteel and deed administrators to costs and uncertainty of litigation.

72. Deed administrators supported application. The uncertainty and risk that OneSteel may have to deliver up the Crusher was disrupting sale process. Deed administrators believed that entering into settlement agreement may be beneficial to creditors and would increase value of the Iron Knob mine (with the Crusher being a critical component of the operation).

73. Section 588FM of the *CA* enables the Court to fix a later time for purposes of section 588FL(2)(b) if satisfied that it is just and equitable to grant that relief.

74. The purpose of an order under section 588FM of the *CA* is to avoid the vesting of a security interest and preserve the secured creditor's security – accordingly, it is relevant to consider the interests of creditors.

75. The particular prejudice which is relevant is the prejudice attributable to the failure to effect registration at an earlier time and where the delay causes prejudice to creditors who have transacted with the company to their detriment, being unaware of the creation of an earlier security interest.[5]

76. Registration in this instance occurred promptly and no prejudice had been suffered by creditors. Deed administrators were empowered by the DOCA to grant new security interests and the Crusher is critical to the mining operations. Davis J satisfied that it was just and equitable to fix 12 May 2017 as the later time for the registration of the new security interests.

77. Section 293 of the *PPSA* confers a power on Court to extend number of business days in a period specified in section 62(3)(b) of the *PPSA* if satisfied it is just and equitable to do so.

78. The order is sought as section 588FM of the *CA* extension only prevents the new security interest from vesting in OneSteel. Section 293(1)(a) order allows the new security interest to take the form of a PMSI which has priority over all other security interests,

79. In exercising discretion under section 293(1) of the *PPSA* to extend the 15 business days prescribed by section 62(3)(b) of the *PPSA,* the Court must take the following factors into account (section 293(3) of the *PPSA*):-

a). whether the need to extend the period arises from inadvertence, accident or some other sufficient cause;

b). whether extending the period would prejudice the position of any other secured parties or creditors; and

c). whether any person has acted or not acted in reliance on the period having ended.

80. Davis J cites Brereton J in *Re Accolade Wines* at [27] repeats the authority from Credit Suisse (discussed below). In extending the period for the purposes of section 293(3)(b) there will normally always be prejudice to creditors.

81. Davis J concludes sufficient cause has been shown and that no substantial prejudice or reliance has been demonstrated. As the interest was granted *after* all other interests there can be no prejudice or reliance – there are four other AllPAPs registered over OneSteel: 2 to BGC Contracting Pty Ltd (**BGC**), 1 to Export Finance and Insurance Corp (**EFIC**) and 1 to National Australia Bank Limited (**NAB**). BGC released Crusher from its AllPAPs, EFIC consented to the relief sought be Alleasing and the Crusher was excluded from NAB's security. None of those creditors will be prejudiced and none of them have relied on the period having ended.

82. **Take Home Message**:- If a new security interest is granted after the critical time, it is arguable that the interest vests in the grantor immediately upon its creation and, to this end, it may be necessary to seek orders to extend the time within which the interest is to be registered. It appears the decision was influenced by the fact that none of the parties who had AllPAPs

[5] Cites Brereton J in *Re Appleyard Capital Pty Ltd* [2014] NSWSC 782.

registered over the Crusher (whose interest would be subordinated to the PMSI) opposed the orders which were sought and the Court was satisfied that it was in the interests of creditors that the extension orders be made.

Re Accolade Wines Australia Limited **[2016] NSWSC 1023**

83. Another decision involving Alleasing Pty Limited and Alleasing Finance Pty Limited providing asset finance and leasing services.

84. Alleasing leased goods to customers for terms exceeding one year and, as a consequence, the leases are PPS Leases by virtue of section 13 of the *PPSA.*

85. Alleasing attempted to register their security interest on the PPS Register, however it only did so against the grantor's ABN not its ACN.

86. On 15 June 2016, Alleasing lodged fresh finance statements.

87. 31 grantors in total, some of which consented the orders sought, some which did not oppose the orders sought and some of which did not respond.

88. Again, the Court considered section 588FL(2) of the *Corporations Act 2001* (Cth) which provides that a security interest which is perfected, registered or becomes enforceable against a third party after the latest of:-

a). six months before the critical time;

b). 20 days after the security agreement came into force; or

c). Such later times as the Court may fix under section 588FM of the *Corporations Act 2001* (Cth).

