SUPREME COURT OF QUEENSLAND

CITATION:	*Re: Enviro Pallets (NSW) Pty Ltd* [2013] QSC 220
PARTIES:	**TAURUS TRADE FINANCE PTY LTD ACN 120 567 866** (applicant) **v** **ENVIRO PALLETS (NSW) PTY LTD (In Liquidation) ACN 096 338 948** (respondent)
FILE NO/S:	SC No 6269 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	30 July 2013
DELIVERED AT:	Brisbane
HEARING DATE:	30 July 2013 (ex tempore)
JUDGE:	Philippides J
ORDER:	**Order as per initialled draft**
CATCHWORDS:	CORPORATIONS – application for leave to proceed against company in liquidation pursuant to Corporations Act 2001 (Cth) s 471B CORPORATIONS – application under Corporations Act 2001 (Cth) s 588FM for extension of time for registration of a security interest *Corporations Act* 2001 (Cth), s 471B, s 588FL(2), s 588FM *Battiston v Maiella Construction Co Pty Ltd* [1967] VR 349 *BHG Nominees Pty Ltd v Ellis Young Investments Pty Ltd* (1998) 16 ACLC 1539 *Capita Financial Group Ltd v Rothwells Ltd (No 2)* (1989) 15 ACLR 348 *CBFC Ltd v Corporate Consulting (Aust) Pty Ltd (in liq) & another* [2010] QSC 395 *In the matter of Cardinia Nominees Pty Ltd* [2013] NSWSC 32 *In re Apex Gold Pty Ltd* [2013] NSWSC 881 *Maher v Taylor* [1984] 1 NSWLR 231

National Australia Bank Ltd v Davis & Waddell (Vic) Pty Ltd [2003] VSC 1

Perpetual Trustees Australia Ltd v Bank of Western Australia Ltd (2004) 185 FLR 163

Re ACE Funding Ltd [2003] FCA 59

Sanwa Australia Finance Ltd v Ground-Breakers Pty Ltd (in liq) [1991] 2 Qd R 456

SOLICITORS: Norton Rose Fulbright for the applicant

HER HONOUR: This is an application for leave to proceed against the respondent, pursuant to section 471B of the *Corporations Act* 2001 (Cth) ("the Act") and also for an order, pursuant to section 588FM(1) of the Act, that the registration time for the collateral the subject of security interests granted, by the respondent to the applicant, on or about 20 September 2012 and registered on the Personal Property Securities Register ("the Register") as registration number 2013011700256461 and registration number 201301170026210 be fixed at 17 January 2013.

The relevant facts can be stated succinctly. Pursuant to a written letter of offer, dated 23 July 2012, and accepted on or about 7 September 2012, the applicant agreed to loan the respondent $1,250,000 under a debtor finance facility. The facility was to refinance an existing debtor finance facility that the respondent held with Allianz Finance Pty Ltd.

As security for the facility, the respondent agreed to grant security interests to the applicant under a first ranking general security agreement over all assets of the respondent and a debtor finance agreement over account debts owed to the respondent. The advance under the facility, by the applicant, was conditional upon the security interests being granted by the respondent and registered. On 12 September 2012, the security documents were prepared by the applicant on the basis that the directors of the respondent were Mark Duffin and Faith Duffin. After becoming aware that, in fact, one of the directors of the respondent had passed away, the applicant prepared amended versions of the security documents for execution by Mr Mark Duffin, as the sole director of the respondent. The amended security documents were executed by Mr Duffin on about 20 September 2012 and were held by the applicant, pending confirmation that ASIC had been notified of the change to the respondent's company officers.

On 24 September 2012, a notice of change to company details was lodged with ASIC, in relation to the respondent. However, it was submitted that, due to inadvertence, the department of the applicant which was responsible for registration of the security interests was not provided with this relevant confirmation until 17 January 2013. The security interests were registered on 17 January 2013.

However, in the interim, on 28 September 2012, the applicant had advanced the amount of $642,035.55 to the respondent as the initial drawdown under the facility, acting in the belief that the security interests had been registered. Between September 2012 and May 2013, the applicant advanced in excess of $2.7 million to the respondent.

Ultimately, on 15 May 2013, an administrator was appointed to the respondent and, on 20 June 2013, the respondent went into liquidation. Leave is sought to proceed against the company being in liquidation, pursuant to section 471B of the *Corporations Act*.

