BROADLEY REES HOGAN | NEWS

PPS Leases – Owner of Goods Loses Title to Liquidator of Tenant

By ,

The New South Wales Supreme Court case of Forge Group Power Limited (in liquidation) (receivers and managers appointed) v General Electric International Inc [2016] NSWSC 52 provides guidance on the following issues in relation to the Personal Property Securities Act 2009 (Cth) (the **PPSR**):

1. When is a lessor of goods 'regularly engaged in the business of leasing goods'?
2. When do goods become fixtures and therefore become part of the land?

The answers to these questions are critical to businesses which lease their valuable assets to tenants (or otherwise part with possession of those assets while retaining ownership). Depending on the answers to these questions in a given case, owners might find that they forever lose title to their assets upon the liquidation of the tenant.

What happened?

The following events occurred:

1. March 2013 – Forge Group Power Pty Ltd (**Forge**) entered into a rental agreement with GE Electric International Inc (**GE**) to lease turbines for a term of 2 years, under which GE would also install, commission and demobilise the turbines. The turbines comprised significant pieces of infrastructure, which were to be used as part of a temporary power station being commissioned by Forge in Port Hedland.
   At no time did GE register its interest in the turbines on the Personal Property Securities Register (**PPSR**).
2. 11 February 2014 – Forge appointed voluntary administrators.
3. 18 March 2014 – Forge was placed in liquidation.

The Administrator of Forge claimed that the turbines vested in Forge immediately before the appointment of the Administrators. This claim was founded on section 267 of the PPSR. Put simply, if the arrangement was Security Interest under the PPSR and it was not registered, then upon the commencement of administration, the interest of the owner of the turbines would vest in Forge. The owner of the turbines would effectively lose its title to them.
The issue in dispute was therefore whether the rental agreement constituted a Security Interest (specifically, a 'PPS Lease') within the meaning of the PPSA. This in turn required an examination of the following issues:

Was GE 'regularly engaged in the business of leasing goods'?

A lease of goods for a term of at least 90 days (or an indefinite term) will generally be a PPS Lease. However, the PPSR specifically excludes lease where the lessor is 'not regularly engaged in the business of leasing goods.' GE argued that it was not regularly engaged in the business of leasing goods in Australia, and therefore the arrangement was not a PPS Lease. On this issue, the Court decided:

a. The relevant question for regularity is whether leasing goods is a **proper component** of the lessor's business. That is, the word 'regularly' does not solely refer to the frequency or repetitiveness of leasing transactions by the lessor (although that may still be a relevant factor), but rather, more closely refers to whether the leasing activities are not abnormal in the context of the lessor's business.

b. The enquiry is not limited to whether the lessor is regularly engaged in leasing in Australia only; rather the global business of the lessor is to be considered.
c. The time for determining if the lessor is regularly engaged in the business of leasing goods is when the lease is entered into (and not, for example, when possession of the goods is first granted or when Administrators are appointed).

Applying these principles, the rental agreement was a PPS Lease within the meaning of the PPSA

Did the goods become fixtures?

GE further argued that the turbines had become affixed to the land and therefore constituted 'fixtures.' The PPSA does not to apply to fixtures as they are part of the real estate and not 'personal property.' If this argument was correct, then the turbines would have been the property of the land owner (who was not a party in the litigation). It might seem counter-intuitive that GE would mount an argument that it had lost title to the turbines to the land owner – but at least GE would have had the opportunity to negotiate and request their return from the land owner.
In deciding that the turbines had ***not***become fixtures, the Court decided:

a. The test of whether something is a fixture within the meaning of the PPSA is the usual well established common law test – it is not a lower threshold test as argued by GE.
b. The test is that of the objective intention of the parties, having regard to the degree and purpose of annexation to the land. Here, the turbines were designed to be removed between sites easily. Further, Forge did not own the land in question and had a contractual obligation to return the turbines to GE at the end of the rental agreement – therefore Forge did not intend to make a gift of the turbines to the land owner.

Lessons to be learned

This is another case of where the owner of valuable goods forever lost title, simply because it did not register its interest on the PPSR. Whilst the outcome seems harsh, it does accord with one of the main objectives of the PPSA – that third parties should be able to assume that goods in the possession of a creditor are owned by that creditor (if there is no registered security interest which reveals the contrary).
Owners of goods that are leased should register their interests on the PPSR. As a result of the Court's interpretation of 'regularly engaged in the business of leasing goods', arrangements might be deemed to be PPSR leases even where the business does not often undertake such activities. Professional advisers should be vigilant, and question their clients whenever it is discovered that valuable assets are in the possession of a third party, to determine if a PPSR security interest has arisen.

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

,

Broadley Rees Hogan (BRH Lawyers) is an independent boutique firm, specialising in corporate, commercial, property, construction and litigation. Based in Brisbane, we act for clients across the country and internationally – **for an unassuming firm, we know how to deal big**.

For more information, please visit **www.brhlawyers.com.au** or **contact us** on (07) 3223 9100.