89. The Court considered section 588FM where the Court may fix a later time if the failure to register was inadvertent, accidental or some other sufficient cause or is not of such a nature as to prejudice the position of creditors or on other grounds if it is just and equitable to grant relief.

90. For the purpose of section 588FM(2)(a)(i), inadvertence includes the failure to advert or understand the requirement for registration within the specified period and innocent error in the sense of failure to register through ignorance of the legal requirement to do so, or the consequences of not doing so. Inadvertence will readily be found where an error of a secured creditor in not attending to registration of its security within time is innocent and does not result from any disregard of its statutory obligations (at 14).

91. Where the grantor is shown to be financially stable, then it is unlikely that a "critical day" will arise in the foreseeable future (at 19) and, to this end, granting relief is unlikely to prejudice any person. However, if the Court is not satisfied that there will be no unsecured creditor which is prejudiced then the Court may impose conditions such as a stay on the operation of an order or by reserving leave for a creditor to set aside the order in the event of a liquidation or administration.

92. There was no evidence that Accolade Wines was insolvent. The security interest claimed by Alleasing was confined to specific collateral which was the subject of the lease and, to this end, no creditor was prejudiced by the delay in Alleasing registering its security.

93. Interestingly, Brereton J concludes, in this instance, that financiers will search ACN, ABN and the company name, which is at odds with his finding as to his earlier decision regarding OneSteel (by reference to OneSteel's ABN only) had a defect which was *seriously misleading.* The finding was based on expert evidence provided in respect of lending practices of financiers.

94. Orders made extending the period referred to in section 62(3)(b) of the PPSA giving liberty to any affected creditor to apply to set aside the extension. Five factors in favour of such an order:

a). Alleasing had not ignored requirement to register, it simply used the ABN instead of the ACN;

b). The PMSIs were in respect of specific collateral;

c). An AllPAP is, by its nature, liable to be trumped by a PMSI;

d). The prejudice which would be suffered would be losing a 'windfall' which the creditor would only acquire through inadvertence; and

e). It is likely the subsequent AllPAPs, being 'prudent financiers, had notice of Alleasing's security interest.

***NFT Specialized in Tower Cranes LLC v Machforce Pty Ltd (in liq)* [2017] WASC 95**

95. NFT Specialized in Tower Cranes LLC (**NFT**) is a company incorporated in Abu Dhabi, United Arab Emirates and rents and supplied tower cranes for building and construction works. Machforce Pty Ltd (**Machforce**) was a supplier of hoists and mast-climbers for hire, installation and maintenance.

96. Between the period 19 September 2014 and 9 July 2015, NFT entered into six rental agreements (**Rental Agreements**) for the hire of several cranes. NFT did not obtain independent legal advice prior to entering the Rental Agreements and was not aware of any of the obligations imposed by the *PPSA* or the *Corporations Act 2001* (Cth).

97. NFT did not lodge any financing statement regarding its interest in the cranes on the PPS Register.

98. NFT asserted that the parties had met in Singapore on 16 January 2016 and orally terminated each of the Rental Agreements. Machforce (and its liquidators) deny that the Rental Agreements were terminated.

99. On 29 March 2016, Machforce went into administration. The administrators lodged financing statements on the PPS Register, one being 'all present and after-acquired property' and six with respect to each crane.

100. On 6 April 2016, the administrators of Machforce notified NFT that they had determined that the cranes vested in Machforce immediately prior to their appointment on 29 March 2016.

101. On 4 May 2016, Machforce went into liquidation.

102. Westpac has a first registered 'all present and after acquired personal property' over Machforce's assets and the liquidators informed Machforce's creditors that funds received from the sale of the cranes will be distributed to Westpac in partial satisfaction of the moneys due to Westpac.

103. One crane was subsequently returned to NFT with the balance being retained by the liquidators on the basis that they had vested in Machforce.

104. Issue 1:- NFT argued that the Rental Agreements were not PPS Leases and, in any event, the Rental Agreements had been terminated.

105. Machforce (by its liquidators) argued that the term of the Rental Agreements was for a least twelve months and the Rental Agreements continued to operate consistent with the practice of the parties. Further, NFT continued to charge Machforce fees in connection with the lease

of the cranes and the liquidators denied that the Rental Agreements had been terminated by NFT.

