CITY INSOLVENCY DISCUSSION GROUP

PPSA UPDATE – RECENT CASES

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DECISIONS

- *Re Duke Contracting Australia Pty Ltd* [2017] NSWSC 767
- *Alleasing Pty Ltd, in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 656
- *In the matter of Accolade Wines Australia Limited and Ors* [2016] NSWSC 1023
- *NFT Specialised in Tower Cranes LLC v Machforce Pty Ltd* [2017] WASC 95
- *Power Rental Op Co Australia, LLC v Forge Group Power Pty Ltd (in liq) (receivers and managers appointed)* [2017] NSWCA 8
- *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);*

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REFRESHER ON PRIORITIES

Generally:-

- A perfected security interest takes priority over an unperfected security interest
- Priority between two perfected interests is determined in favour of the earlier perfected interest over the later perfected security interests
- Priority between two unperfected security interests is determined in favour of the security interest which ‘attached’ to the personal property.
- A Purchase Money Security Interest (**PMSI**) has super priority over other security interests (section 62 of the *Personal Property Securities Act 2009* (Cth)

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TIMING OF REGISTRATION

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 attached 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.

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RE DUKE CONTRACTING AUSTRALIA PTY LTD [2017] NSWSC 767

Supreme Court of New South Wales, Brereton J, 14 June 2017

- Komatsu Australia Corporate Finance Pty Ltd ("**Komatsu**"), a provider of finance for purchasers of mining and earthmoving equipment supplied by a related company, Komatsu Australia Pty Ltd.
- Komatsu entered a 'master chattel mortgage' with Duke Contracting Australia Pty Ltd in its own capacity and in its capacity as trustee for the "Duke Trust"
- Duke had its own ACN and the Duke Trust had a separate ABN.
- From time to time, Komatsu would advance money to Duke to purchase equipment with Duke and the Trust granting a security interest in the equipment.

RE DUKE CONTRACTING AUSTRALIA PTY LTD [2017] NSWSC 767 (CONT'D)

- On 27 April 2014, Duke requested Komatsu advance it a loan to acquire a Komatsu Crawler Excavator which loan was to be secured by a mortgage
- On 7 May 2014. Komatsu advanced the moneys to the supplier.
- Komatsu lodged a financing statement on the PPSR in respect of its interest in the excavator, but did not include the Trust's ABN.
- Komatsu introduced new registration procedures and lodged two further financing statements including Duke's ACN and the Trust's ABN noting that the interests were PMSIs
- On 20 March 2017, voluntary administrators were appointed to Duke and its administrators informed Duke that registration of its security interest had not been effective

RE DUKE CONTRACTING AUSTRALIA PTY LTD [2017] NSWSC 767 (CONT'D)

- The registration did not occur within 15 business days of Duke taking possession of the excavator as required by section 62(3)(b) of the *PPSA*
- While the security interest did not vest in Duke (as the insolvency event occurred in excess of six months after registration), the security interest did not attract the super-priority ordinarily afforded to a PMSI holder
- Komatsu applied for an order under section 293(1)(a) of the *PPSA* for an order extending the number of business days for the purpose of section 62(3)(b) of the *PPSA.*
- Section 293(1)(a) provides that a Court may make an order extending the number of business days if it is satisfied that it is "just and equitable to do so"
- Section 293(2) allows the Court to extend the number of business days even if the period has expired.

RE DUKE CONTRACTING AUSTRALIA PTY LTD [2017] NSWSC 767 (CONT'D)

- In making an order under section 293(3) of the *PPSA*, the Court **must** take into account:-
  a) whether the need to extend the period arises from accident, inadvertence or some other sufficient cause;
  b) whether extending the period would prejudice the position of any other secured creditor;
  c) Whether any person has acted (or not acted) in reliance on the period having ended.

RE DUKE CONTRACTING AUSTRALIA PTY LTD [2017] NSWSC 767 (CONT'D)

- Duke's security interest was perfected prior to the insolvency event, an extension of time was available pursuant to section 588FL of the *Corporations Act* 2001 (Cth).
- **Inadvertence**: Brereton J found the failure to register was inadvertent. Komatsu and its officers were ignorant of the requirement to register against the Trust's ABN and the requirement to register the PMSI within 15 business and the consequences which would from not doing so.
- **Prejudice**: Unsecured creditors would not be prejudiced as Komatsu's interest was not liable to vest in Duke. The only creditor who would be prejudiced would be NAB who had an AllPAP which was registered on 1 July 2014.
- **Brereton J** - Prejudice is not irrelevant but it is not conclusive. Prejudice will be significant chiefly when coupled with reliance.

