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Applying to Court to extend the deadline for registering on the PPSA – ask and you shall receive?

By ,

In the recent New South Wales Supreme Court case of *In the Matter of Accolade Wines Australia Limited and other companies* [2016] NSWSC 1023, a Secured Party registered Security Interests on the Personal Property Securities Register (**PPSR**), but failed to do so within statutory timeframes resulting in it losing certain benefits attaching to its registrations. The case provides some guidance on when a court might be willing to extend the timeframe for a Secured Party to register its interests so as to not lose those benefits.

What happened?

1. Alleasing Pty Ltd and Alleasing Finance Pty Ltd (**Alleasing**) were in the business of providing asset finance and leasing services to businesses. The leases were for a duration of greater than 1 year, and therefore were Security Interests within the meaning of the Personal Property Securities Act (the **PPSA**).
2. When Alleasing entered into leases with customers, it would promptly register its interest on the PPSR.
3. When conducting an audit of its PPSR registrations, Alleasing discovered that many registrations were defective as they were registered against the ABNs of their customers rather than the customers' ACNs. The PPSA and its associated regulations require that where a grantor (ie the customers of Alleasing) is a corporation, to be effective the registration must be against the ACN of the grantor (not the ABN).
4. Upon this discovery, Alleasing promptly took steps in June 2016 to register again the relevant Security Interests on the PPSR, this time referring to the customers' ACNs. The reasoning was that if the earlier registrations (against the ABNs) were defective, then Alleasing would be able to rely on the June 2016 registrations (against the ACNs). While this was undoubtedly the correct course of action for Alleasing to take, it gave rise to a timing issue under the PPSA and the Corporations Act. That is, the timeframe between when the leases were entered into and June 2016 meant that the June 2016 registrations did not occur within the timeframes imposed by the those Acts.
5. Alleasing applied to the Court for an order to extend the timeframes imposed by the legislation, so that the June 2016 registrations would enjoy the benefits that they would have had if they were made on time.

What are the timeframes and what are the consequences of being late?

The Corporations Act and the PPSA each contain sections that provide for certain consequences if Secured Parties do not register their Security Interests on the PPSR within certain timeframes:

1. **Section 588FL Corporations Act** – If a customer of Alleasing became insolvent within 6 months after Alleasing registered its Security Interest, the Security Interest would vest in the customer, meaning that Alleasing would lose all title to the property it had leased to the customer.
   Section 588FM allows a Secured Party to apply to Court to extend this timeframe.
2. **Section 293 PPSA** – Where Alleasing's Security Interests were Purchase Money Security Interests (**PMSIs**), they would lose the 'super' priority conferred on PMSIs if not registered within 15 days of the customers taking possession of the equipment.
   Section 293 allows a Secured Party to apply to Court to extend this timeframe.

What did the Court say regarding the section 588FM application?

The Court granted Alleasing's application for extension so that the June 2016 registration would not vest in the customers upon insolvency. To grant an extension under s.588FM, the Court must be satisfied that at least 1 of the following grounds apply:

- The failure to register with time was accidental or due to inadvertence or some other sufficient cause; or
- The failure to register within time is not of such a nature as to prejudice the position of creditors or shareholders; or
- There are other just and equitable grounds to grant the extension.

The Court decided that the first ground applied, that is Alleasing's failure to correctly register before June 2016 was due to inadvertence. Alleasing led evidence to show that its employees who attended to the initial defective registrations had used a third party service provider platform (as opposed to directly using the PPSR website). That third party platform enabled registrations to be made by either ABN or ACN, and did not alert the employees as to the consequences of using 1 or the other. The employees therefore believed that the registrations by ABN were sufficient.

The Court did not consider it necessary to determine if the other 2 grounds applied. However, the Court did make some useful observations in relation to whether the delay would cause prejudice to creditors. In evaluating prejudice, a comparison is to be made between the position of creditors if an extension were granted, with their position if there had been an effective timely registration – often there will be no difference, as in either case the relevant property would not vest in the customer and therefore not be available for distribution to creditors.

What did the Court say regarding the s.293 Application?

The Court also granted this extension. For an extension under s.293, the Court must take into account:

- Whether the need to extend arises as a result of accident or inadvertence or some other sufficient cause; and
- Whether extending the period would prejudice the position of any other secured parties or creditors.

The Court held that the extension would prejudice other Secured Parties who had registered securities over all of the customers' present and after acquired property (**AllPAPS**). However this prejudice was not conclusive. In the case of an AllPAP holder who took security from a customer before Alleasing's initial invalid registration, the AllPAP holder would only be prejudiced by losing a windfall arising from the inadvertence. In the case of an AllPAP holder who took security after Alleasing's initial invalid registration, that AllPAP Holder would likely have had notice of Alleasing's interest as it is market practice to undertake searches of both ACNs and ABNs. Even if the later AllPAP Holder did not have such notice, it is unlikely Alleasing's interest would have been material to its decision to grant financial accommodation as Alleasing's security was over specified, limited property only.

Points to take away

The case illustrates the importance of correctly registering Security Interests in accordance with the legislation. What might be perceived as a minor error in the registration process might in fact invalidate the registration.

The Court was prepared to find that there had been 'inadvertence' on the part of Alleasing, in circumstances where the error because its employees were not aware of the statutory requirements when undertaking registrations.

It also illustrates the difference between prejudice under s.588FM of the Corporations Act and s.293 of the PPSA. In the case of the Corporations Act, the focus is on prejudice to creditors and shareholders, whereas under the PPSA the focus is on prejudice to other Secured Parties.

It might also be observed that this case did not arise in an insolvency context – none of Alleasing's customers were in liquidation. Alleasing simply wanted to correct its failure, so that it would be protected if insolvency did occur. In future cases where insolvency has occurred, the Court might be forced by the liquidator to address more robust

arguments as to why extensions should not be granted.

Should you wish to discuss any matters arising out of this article, please contact the author:

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