106. Finding:- the Rental Agreements were not PPS Leases within the meaning of section 13(1)(c) of the *PPSA.* They were not automatically renewable nor renewable at the option of one of the parties. However, the Rental Agreements did give rise to security interest as 'PPS Leases within the meaning of section 13(1)(d) of the *PPSA.* While rental was not required to be paid until a certain date, other rights and obligations arose prior to the commencement of the Rental Agreements.

107. Finding:- Rental Agreements were not terminated on 16 January 2016. No clear and unequivocal statement made by, or on behalf of NFT, to terminate the Rental Agreements. Further the charging of rent and lodgment of a proof of debt was consistent with a finding that the Rental Agreements had not been terminated. Some form of notice or act was required to evidence the election to terminate.

108. Issue 2: Status of NFT's security interests at the date of the administration. NFT was not in possession and had not taken steps to re-take possession of the cranes. Accordingly, NFT was not in possession or control of the cranes. NFT lodged a financing statement on 11 May 2016 *after* the date of the appointment of administrators. NFT's security interest, as at appointment, was unperfected.

109. Issue 3:- Did NFT's interest in the cranes vest pursuant to section 267 of the *PPSA.* Yes, as section 267 of the *PPSA* provides that a security interest granted by a corporation which is unperfected at the commencement of winding up or administration will vest in the corporation the subject of the administration or winding up. The relevant time is the Appointment Date and, as NFT had not perfected the interest, the interest vested in Machforce.

110. Issue 4:- Extension of time and the application of 588FM of the *Corporations Act* 2001 (Cth). If the security interest survived the termination. Then NFT sought an extension of time to 11 May 2016 to register its interest on the PPSR for the purposes of section 588 FM of the *Corporations Act 2001* (Cth).

111. NFT submitted that regard should be had to the decision in *In the matter of Accolade Wines Australia Ltd* [2016] NSWSC 1023, where for the purpose of "section 588FM(2)(a)(i), inadvertence includes failure to advert to or understand the requirement for registration within the specified period, and innocent error in the sense of failure to register through ignorance of the legal requirement to do so, or the consequences of not doing so". NFT claimed it was inadvertence as:-

a). the Rental Agreements had been terminated;

b). the law applicable to the Rental Agreements was the law of the UAE not of Australia;

c). NFT was not aware that even though it was the owner of the cranes it was required to register a security interest against that collateral.

112. Finding:- NFT fails as section 588FM has no application. The security interest existed and was unperfected. An order under section 588FM affects the date on which a financing statement must be perfected by registration under section 588FL – the security interests did not vest under section 588FL but under section 267 of the *PPSA.*

113. Section 588FL will only apply where a security interest has been perfected by registration **and no other means at the critical time.** As no financing statement had been lodged at the date of the appointment, section 588FL(2)(a) has no application.

114. In *Mentha, in the matter of Arrium (administrators appointed)* [2016] FCA 972, which was relied upon by NFT, the security interest arose after the critical time. Here, the security interest

existed prior to appointment and, upon appointment, vested in Machforce – No new security interest was created.

115. Even if new security interests had been created, they had not been perfected and therefore did not meet the requirements of section 588FL(2)(a)(ii).

116. Even if an extension of time could have been granted, Court would decline the relief on the basis that it would not be justified on the basis of inadvertence. At least as early as 30 January 2016, NFT was aware of the *PPSA* and the requirement to register on the PPS Register. Further, Court was not satisfied that that relief pursuant to section 293(1)(a) of the *PPSA* would be appropriate as Acting Master Strk was not satisfied that the need to extend the time had arisen as a result of an accident, inadvertence or some other sufficient cause.

***Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] NSWCA 8**

Bathurst CJ, Beazley P, Ward JA, delivered on 6 February 2017.

117. In March 2013, General Electric International Inc. (**GE**) agreed to lease turbines to Forge Group Power Pty Ltd (**Forge Power**) – the appellants, Power Rental Op Co Australia, LLC and Power Rental Asset Co Two, LLC (**Appellants**), acquired GE's interest when their parent company, APR Energy Plc, acquired GE's rental business.