RE DUKE CONTRACTING AUSTRALIA PTY LTD [2017] NSWSC 767 (CONT'D)

- **Reliance**: Reliance is where a third party has dealt with the grantor in the belief that there was no PMSI which would take priority over its interest.
- Brereton J finds that NAB would likely have searched Duke's ACN and the Trust's ABN and, consequently, discovered the initial registration which expressly stated the interest was a PMSI.
- NAB had also been joined to the action, served with the application and had indicated that it did not intend to appear or make submissions. In those circumstances, the Court was prepared to readily conclude that the prejudice, if any, suffered by NAB would not justify the refusal of the extension sought by Komatsu.

RE ONESTEEL MANUFACTURING PTY LIMITED (ADMINISTRATORS APPOINTED) [2017] NSWSC 21

Supreme Court of New South Wales, Brereton J, 31 January 2017

- Alleasing Pty Limited (**Alleasing**) conducts a business of asset financing and leasing. OneSteel Manufacturing Pty Ltd (**OneSteel**) operates the Iron Knob mine in South Australia.
- Alleasing and OneSteel entered a 'master lease agreement' which would govern items which OneSteel leased from Alleasing from time to time by way of rental schedules.
- One such rental was a "Crusher", which lease was effective from 1 May 2015 for a period of 6 years with quarterly rent in excess of $1,000,000.00. The Striker was supplied by Striker Australia Pty Ltd and funded by Alleasing at OneSteel's request.
- A further rental arrangement was entered between Alleasing and OneSteel relating to spare parts for the Crusher commencing 1 July 2015.
- It was common ground between the parties that the "Crusher" lease and the "Parts" lease were PPS Leases within the meaning of section 13 of the *PPSA.*
- Alleasing's employees, using a Business to Government interface, did not include OneSteel's ACN when registering Alleasing's security interests against OneSteel. Only OneSteel's ABN was used.

RE ONESTEEL MANUFACTURING PTY LIMITED (ADMINISTRATORS APPOINTED) [2017] NSWSC 21 (CONT'D)

- The Crusher lease was registered on the PPS Register on 17 October 2014 and the Parts lease was registered on the PPS Register on 7 July 2015.
- BGC registered an AllPAP against OneSteel on 11 July 2014. BGC released the Crusher from the AllPAP on 29 October 2014.
- The combined effect of section 153 of the *PPSA* and clause 1.3 of Schedule 1 of the *PPSA* mandated that OneSteel's ACN be used. OneSteel's ACN was identical to the last 9 digits of OneSteel's ABN.
- A defect in registration of a security interest will only be ineffective if, **and only** if, the defect is seriously misleading (section 164(1)(a) of the *PPSA*) or is a defect mentioned in section 165 of the *PPSA* (section 164(1)(b).
- It is not necessary to establish that any person was *actually* misled by the defect (section 164(2) of the *PPSA*

RE ONESTEEL MANUFACTURING PTY LIMITED (ADMINISTRATORS APPOINTED) [2017] NSWSC 21 (CONT'D)

- Court found that the registration was 'seriously misleading' under section 164 of the *PPSA*..
- Further, under section 165(b) of the *PPSA*, the registration was defective as no search of OneSteel's details (being its ACN) would have disclosed the registration.
- Alleasing argued, unsuccessfully, that several business to government searches would have revealed the registration – Brereton J rejected this submission on the basis that those interfaces sourced information from other sources and were not searches authorised by section 171 and 172 of the *PPSA*
- Section 267(1) and 267(2) of the *PPSA* provides that where a security interest is unperfected **and** an administrator is appointed to a body corporate (among other events) then the unperfected security interest will vest in the grantor immediately before the appointment of the administrator.
- Alleasing's security interest was not perfected and liable to vest in OneSteel at the time immediately prior to the appointment of administrator's to OneSteel.

