

# SUPREME COURT OF QUEENSLAND

CITATION: *Overflow FNQ Pty Ltd (in liquidation); Kelly & Ors v Austwide Consumer Products Pty Ltd* [2017] QSC 76

PARTIES: **In the matter of OVERFLOW FNQ PTY LTD  
ACN 101 890 831 (in liquidation)  
TODD WILLIAM KELLY and  
GERALD THOMAS COLLINS**  
(First Applicants)  
and  
**OVERFLOW FNQ PTY LTD (IN LIQUIDATION)  
ACN 101 890 831**  
(Second Applicant)  
v  
**AUSTWIDE CONSUMER PRODUCTS PTY LTD  
ACN 009 438 153**  
(Respondent)

FILE NO/S: SC No 143 of 2017

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Cairns

DELIVERED ON: 9 May 2017

DELIVERED AT: Cairns

HEARING DATE: 28 April 2017

JUDGE: Henry J

ORDERS: 

- 1. It is declared that the interest of the respondent, Austwide Consumer Products Pty Ltd as chargee pursuant to an agreement titled “Business application form in terms of trade” dated 16 August 2010 (and the subject of PPSA registration number 201511100062557) has vested in the second applicant.**
- 2. The respondent pay the first and second applicants’ costs of the application.**

CATCHWORDS: SECURITIES — CORPORATIONS ACT 2001 (CTH) – CHAPTER 5 – EXTERNAL ADMINISTRATION –PART 5.7B – RECOVERING PROPERTY OR COMPENSATION FOR THE BENEFIT OF CREDITORS OF INSOLVENT COMPANY (ss 588D–588Z) – 588FL – Vesting of PPSA security interests if collateral not registered within time –

Where court considered time limitations – Where security interest not registered within time

*Acts Interpretation Act* 1901(Cth) ss 36(1), 22(1)(b), 23(b), 22(1)(g)

*Corporations Act* 2001 (Cth) ss 5C, 51, 105, 511, 513B, 513C, 588FL(2), 588FL(2)(a), 588FL(2)(b), 588FL(4), 588FL(7)

*Personal Property Securities Act* 2009 (Cth) ss 12, 160(1)

*Prowse v McIntyre* (1961) 111 CLR 264, cited

*Dodds v Walker* [1981] 1 WLR 1027, cited

*Re Weston Application* (2009) 255 ALR 362, cited

*Carrafa (as liquidators of Relux Commercial Pty Ltd) (in liq) v Doka Formwork Pty Ltd* (2014) 104 ASCR 163, distinguished

COUNSEL: No appearances, application heard on the papers

SOLICITORS: Miller Harris Lawyers for the applicants  
Metaxas & Hager for the respondent

- [1] The first applicants are liquidators of Overflow FNQ Pty Ltd (“Overflow”). They have realised its assets. They seek a declaration that the respondent’s security interest under its terms of trade agreement with Overflow has vested in Overflow.
- [2] The issue on which the application turns is whether the respondent registered its security interest sufficiently long before administration began, so as to avoid the interest being statutorily deemed to have vested in Overflow.

### **Background**

- [3] After the first ranking secured creditor, NAB, the respondent asserts an entitlement as second ranking secured creditor in respect of sale proceeds of company property said to be the subject of a security interest of the respondent. That interest allegedly arises out of a document styled “Business application form and terms of trade” submitted to the respondent by Overflow. That document’s terms provided that “[b]y way of security

against future unpaid accounts”, ownership of goods supplied to Overflow by the respondent would not pass, even if paid for in full, until on sold.<sup>1</sup>

- [4] The interest sought to be secured is a security interest within the meaning of the *Personal Property Securities Act 2009* (Cth) (“PPSA”)<sup>2</sup> and, pursuant to s 51 of the *Corporations Act 2001* (Cth) (“*Corporations Act*”), is a PPSA security interest within the meaning of the *Corporations Act*. For present purposes, s 588FL(4) *Corporations Act* has the practical effect that a PPSA security interest granted by a company to which an administrator is subsequently appointed is deemed to have vested in the company from immediately before the appointment of the administrator if it is a PPSA security interest covered by s 588FL(2). Section 588FL(2) relevantly provides:

“This subsection covers a PPSA security interest if:

- (a) at the critical time, or, if the security interest arises after the critical time, when the security interest arises:
  - (i) the security interest is enforceable against third parties under the law of Australia; and
  - (ii) the security interest is perfected by registration, and by no other means; and
- (b) the registration time for the collateral is after the latest of the following times:
  - (i) six months before the critical time; ...” (emphasis added)

- [5] It is not disputed that s 588FL(2)(a) applies. The controversy lies in whether s 588FL(2)(b) applies, that is, whether “the registration time” in this case was “after ... six months before the critical time”.