118. The turbines were valued at US $44 million.

119. The lease commenced on 1 January 2014.

120. On 11 February 2014, Forge Power appointed voluntary administrators.

121. On 18 March 2014, Forge Power went into liquidation.

122. GE did not register a financing statement on the PPSR and GE's interest remained unperfected.

123. At first instance it was found that the *Personal Property Securities Act* 2009 (WA) (***PPSA***) did apply to the lease and, accordingly, it was a PPS Lease as that term is defined under the *PPSA.*

124. By virtue of section 267(2) of the *PPSA*, GE's unperfected security interest vested in Forge Power.

125. In concluding that the lease was a PPS Lease regard was had to section 13(1) of the *PPSA* and that:-

a). GE was regularly engaged in the business of leasing the goods; and

b). the turbines were not fixtures for the purposes of the *PPSA.*

126. The relevant facts were:-

a). On 23 January 2013, Forge Power entered a design, build, operate and maintain contract with Regional Power Corporation;

b). Forge had to carry out "Works" and perform "Services" and the scope specifically contemplated the lease of gas turbines (GE TM2500 GTG units);

c). At the end date (being 31 December 2015 but with options to extend) the plant was to be handed over to Horizon Power – it was common ground that the turbines would not be handed over to Horizon Power;

d). Forge Power was obliged to supply electricity to Horizon Power from the commence of the operations and maintenance phase until the end date;

e). "Plant" referred to the temporary power station though there was contemplation that a permanent station would be constructed;

127. 5 March 2013, Forge Power entered into lease with GE for the lease of four turbines for a period of two years commencing 1 January 2014.

128. Express provision that the lease was to be a "true lease and not a sale or financing transaction".

129. GE was obliged to provide equipment suitable for connection and to provide services to Forge Power.

130. Forge Power responsible for transportation of the Turbines and for the prompt and timely return of the turbines.

131. There were express provisions that the turbines remained the property of GE and that the turbines were to remain personal property at all times notwithstanding they may be affixed to real property.

132. On 22 October 2013, GE sold its temporary power generation business and the Appellants acquired GE's interest.

133. The turbines weighed approximately 102 metric tonnes, 21,305 mm long, 6,715 mm wide and 9,363 mm high.

134. The turbines were affixed to the connections (pipelines/conductors) and the seismic and wind kits.

135. On 11 February 2014, administrators were appointed to Forge Power.

136. On 18 March 2014, Forge Power went into liquidation.

137. On 26 February 2014, GE terminated the Lease (which it had a right to do if an insolvency event occurred).

138. Forge Power's administrators informed GE that they considered Forge Power had acquired title by virtue of the *PPSA.*

139. Two issues:-

a). what is the test to be applied when in determining whether a good is "affixed to land"; and

b). whether the turbines were affixed to the land.

140. Forge Power contended that common law test of affixation applied *quicquid plantatur solo, solo cedit* (whatever is affixed to the ground belongs to the ground). The Appellants contended that the definition contained in section 10 of the *PPSA* introduced a bespoke meaning of "affixed to land".

141. The Appellants argue that all that is required is a "non-trivial" attachment being "affixed in a way that couldn't be easily removed. Whether the affixation is temporary or permanent is irrelevant.

142. At first instance, Court found that common law test is to be applied, that is, whether an item has become a fixture depends upon the objective intention with which the item was put in

place, having regard to the degree and object of annexation, but each case depends on its own circumstances.[6]

143. In determining the purpose or object of affixing the item, the Court may consider:-

a). whether attachment was for the better enjoyment of the property generally;

b). the nature of the property the subject of the affixation;

c). whether the item was intended to be in position either permanently or temporarily;

d). the function to be served by the annexation of the item.

144. In determining the degree of annexation, the Court may consider:-

a). whether removal would cause damage to the land or buildings to which the item is attached;

b). the mode and structure of annexation;

c). whether removal would damage or destroy the attached item;

d). whether the cost of removal would exceed the value of the attached item.

145. At first instance, the following 12 factors contributed to conclusion that the items were not attached to the land with the intention that would become fixtures:-

a). the turbines were designed to demobilised and moved to another site in a short time – the trailers kept their wheels on at all times;

b). the turbines were only intended to be on site for a period of two years;

c). Forge Power was contractually bound to return the turbines;

d). the seismic and windkits were installed to prevent damage and were designed to be easily removed and transported;

e). the attachment to the land (kits and utilities) was for the better enjoyment of the turbines, not the land;

f). removal would cause no damage to the land;

g). removal would not damage turbines;

h). cost of removal was modest in comparison to the cost of the turbines;

i). the contract expressly provided that title to the turbines would not pass to the owner of the land;

j). the contract expressly provided that the turbines remained personal property;

k). Forge Power did not own site and there was no intention by Forge to gift the turbines to Horizon Power;

l). GE prescribed the mechanism for attachment and did not intend the turbines to become property of the owner of the land.