RE ONESTEEL MANUFACTURING PTY LIMITED (ADMINISTRATORS APPOINTED) [2017] NSWSC 21 (CONT'D)

- Alleasing relied on section 252B of the *PPSA* which provides that no provision of the *PPSA* will apply to the extent where it operates in an 'acquisition of property' otherwise than on 'just terms'
- The *PPSA* defines the terms "acquisition of property" and "just terms" contained in section 51(xxxi) of the *Constitution*
- Alleasing asserted that the vest of its interest in OneSteel would have been an acquisition of property which was not on just terms
- Brereton J finds that the vesting of the interest in OneSteel was not an acquisition of property but a consequence of certain events happening. That is, the vesting is the consequence of holding an unperfected security interest when the grantor goes into administration
- The purpose of section 51(xxxi) is to limit the exercise of legislative power and aimed at the acquisition of property for a public purpose.
- The *PPSA* is designed to govern competing rights, claims or obligations and is not readily capable of being characterised as an acquisition of property for a public purpose.
- Brereton J followed Le Miere J's decision in *White v Spiers Earthworks Pty Ltd* (2014) 99 ACSR 214 and section 252B does not preclude the interest from vesting in OneSteel.

RE ONESTEEL MANUFACTURING PTY LIMITED (ADMINISTRATORS APPOINTED) [2017] NSWSC 21 (CONT'D)

- Alleasing then sought an order pursuant to section 588FM of the *Corporations Act 2001* (Cth) to fix a later date for the purposes of section 588FL of the *Corporations Act 2001* (Cth)
- The Court may fix a later time (for the purposes of section 588FL) if satisfied that:-
  a) the failure to register the collateral earlier:
     i. was accidental or due to inadvertence or some other sufficient cause;
     ii. is not of such a nature as to prejudice the position of creditors or shareholders; or
  b) on other grounds, it is just and equitable to grant relief.
- While the Court was satisfied the failure to register was due to inadvertence and there was no prejudice to creditors, section 588FM was not enlivened as, at the critical time, the registration was not perfected. Section 588FM only "immunises a perfected registration from vesting".
- Alleasing contentions were dismissed and its interest vested in OneSteel

ALLEASING PTY LTD, IN THE MATTER OF ONESTEEL MANUFACTURING PTY LTD V ONESTEEL MANUFACTURING PTY LTD [2017] FCA 656

Federal Court of Australia, Davies J, 9 June 2017

- Alleasing appealed to the New South Wales Court of Appeal and the parties settled, in principle, the dispute by way of OneSteel (by its administrators) granting new security interests to Alleasing.
- By November 2016, OneSteel had entered a Deed of Company Arrangement with the administrators being appointed the deed administrators.
- Alleasing sought orders in the Federal Court of Australia pursuant to:-

  a) 588FM of the *Corporations Act 2001* (Cth) to fix a later time to register the security interests; and

  b) 293 of the *PPSA* extending the period of time prescribed by section 62(3)(b) of the *PPSA* to register a PMSI,

  which orders were sought as the freshly granted interests may automatically vest in OneSteel.
- The Court was prepared to extend the time under both statutory provisions which involved considering the factors outlined in *Re Duke Contracting Australia Pty Ltd* [2017] NSWSC 767

ALLEASING PTY LTD, IN THE MATTER OF ONESTEEL MANUFACTURING PTY LTD V ONESTEEL MANUFACTURING PTY LTD [2017] FCA 656 (CONT'D)

- Factors which were in favour of granting relief sought by Alleasing:-
  I. Crusher was critical to the Iron Knob mine operations and greatly increased the value;
  II. Deed administrators supported the application and were authorised, under the DOCA, to compromise claims for and on behalf of OneSteel and considered the settlement was in the interest of creditors;
  III. Uncertainty as to the outcome of the appeal was disrupting the sale process;
  IV. As the security interests had been recently created, no creditors could have relied on not being aware of the security interest;
  V. The only prejudice could have been to secured creditors – there were four other AllPAPs (2 to BGC, 1 to NAB and 1 to Export Finance and Insurance Corp **(EFIC)** . BGC released the Crusher from the AllPAPs, EFIC consented to the relief sought by Alleasing and the Crusher was excluded from NAB's AllPAP.

RE ACCOLADE WINES AUSTALIA LIMITED [2017] NSWSC 1023

Supreme Court of New South Wales, Brereton J, 25 July 2016

- Another authority involving Alleasing which only registered its security interest by reference to Accolade Wines Australia Limited's ABN not its ACN.
- Accolade Wines was not in administration and it did not appear that a critical event would occur in the six months following the order. Accordingly, Brereton J satisfied that the failure to register at an earlier time was inadvertent and that creditors would not be prejudiced by the delay and made order under section 588FM of the *Corporations Act 2001* (Cth) to fix a later time to register for the purposes of section 588FM.
- Alleasing also sought extension of the period specified in section 62(3)(b) of the *PPSA* so that it could register its PMSI against the collateral and attract the super priority afforded to PMSIs.
- Again, Brereton J found that the need to extend the period arose by virtue of inadvertence.