- [6] Section 588FL(7) defines the “critical time”:

“In this section:

***critical time***, in relation to a company, means:

- (a) if the company is being wound up – when, on a day, the event occurs by virtue of which the winding-up is taken to have begun or commenced on that day under section 513A or 513B; or
- (b) in any other case – when, on a day, the event occurs by virtue of which the day is the section 513C day for the company.”

<sup>1</sup> Affidavit of Todd William Kelly filed 24 March 2017 Ex p 13.

<sup>2</sup> See in particular PPSA s 12.

- [7] The first applicant liquidators commenced in that role when, on 14 June 2016 a resolution was passed for Overflow to enter liquidation. However, the company was already in administration, the first applicants having been appointed as voluntary administrators of Overflow at 8.00 am on 10 May 2016. This has the consequence, pursuant to ss 513B and 513C of the *Corporations Act*, that the critical time within the meaning of s 588FL(7) was the day of 10 May 2016 or, more specifically, 8.00 am on that day.
- [8] As for the registration time for the collateral in which security interest was granted under the terms of trade, it was registered on 10 November 2015 at 5.18 pm (Canberra time),<sup>3</sup> or 4.18 pm (Queensland time).<sup>4</sup>

### **The issue**

- [9] The question with which the present application is concerned is whether that registration time occurred “after ... six months before the critical time”. If so, the interest vested in Overflow.<sup>5</sup>
- [10] The resolution of that question bears upon the conduct of the winding up and is thus a proper question for the court’s determination pursuant to s 511 of the *Corporations Act*.

### **Discussion**

- [11] The only reported decision cited by the parties involving a calculation of time under s 588FL(2) was a single judge decision of the Supreme Court of Victoria in *Carrafa (as liquidators of Relux Commercial Pty Ltd) (in liq) v Doka Formwork Pty Ltd*.<sup>6</sup> In that case Sifris J calculated the s 588FL(2) time within which the security interest in that case needed to have been registered as “the latest of... 6 months before the critical time of 7 April 2014, which is 7 October 2013”.<sup>7</sup> The respondent relies upon that calculation to contend the registration time here of 10 November 2015 was six months before the critical

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<sup>3</sup> To be more precise it was actually 17:18:57.

<sup>4</sup> Affidavit of Todd William Kelly filed 24 March 2017 Ex p 15. Judicial notice is taken of the one hour time difference during daylight saving as between Canberra and Queensland.

<sup>5</sup> The respondent’s written submissions sought to advance an additional application in the event the applicant was unsuccessful but it is unnecessary to deal with the issues raised by that given the applicant will succeed in the present application.

<sup>6</sup> (2014) 104 ASCR 163.

<sup>7</sup> Ibid, 173.

time of 10 May 2016. However, Sifris J was not concerned with a close run calculation like the present. His calculation is of no guidance here because it involved no consideration of the issue of the extent to which, if any, the days bookending the period in question should be included or excluded.

[12] That issue is addressed by statutory provisions which, in summary, take the approach of counting one of the days bookending a period but not both.

[13] Section 105 of the *Corporations Act* provides:

**“105 Calculation of time**

Without limiting subsection 36(1) of the *Acts Interpretation Act 1901*, in calculating how many days a particular day, act or event is before or after another day, act or event, the first-mentioned day, or the day of the first-mentioned act or event, is to be counted but not the other day, or the day of the other act or event.”

[14] As to subsection 36(1) of the *Acts Interpretation Act 1901* (Cth) (“*Acts Interpretation Act*”), pursuant to s 5C of the *Corporations Act* it is the *Acts Interpretation Act* which was in force as at 1 January 2005 which applies. In the present context s 36(1) of that Act would not give a materially different result than the application of s 105. Section 36(1) provides:

**“36. Reckoning of time**

(1) Where in an Act any period of time, dating from a given day, act or event, is prescribed or allowed for any purpose, the time shall, unless the contrary intention appears, be reckoned exclusive of such day or of the day of such act or event.”