Factors that are pertinent, in determining whether to grant leave, include:

- the amount and seriousness of the claim (see *BHG Nominees Pty Ltd v Ellis Young Investments Pty Ltd* (1998) 16 ACLC 1539);
- whether there is any procedural or substantive prejudice to the creditors, resulting from the proceedings (*Maher v Taylor* [1984] 1 NSWLR 231);

- whether the applicant's claim is of a type which should proceed by action to judgment, rather than one which is capable of being dealt with in an ordinary way by proof of debt on a winding up (see *Battiston v Maiella Construction Co Pty Ltd* [1967] VR 349); and
- whether the granting of leave will unleash an avalanche of litigation (see *Capita Financial Group Ltd v Rothwells Ltd (No 2)* (1989) 15 ACLR 348).

Generally, a secured creditor is entitled to exercise its rights under its security, notwithstanding the making of an order for the winding up of the company. In that vein, section 471C of the Act states: "Nothing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security." That position is well established in the authorities (see *Perpetual Trustees Australia Ltd v Bank of Western Australia Ltd* (2004) 185 FLR 163).

In relation to the factors relevant to considering whether to grant leave to proceed, I note the following. The claim is for a significant amount which remains secured. The only security interest granted by the respondent and registered after 17 January 2013 is a security interest granted to Volvo Finance Australia Pty Ltd, in relation to specific collateral. The orders sought include that the extension to the timeframe for registration, for the purposes of section 588FL(2)(b)(ii), and will have no effect on the priority to be afforded to security interests registered on the Register, prior to or after 17 January 2013. Moreover, there is no doubt that the applicant is a creditor of the respondent and, bearing in mind all the circumstances, there will be no procedural or substantive prejudice to the creditors if leave is granted. Further, I note that the application requires a determination by the court, under section 588FM, and so cannot proceed in the ordinary way, by way of proof of debt in the winding up proceeding. There is, additionally, in my view, no danger of unleashing an avalanche of litigation as this is a discrete application. Furthermore, the liquidator appointed to the respondent does not oppose the granting of leave. In those circumstances, leave is granted.

Turning to the question of whether an extension of time should be granted, I note the provisions of section 588FL(2) of the Act:

> "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) 6 months before the critical time;
>
> (ii) the time that is the end of 20 business days after the security agreement that gave rise to the security interest came into force, or the time that is the critical time, whichever time is earlier;

(iii) …

(iv) a later time ordered by the Court under section 588FM."

I note that, for the purposes of section 588FL(7), "critical time", in the context here, is a period referring to the appointment of an administrator to the respondent on 15 May 2013. I also note that the effect of section 588FL(2) is that, if an administrator or liquidator is appointed to a company, any PPSA security interest which was perfected, registered or enforceable against a third party, after the latest of six months before the date of appointment or 20 days after the security agreement came into force, vests in the company, under section 588FL(4). The security documents, as mentioned, were registered on 17 January 2013, more than 20 business days after the security documents came into force and within six months of the appointment of the administrator and are therefore caught by section 588FL(2).

Section 588FM(2) allows the company or an interested person to apply to the court for the fixing of a later time, for the purposes of section 588FL(2)(b)(iv). It in effect permits the court to make the order sought if it is satisfied that:

(a) the failure to register the collateral earlier was accidental or due to inadvertence or some other sufficient cause, and is not of such a nature as to prejudice the position of creditors or sharesholders; or

(b) on other grounds, it is just and equitable to grant relief.

The terms of section 588FM(2) are similar to the circumstances which previously pertained to the extension of time for lodgement of a notice of charge under section 266(4) of the Act (see *In the matter of Cardinia Nominees Pty Ltd* [2013] NSWSC 32 at [10]; see also *In re Apex Gold Pty Ltd* [2013] NSWSC 881). The grounds for relief, in section 588FM(2)(a)(i) and (a)(ii) and 588FM(2)(b), are alternative and any one of the three separate grounds, if established, is sufficient to allow the court to extend the time for registration; see *National Australia Bank Ltd v Davis & Waddell (Vic) Pty Ltd* [2003] VSC 1 at [45]. In the present case, the applicant relies upon the ground, in section 588FM(2)(a)(i), that the failure to register the security documents within the time required was "due to inadvertence".

There is an ancillary submission, made in the alternative, that the applicant is able to rely on the fact that "it is just and equitable to grant relief", as provided by section 588FM(2)(b). In my view, there is no need to deal with the alternate basis, as the first and primary basis is satisfied.

As to what constitutes inadvertence, a number of principles have been referred to in the case law dealing with the analogous provision of section 266 of the Act which, as I mentioned, was the section which preceded section 588FM(2)(a). Those propositions were helpfully outlined in the submissions provided by the applicant. In particular, there is authority that, for present purposes, inadvertent should be understood as "not properly attentive" (see *Re ACE Funding Ltd* [2003] FCA 59 at [8]). Further, there are Queensland cases where it has been held that a failure to register a charge, due to administrative errors in the input of information, constitutes inadvertence for the purposes of section 266(4)(a) (see *CBFC Ltd v Corporate Consulting (Aust) Pty Ltd (in liq) & another* [2010] QCS 395 at [18]). A lack of

legal understanding as to the requirements of registration, and the implications of late registration, has also been held to amount to inadvertence (see *Sanwa Australia Finance Ltd v Ground-Breakers Pty Ltd (in liq)* [1991] 2 Qd R 456*; National Australia Bank v Davis & Waddell (Vic) Pty Ltd* [2003] VSC 1 at [65]).