RE ACCOLADE WINES AUSTALIA LIMITED [2017] NSWSC 1023 (CONT'D)

- Case turned on prejudice to, and reliance by, other creditors.
- While there were other creditors (holding AllPAPs) that prejudice had to be coupled with the creditor relying on the collateral being unencumbered.
- There were 13 security interests (AllPAPs) from 8 financiers which were sophisticated lenders.
- Evidence was led that it was common practice for financiers to conduct searches of ABN, ACN and the company name. Unlike his decision in *Onesteel,* Brereton J finds that a prudent financier would have conducted other searches and discovered Alleasing's interest and, to this end, improbable that a subsequent AllPAP holder would have relied on the relevant period having expired (at 36).
- The distinguishing feature in the decision in *Accolade Wines* and *OneSteel* may be the apparent solvency of the grantor in *Accolade Wines* in contrast to the insolvent position of *OneSteel.*

RE ACCOLADE WINES AUSTALIA LIMITED [2017] NSWSC 1023 (CONT'D)

- 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 it would only acquire through inadvertence; and
  e) It is likely the subsequent AllPAPs had notice of Alleasing's security interest.

NFT SPECIALISED IN TOWER CRANES LLC V MACHFORCE PTY LTD (IN LIQ) [2017] WASC 95

Supreme Court of Western Australia, Acting Master Strk, 4 April 2017

- NFT Specialized in Tower Cranes LLC (**NFT**) incorporated in Abu Dhabi, UAE, and supplied tower cranes for building and construction works. Machforce Pty Ltd (**Machforce**) was a supplier of hoists and mast-climbers and installed and maintained the same.
- Between 19 March 2014 and 9 July 2015, NFT entered into six rental agreements with Machforce for the hire of six cranes.
- Machforce fell into arrears under the rental agreements. On 16 January 2016, representatives for the parties met in Singapore where NFT asserted it had terminated the rental agreements.
- NFT continued to charge Machforce rent for the hire of the cranes.
- On 29 March 2016, Machforce went into administration and the administrators registered AllPAPs over Machforce.
- On 6 April 2016, the administrators of Machforce notified NFT that they had determined that the cranes had vested in Machforce immediately prior to the administrators' appointment.
- On 4 May 2016, Machforce went into liquidation.
- NFT did not lodge financing statements with respect to the rental agreements until 11 May 2017.

NFT SPECIALISED IN TOWER CRANES LLC V MACHFORCE PTY LTD (IN LIQ) [2017] WASC 95 (CONT'D)

- Issue 1: NFT argued that the rental agreements were not PPS Leases and, in any event, they had been terminated. The administrators contended that the terms of the rental agreements, which were for a minimum of twelve months continued to operate after the expiry. The continued imposition of rent was inconsistent with NFT's purported termination of the rental agreements.
- Finding: The rental agreements were not PPS Leases within the meaning of section 13(1)(c) of the *PPSA*, However, the rental agreements did give rise to a security interest within the meaning of section 13(1)(d) of the *PPSA.*
- Further, there was no clear and unequivocal statement by, or on behalf of, NFT to terminate the rental agreements. NFT had continued to charge rent, had taken no steps to take possession of the cranes and lodged a proof of debt including the period after 16 January 2016 which was consistent with the finding that NFT had not, in fact, terminated the rental agreements.

NFT SPECIALISED IN TOWER CRANES LLC V MACHFORCE PTY LTD (IN LIQ) [2017] WASC 95 (CONT'D)

- Issue 2: What was the status of NFT's security interest immediately prior to the administration (on 29 March 2016)?
- Finding: NFT was not in possession of the cranes and had not taken steps to re-take possession of the cranes. As its security interest was not registered until 11 May 2016 (after the commencement of the administration), NFT's security interest was not protected.
- Issue 3: Did NFT's interest in the cranes vest in Machforce pursuant to section 267 of the *PPSA?*
- Finding: The interest did vest as it was unperfected at the commencement of the administration.

NFT SPECIALISED IN TOWER CRANES LLC V MACHFORCE PTY LTD (IN LIQ) [2017] WASC 95 (CONT'D)

- Issue 4: Did the Court have power to fix a later time pursuant to section 588FM of the *Corporations Act 2001* (Cth) if the security interest survived the purported termination?
- NFT relied on *Accolade Wines* and submitted that the failure to register was inadvertent as:-
  a) It believed that the rental agreements had been terminated;
  b) The law applicable to the rental agreements was the law of the United Arab Emirates; and
  c) NFT was not aware that, as the owner of the cranes, it was required to register a security interest against the collateral.
- NFT further relied on *Mentha, in the matter of Arrium (administrators appointed)* [2016] FCA 972. However, similar to *Alleasing and OneSteel* in the Federal Court, the case was distinguishable as the relevant security interest arose *after* the date of administration.