[15] Therefore, to ascertain the point in time six months before the critical time, the day of the critical time, 10 May 2016, should not be included in the count six months backwards in time. That six month count is therefore back to and inclusive of all of 10 November 2015. The point in time “six months before the critical time” was therefore the stroke of midnight on the night of the ninth into the tenth of November 2015.<sup>8</sup> To avoid the vesting consequences of s 588FL the respondent needed to have registered its interest by that time. Registration at any time after 10 November began would have been “after ... six

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<sup>8</sup> The beginning of a day being nothing but the end of the day before, per Kitto J, *Prowse v McIntyre* (1961) 111 CLR 264, 274.

months before the critical time”. Here the registration time was 4.18 pm on 10 November 2015, which was well after the beginning of that day and therefore after six months before the critical time.

[16] Because section 588FL(2)(b) refers to the determinative period of time by reference to months rather than days it is prudent to consider whether the relevant statutory definition of months works the same result. It does.

[17] Section 22(1)(b) of the *Acts Interpretation Act* (in force as at 1 January 2005) defines “month” as meaning a calendar month. As to the meaning of “months”, for the purpose of counting six months, s 23(b) of the Act provides that words in the plural include the singular. Section 22(1)(g) of the Act defines calendar month as follows:

“**Calendar month** means a period commencing at the beginning of a day on one of the 12 months of the year and ending immediately before the beginning of the corresponding day of the next month or, if there is no such corresponding day, ending at the expiration of the next month.”

[18] The calculation of six “months before the critical time” therefore requires identification of a period commencing at “the beginning” of a day of a month and ending “immediately before the beginning” of the corresponding day of the month six months subsequent thereto. The relevant corresponding day here is 10 May 2016 and the period of six months before it necessarily ended immediately before 10 May 2016 began, namely at the end of 9 May 2016. Counting back, the six month period therefore started at the beginning of 10 November 2015.<sup>9</sup> For the respondent to succeed here registration needed to have occurred before “the beginning” of 10 November 2015. As already noted, registration did not occur until the late afternoon of 10 November 2015, well after the beginning of that day and therefore after six months before the critical time.

[19] It follows, as the applicant contends, that s 588FL(2) does cover the PPSA security interest in this case.

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<sup>9</sup> The same result flows from the application of the common law’s corresponding date principle, discussed in *Dodds v Walker* [1981] 1 WLR 1027 and followed in *Re Weston Application* (2009) 255 ALR 362. The applicant submitted its position was supported by *Re Weston Application*. It is not. While Barrett J did not expressly refer to the *Acts Interpretation Act* definition of month, his reasoning is consistent with it.

- [20] Neither party argued that the relevant time falls to be reckoned by reference to specific times of day. Arguably it might be, on the basis that the registration time and critical time both appear to be references to actual times of day. The “registration time” for collateral in respect of a PPSA security interest is, pursuant to s 160(1) PPSA, the moment when the description of registered collateral becomes available for search in the register. The relevant “critical time” under s 588FL(7) is “when, on a day, the event occurs by virtue of which the day is the s 513C day for the company”. The only available evidence of when the event by virtue of which administration began on 10 May 2016 occurred is that the voluntary administrators’ appointment occurred at 8.00 am. That the registration time and critical time are specific times, not just specific days, raises the question whether the gap between the time of registration and the critical time ought be reckoned down to the exact time of day.
- [21] It is unnecessary to determine that question, which was not argued, because even applying such a reckoning the registration time was too late to avoid the application of s 588FL. Ignoring the above mentioned statutory provisions about days and months, and reckoning by reference to times of day, the point in time six months before the critical time of 8.00 am on 10 May 2016 would have been the moment immediately before 8.00 am on 10 November 2015. On any view that was much earlier in the day than the 4.18 pm registration time. It follows, even if reckoning the period in question by reference to times of day, the registration time of 4.18 pm on 10 November 2015 was less than six months before, and thus occurred after six months before, the critical time.

### **Conclusion**

- [22] For all of these reasons it is clear s 588FL(2) does cover the security interest.
- [23] The security interest therefore vested in Overflow. The applicants seek a declaration to that effect. Such a declaration will adequately answer the question which has arisen for consideration pursuant to s 511 of the *Corporations Act*.
- [24] Costs should follow the event.

### **Orders**

[25] My orders are:

1. It is declared that the interest of the respondent, Austwide Consumer Products Pty Ltd as chargee pursuant to an agreement title “Business application form in terms of trade” dated 16 August 2010 (and the subject of PPSA registration number 201511100062557), has vested in the second applicant.
2. The respondent pay the first and second applicants’ costs of the application.