For the purposes of this application it was submitted that the applicant's failure to lodge the security documents for registration was due to inadvertence in the form of an internal administrative error between departments, similar to that which was accepted in *National Australia Bank v Davis & Waddell (Vic) Pty Ltd* and also in *CBFC*. The particular failure to register the security documents went undetected by the applicant until 17 January 2013, when the applicant moved promptly to perfect its interest by registering the security documents.

In relation to factors relevant to the exercise of the discretion to fix time under section 588FM, reference was made to a number of considerations identified in authorities such as *NAB v Davis & Waddell* and *Sanwa Australia*, which, it was submitted, may be applied to the present case as follows:

- the applicant would not have advanced funds to the respondent under the facility without the agreed security interest;
- the respondent agreed to provide the security interests and executed them presumably on the basis they would be registered;
- the security documents were registered on 17 January 2013, and the respondent continued to trade until 15 May 2013 when an administrator was appointed;
- the respondent upon becoming aware of the appointment of the administrator acted promptly to take steps to bring the application;
- the period that expired from when the security documents should have been registered to when they were, whilst significant and therefore a relevant consideration, nevertheless occurred in circumstances where the applicant moved quickly upon becoming aware of what had taken place; and
- the respondent continued to trade for about four months after that registration and in those circumstances the period of extension should not be seen as unreasonable;
- the applicant gave considerable value for the security documents. And a creditor searching the register after 17 January 2013 would have been aware of the security interests in favour of the applicant;
- the respondent had debt factoring facilities with Allianz Finance prior to the present facility, which were registered, and would have been known to creditors;
- there is no evidence or suggestion that any creditor extended credit or advanced money to the respondent after searching the Register between 28 September 2012 and 17 January 2013;
- the respondent relied on the facility to continue trading up until May 2013;
- in respect of the security interests granted by the respondent and registered prior to 17 January 2013, none are general security interests and the extension

order sought does not affect the priority of these interests as that is governed by s 55 of the *Personal Property Securities Act* 2009 (Cth).

After the time that the security documents should have been registered the only secured creditors to advance credit to the respondent were BMW Australia Finance Ltd, and Volvo Finance Australia Ltd, both in relation to motor vehicles. The position with respect to those creditors will not be affected. The order sought includes a specific proviso in respect of registered securities.

Additionally, there is no evidence that the respondent was insolvent, or that the applicant had reason to be concerned about the respondent's solvency, when the security documents were provided.

Furthermore, I am satisfied that, taking into account the matters outlined, it cannot be said that the unsecured creditors will be unfairly prejudiced by the proposed order. In relation to notification of the application, I note that notification was provided to the liquidator appointed to the respondent and all secured creditors listed on a PPSR grantor search of the respondent.

In particular, I note that the liquidator neither consents, nor opposes, the orders sought and that that position was indicated after the liquidator obtained legal advice.

In relation to the unsecured creditors, the liquidator, at a time when he was acting as administrator, at a meeting of creditors, advised unsecured creditors of the applicant's intention to bring the application, and that if any creditor wished to be heard at the hearing of the application that they should provide details to the administrator's office so that they could be served with material. Subsequently, the liquidator specifically wrote to unsecured creditors on 23 July 2013 sending a copy of the application, advising of the orders being sought, and again advising that if any creditors wished to be heard they should email the lawyers of the applicant. As it turns out the applicant has not received notification of any unsecured creditor wishing to be heard at the hearing of this application, or indeed opposing to it. In those circumstances, I am satisfied that all those who have an interest in being heard have been given ample notice of the application and otherwise are sufficiently represented by the liquidator of the respondent for the purpose of allowing them a proper opportunity to ventilate any possible prejudice should an order be made as sought.

Accordingly, I consider that the orders sought in relation to section 588FM(1) of the *Corporations Act* should be made. A draft order has been provided, paragraph 2 of which sets out the terms of the orders sought in relation to section 588FM(1). The draft order also provides in paragraph 3 the following: "order 2 does not affect the priority under the *Personal Property Securities Act* 2009 (Cth) of any security interests registered over assets of the respondent before or after 17 January 2013." As was correctly stated on behalf of the applicant that order might not, strictly speaking, be required. However, it is I think appropriate that it is made and it accords with indications that were given by the applicant to the creditors. The order provided in draft form will be initialled by me and will be placed with the court file.