NFT SPECIALISED IN TOWER CRANES LLC V MACHFORCE PTY LTD (IN LIQ) [2017] WASC 95 (CONT'D)

- Finding: No relief was available to NFT under section 588FM of the *Corporations Act 2001* (Cth) to fix a later time for the purposes of section 588FL of the *Corporations Act 2001* (Cth)
- The specific security interest existed prior to the appointment of administrators and **as at the critical time** the security interest had not been perfected. Section 588FL refers to perfection **by registration only.**
- The security interest vested in Machforce immediately prior to the appointment of the administrators and no subsequent security interest had been created.
- Even if a new security interest had been created after the administration, section 588FL of the *Corporations Act 2001* (Cth) was not available as it was not perfected.
- Notwithstanding the relief was not available, the Court would have declined the relief on the basis that it was not satisfied the failure to register arose by virtue of inadvertence, accident or some other sufficient cause. NFT knew, as early as 30 January 2016, that it was required to lodge a financing statement.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8

New South Wales Court of Appeal, Bathurst CJ, Beazley P, Ward JA, 6 February 2017

Appeal from decision of Hammerschlag J in Forge Group Power Pty Limited)in liquidation) (receivers and managers appointed) v General Electric International Inc. [2016] NSWSC 52

- In March 2013, General Electric International Inc. (**GE**) agreed to lease four turbines, valued at US$44 million, to Forge Group Power Pty Ltd (**Forge**), which leases commenced from 1 January 2014.
- On 11 February 2014, voluntary administrators were appointed to Forge.
- On 18 March 2014, Forge Power went into liquidation.
- GE did not lodge a finance statement on the PPS register with respect to the lease and its security interest was not perfected.
- The administrators claimed that the turbines vested in Forge immediately prior to the appointment of the administrators.
- At first instance, in Supreme Court of New South Wales, it was held that the *PPSA* did apply to the lease and , by virtue of section 267(2) of the *PPSA*, GE's interest in the turbines vested in Forge upon the appointment of the administrators.
- In finding that the *PPSA* applied to the lease, regard was had to GE being 'regularly engaged' in the business of leasing.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

Facts

- Forge was engaged by Horizon Power to design, build, operate and maintain a power station.
- The scope of works and services under the agreement contemplated the lease of gas turbines.
- At the end of the contract, 31 December 2015, Forge was to handover the "Plant", as defined in the contract, but the turbines would not be handed over to Horizon Power.
- The definition of "Plant" in the contract included reference to a temporary power station, however there was scope for a permanent power station to be constructed.
- The express terms of the contract included that GE would retain ownership of the turbines and the turbines would remain personal property notwithstanding any attachment to real property.
- The turbines were affixed to connections (pipelines/conductors) and seismic and wind kits were attached to the turbines to assist securing the turbines.
- The turbines were situated, at all material times, on the trailers which had been used to transport them to the site.
- GE terminated the lease (which it had a right to do) when Forge went into voluntary administration

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

- Two issues were pressed in the appeal:
  a) what is the test to be applied in determining whether a good is "affixed to land"?; and
  b) were the turbines affixed to the land?
- Forge contended the appropriate test is *"whatever is affixed to the ground belongs to the ground"*. The appellants, who GE had assigned their rights to, contended that the *PPSA* introduced a bespoke meaning of "affixed to land" which required only that there needed to be some form of 'non-trivial attachment' to the land.
- Court found that in determining whether an item has become a fixture, regard is to be had to the **purpose** of annexing the good and the **degree** to which it was affixed.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

Purpose of Annexation

- In determining the purpose of the annexation, the Court may regard:-
  a) whether the attachment was for the better enjoyment of the land generally;
  b) the nature of the property the subject of the annexation (that is, the item);
  c) whether the annexation was to be fixed permanently or temporarily;
  d) the function to be served by the affixation.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

Degree of Annexation

- In determining the degree of the annexation, the Court may have regard to:-
  a) whether removal would cause damage to the land or the 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 costs of removal would exceed the value of the attached item.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

Court found that the turbines were not attached to the land so that they should become fixtures