[6] *Agripower v Blomfield* [2015] NSWCA 30 at [74] – [81].

146. Appellant's argue that the language of the statute is determinative, not pre-existing common law concepts. The *PPSA* was introduced to make substantial changes to the application of common law and equitable principles across the Commonwealth, States and Territories.

147. The process of construction of statutory authority starts with the words of the statute, read in their context. Appellants argue that only relevant criterion is affixation.

148. Appellants argue that had Parliament intended the common law to apply, they would have said "fixtures means goods, other than crops, that are fixtures under the common law".

149. Further, the definition given by the Appellants works more consistently with the surrounding provisions. The express exclusion of "fixtures" from land is otiose if *PPSA* has common law meaning.

150. In enacting *PPSA* Parliament must have been aware of the common practice of separating interest in land and fixtures and the substantial expansion of "fixtures" in duties legislation.

151. The appellant's pressed a "bright line" test – that is, the context of the *PPSA* is designed to facilitate an observer making a ready assessment whether something was a fixture by observing whether it had a 'non-trivial attachment'.

152. Forge Power argued that accepting Appelant's interpretation would introduce a new species of property – a non-fixture fixture – which would lead to the same uncertainty and complexity which the *PPSA* was designed to overcome.

153. Forge Power contended that where Parliament uses well know legal terms it intends them to have that technical legal meaning. In any event, even without that presumption, by reference to the text, structure and objects of the *PPSA* it is intended that interest in land are to be dealt with under State, common law or Commonwealth law whereas security interests in real property are to be dealt with under the *PPSA.*

154. Finding:

a). it is clear that the *PPSA* was intended to address the uncertainty and complexity of the various statutory regimes (at 83);

b). the 'bright' line test creates its own uncertainty in determining whether an attachment is trivial or not (at 85);

c). the matter turns on degree of affixation.

155. Finding:-

a). Seismic wind kit clearly intended for better enjoyment of the turbines (144);

b). Pipeline/fuel connection clearly for mixed purposes – part for the better enjoyment of the turbines (delivery of the electricity generated) and part for the better enjoyment of the land being used as a power station grid, however, connection was not so substantial or enduring as to warrant a finding they had become fixtures as they could be removed or detached (145);

c). Power station was temporary and while parties could have extended the term indefinitely, the arrangement between the parties was for a finite period (146);

d). While temporary attachment is not determinative, it is not irrelevant (147);

e). not convinced that first instance judge erred in finding that the turbines did not become fixtures in the common law sense.

***Credit Suisse AG, Sydney Branch v Springsure Property Holdings Pty Ltd (in liquidation) (Receivers and Managers Appointed)* [2017] QSC 142**

Bond J, Delivered on 30 June 2017

156. Credit Suisse AG, Sydney Branch (**Credit Suisse**) entered into agreements with Springsure Creek Coal Pty Ltd (**SCC**) being a Guarantee Facilities Agreement dated 29 June 2012 (**GFA**) and Security Trust Deed dated 6 July 2012 (**Trust Deed**).

157. GFA was the primary facility agreement and recorded terms upon which Credit Suisse would provide the facility.

158. The Trust Deed regulated the exercise of rights under the GFA.

159. On 11 February 2014, Credit Suisse and Springsure Property Holdings Pty Ltd (in liquidation) (Receivers and Managers Appointed)[7] (**SPH**) executed three instruments which had effect of adding SPH as a guarantor of SCC's obligations under the GFA and also charging certain property of SPH as security for SPH's obligations.

160. Instruments were:-

    a). First Amendment Deed (**First Deed**) – amended and restated GFA (and made SPH a guarantor) and amended and restated STD;

    b). General Security Agreement (**GSA**) which charged SPH's property as security for performance of SPH's obligations under GFA;

    c). Accession Deed – SPH was taken to be a party to the Trust Deed.

161. In 2014, SPH acquired 3 lots of land, First Kilmore Access Road, Second Kilmore Access Road and Turkey Road Property (**Properties**).

162. Voluntary administrators appointed to SPH on 22 September 2014 which constituted an event of default under the GFA.

163. SPH was unable to pay the amounts demanded by Credit Suisse.

164. Credit Suisse claimed that by virtue of the 11 February 2014 instruments, SPH charged its interest in the Properties to Credit Suisse. SPH contended that the proper construction of the GSA provided that the property charged by SPH did not include the *after-acquired* land.