- 12 factors supported conclusion that the turbines were not intended to be fixtures:-
  a) the turbines were designed to be demobilised and moved to another site and were situated on trailers at all material times;
  b) the turbines were intended to be on site for only two years;
  c) Forge was contractually bound to return the turbines;
  d) the seismic and wind kits were designed to prevent damage and could be easily removed and transported;
  e) removal would not damage the land;
  f) removal would not damage the turbines;
  g) cost of removal of the turbines was modest in comparison to the costs of the turbines.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

Court found that the turbines were not attached to the land so that they should become fixtures

- 12 factors (continued):-
  - h) the attachment to the land was for the better enjoyment of the turbines not the land;
  - i) the contract expressly provided that title does not pass to the owner of the land;
  - j) the contract expressly provided that the turbines remained *personal property*;
  - k) Forge did not own the site and it was unlikely that it wished to gift the turbines to Horizon Power;
  - l) GE prescribed the mechanism for attachment and did not intend the turbines to become the property of the owner of the land.

POWER RENTAL OP CO AUSTRALIA, LLC V FORGE GROUP POWER PTY LTD (IN LIQ) (RECEIVERS AND MANAGERS APPOINTED) [2017] NSWCA 8 (CONT'D)

- The 'bright line' test was central to the appellant's argument that the *PPSA* introduced a new meaning to "affixed to land". The bright line test was that a reasonable observer could 'see' a non-trivial attachment and, therefore, would know whether an item was affixed to land.
- Forge contended that such a construction would introduce a third species of property – "a non-fixture fixture".
- Court rejected appellant's submission – the bright line test created its only uncertainty, and the *PPSA* was intended to overcome the complexity and uncertainty of the various statutory regimes which pre-dated the *PPSA.*
- Court of Appeal found that the first instance judge did not err and that the turbines had not become fixtures.
- While the turbines were connected to the land, the connection was not so substantial or enduring as to justify a finding that the turbines had become fixtures.

CREDIT SUISSE AG, SYDNEY BRANCH V SPRINGSURE PROPERTY HOLDINGS PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) [2017] QSC 142

Supreme Court of Queensland, Bond J, 30 June 2017

- Credit Suisse AG, Sydney Branch (**Credit Suisse**) entered into agreements with Springsure Creek Coal Pty Ltd (**SCC**) being a Guarantee Facilities Agreement on 29 June 2012 (**GFA**) and a Security Trust Deed on 6 July 2012 (**Trust Deed**).
- The Trust Deed regulated the exercise of rights under the GFA.
- On 11 February 2014, Credit Suisse executed three further instruments with Springsure Property Holdings Pty Ltd (in liquidation) (receivers and managers appointed) (**SPH**) which had the effect of adding SPH as a guarantor of SCC's obligations.
- Subsequently, SPH acquired three lots of real property.
- Voluntary administrators were appointed to SPH on 22 September 2014.
- Credit Suisse asserted that by virtue of the 11 February 2014 instruments, SPH charged its interest in the land to Credit Suisse. SPH contended that the property charged by SPH did not include the after acquired land.

CREDIT SUISSE AG, SYDNEY BRANCH V SPRINGSURE PROPERTY HOLDINGS PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) [2017] QSC 142

- The three instruments executed by SPH were a First Amendment Deed, a General Security Agreement (**GSA)** and an Accession Deed
- The GSA, relevantly, included a provision that certain words had the meaning given to them in the *PPSA* which included “property”.
- In the GSA, “property or “asset” was also defined to include “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”
- SPH submitted that the appropriate definition was the *PPSA* definition. Credit Suisse submitted that the broader definition ought be preferred and that SPH had charged its interest in the land to Credit Suisse.

CREDIT SUISSE AG, SYDNEY BRANCH V SPRINGSURE PROPERTY HOLDINGS PTY LTD (IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) [2017] QSC 142

Finding:-

- SPH had charged its interest in the land to Credit Suisse.
- SPH's submissions were rejected:-

a) extrinsic evidence would not have assisted SPH as Credit Suisse may have wanted to have greater securitisation of its facility by charging land which SPH acquired in the future;

b) a rule of construction provides that where there is ambiguity in a clause in a guarantee, the Court should construe the clause in favour of the guarantor. The Court found that the presumption was not available to SPH as its construction was not 'fairly arguable'; and

c) while the Court accepted that there intention was to grant a security interest in accordance with the *PPSA*, the reference to land in the balance of the finance documents evinced an intention that the phrase 'after-acquired property' clearly wasn't intended to be confined to personal property.