165. Separate question be tried: "*On the proper construction of the GSA, the Properties are "Collateral" within the meaning of clause 2.1 of the GSA."*

166. First Amendment Deed took effect from due execution of the GSA, Accession Deed, a mortgage granted by SPH in "Den-Lo Park" and a specific security agreement granted by SPH's parent company in relation to shares in SPH held by the parent company.

167. On date that First Deed to effect:-

    a). GFA was amended and restated and finance facility of $67.3m with potential to increase to $112.3m;

    b). Trust Deed was amended and restated to be binding upon parties;

    c). Plaintiff released certain property which had been security.

[7] Among other parties.

168. Relevant terms of GFA:-

a). finance facility was made available to SCC by "Participants";[8]

b). each guarantor:-

i). guaranteed to Credit Suisse and associated entities (**Finance Parties**) the punctual performance of obligations under "Finance Documents";

ii). undertook to the Finance Parties that where a relevant obligor (including SCC and SPH) did not pay then the guarantor would pay as if was principal debtor;

iii). indemnified the Finance Parties against loss in certain circumstances.

c). Finance Documents included the GSA, the Trust Deed, First Deed, GFA;

d). "Assets" included "present and future properties, revenues and rights of every description";

e). Other provisions supported the granting of security over all assets as other clauses contemplated how SPH could deal with assets which it acquired in the future;

169. Relevant terms of GSA:-

a). SPH granted security to Credit Suisse (as "Secured Party") in "Collateral" to secure payment of "Secured Money";

b). SPH was obliged to comply with all of its obligations and undertakings as set out in the "Transaction Documents" (was cross referenced to the meaning given in Trust Deed and included the GFA);

c). "Collateral" defined as of the "Grantor's present and after-acquired property, including anything in respect of which the Grantor has at any time a sufficient right, interest or power to grant a Security";

d). "Property" defined as "'property' or 'asset' includes any real or personal, present or future, tangible or intangible property or asset and any right, interest, revenue or benefit in, under or derived from the property or asset";

e). GSA had provision for manner in which SPH could deal with future assets acquired by it;

f). there was a provision which provided that the certain words has meaning given to them in the *Personal Property Securities Act 2009* (Cth) (***PPSA***) including, relevantly, "property".

170. SPH contended that the appropriate definition to use was the PPSA definition, which does not include real property. Credit Suisse contended the broader definition ought to be adopted which would result in the real property being charged by SPH.

171. Bond J acknowledges that preferring Credit Suisse's interpretation would render "after-acquired" redundant and superfluous. However, the fact that specific words become superfluous is not determinative of construction – other words included in the catch-all PPSA definition were 'bankrupt', 'located', 'intermediated security' which did not appear in the GSA.

172. Contextual matters:-

[8] Credit Suisse was expressly defined as a participant.

a). Use of word “including”, words were extremely broad, were intended to be broad and to enhance rather than limit the scope.

b). Phrase “present and after acquired property” cannot be disaggregated to “present” (without a noun) and “after-acquired property” (with a noun), so parties must have intended to use the ordinary word “property” and, thereafter, the ordinary and natural meaning of “after-acquired” and “present”;

c). use of Collateral as “present property and after-acquired property” problematic for SPH;

d). land contemplated to be capable of being security eg. Three clauses use expression “any Land that is part of the Collateral”;

e). there would be absurd result if present land was included but not after-acquired land;

f). wide interpretation of Collateral is suggested.

173. Four arguments were raised by SPH dismissed:-

a). If extrinsic evidence admissible, would have shown that it was not the parties objective commercial aim that real property acquired after would be included as security – Bond J – even if it were admissible, would not undermine possibility that the financier would want greater securitisation of its facility;

b). Relied on *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 216 – where there is ambiguity a contractual provision should be interpreted in favour of surety. Not followed as construction preferred by SPH is not fairly arguable by reason by other rules of construction;

c). Intention was to grant a security in accordance with *PPSA*. Agreed - but to be compelling the intention must have been to limit the phrase “after-acquired property” to the *PPSA* sense – clearly wasn’t supposed to be so confined;

d). Variations of the theme “if they had meant that, they would have said it differently” – not convincing – is a game all parties can play on issues of interpretation.