LexisNexis

Financial Services Newsletter

2020 . Vol 19 No 4

Contents

Information contained in this newsletter is current as at July 2020

LexisNexis Butterworths

General Editor's note

Karen Lee *LEGAL KNOW-HOW*

Welcome to the *Financial Services Newsletter*. I hope you are staying well.

In response to COVID-19, the Australian Securities and Investments Commission has temporarily changed its regulatory work and priorities to allow regulated entities to focus on the impact of the pandemic. That said, directors must remember they need to continue to act with due care, skill and discipline in the best interests of the company despite challenges posed by the pandemic. **Christine Blight**, **Vanessa Ip**, **Claudia Marcellos**, together with editorial board member **Fadi Khoury** (Corrs Chambers Westgarth) explain this by taking us through the recent High Court decision in *ASIC v King*[1] and the Federal Court decision in *Cassimatis v ASIC*.[2] Importantly, the authors outline what these decisions mean for directors and officers of Australian Financial Services Licence holders.

The COVID-19 pandemic has made traditional "wet ink" signing of documents impractical, and even impossible in some cases. Recent law reform has brought about some welcome changes, even if only temporarily. In their article "Electronic signatures, remote witnessing and COVID-19", editorial board member **Andrea Beatty** and **Gabor Papdi** (Piper Alderman) give us an overview of the reforms in the various Australian jurisdictions.

In 2020, we continue to see personal property securities (PPS) cases being heard in court. Regular readers will know that I follow all things PPS, and PPS indeed is one pet topic of mine. I am pleased to bring you a case law update by **Martin Lovell** and **Oliver Radan** (Piper Alderman). The authors consider three recent PPS decisions that remind all of us of the importance of accurately documenting and perfecting security interests under the Personal Property Securities Act 2009 (Cth).

I hope you enjoy these articles. Please continue to email me with suggestions and feedback.

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Karen Lee is the General Editor of the Australian Banking & Finance Law Bulletin and the Financial Services Newsletter. She also partners LexisNexis in other capacities, including as Specialist Editor for precedents in banking and finance, mortgages and options, and as contributing author of a number of other publications, including Australian Corporate Finance Law, Halsbury's Laws of Australia and Practice Guidance for General Counsel. Karen established her legal consulting practice, Legal Know-How, in 2012. She provides expert advice to firms and businesses on risk management, legal and business process improvement, legal documentation, regulatory compliance and knowledge management. Prior to this, Karen worked extensively in-house, including as Head of Legal for a leading Australasian non-bank lender, as well as in top-tier private practice, including as Counsel at Allen & Overy and Clayton Utz.

Footnotes

1. *Australian Securities and Investments Commission (ASIC) v King* (2020) 376 ALR 1; [2020] HCA 4; BC202001632.
2. *Cassimatis v Australian Securities and Investments Commission (ASIC)* (2020) 376 ALR 261; [2020] FCAFC 52; BC202002848.

Recent developments for directors and officers of AFS licensees

***Christine Blight**, **Vanessa Ip**, **Claudia Marcellos** and **Fadi C Khoury** CORRS CHAMBERS WESTGARTH*

The Australian Securities and Investments Commission (ASIC) has used recent success in the High Court and the Federal Court to reinforce that directors must continue to act with due care, skill and discipline in the best interests of the company despite challenges boards might face in dealing with the COVID-19 pandemic.

Here we examine the implications for boards and executives of financial services companies following the recent decisions in *Australian Securities and Investments Commission (ASIC) v King*[1] (*ASIC v King*) and *Cassimatis v ASIC*[2] and commentary from Commissioner John Price.

ASIC v King

In *ASIC v King*, the High Court of Australia opined on the proper construction of the definition of "officer" in s 9 of the Corporations Act 2001 (Cth), clarifying that the phrase "capacity to affect significantly the corporation's financial standing" in subs (b)(ii) of the definition also captures individuals outside the management of the corporation that are able to influence the company's affairs.

Mr King was the Chief Executive Officer (CEO) and executive director of MFS Ltd, the parent company of the MFS group of companies (MFS Group). MFS Group managed the Premium Income Fund (PIF), a registered managed investment scheme to which MFS Investment Management Pty Ltd (MFSIM) was appointed as responsible entity. MFSIM (as responsible entity of PIF) entered into a $200 million loan facility with the Royal Bank of Scotland for the benefit of the PIF (the RBS Loan). An amount of $150 million from the RBS Loan was subsequently drawn down, and $130 million was paid to MFS Administration Pty Ltd (MFS Administration), which then used $103 million to pay an outstanding debt in the name of MFS Castle Pty Ltd, another wholly owned subsidiary of MFS Ltd. There was no agreement under which MFSIM as responsible entity of PIF would receive any consideration for this payment or any security provided to MFSIM for the transaction. Ultimately, the MFS Group collapsed causing PIF investors to incur substantial losses.

ASIC commenced proceedings against Mr King as an "officer" of MFSIM on the basis that he was a person who had the "capacity to affect significantly the corporation's financial standing" despite the fact that he did not hold a designated role in MFSIM. The Supreme Court of Queensland held in favour of ASIC.[3]

Court of Appeal

The Queensland Court of Appeal[4] held that Mr King was not an "officer" of MFSIM in his position as CEO and director of MFS Ltd, since he did not hold an "office" in MFSIM that was a "recognised position with rights and duties attached to it".[5]

ASIC appealed to the High Court.

High Court decision

The High Court (Kiefel CJ, Gageler and Keane JJ) unanimously held that the Court of Appeal had misconstrued the definition of "officer" in the Act. Their Honours determined that the proper construction of the definition of "officer" is to adopt a literal application of the text in s 9 of the Act. Accordingly, while s 9(a) of the definition of "officer" of a corporation captures persons that hold a position or "office" within the company, s 9(b) is intended to capture persons that do not hold an office within the company.[6] Their Honours provided the following test for determining whether an individual falls under s 9(b)(ii) of the Act:[7]

- What was the role of the individual in regard to the company?
- What were the responsibilities and duties of that role?
- What actions or inactions were involved in relation to determining the financial standing of the company?

Their Honours notably observed:

> If the CEO of the parent company of a group of companies is allowed to act in relation to other companies in the group untrammelled by the duties that attach to officers of each of the other companies in the group, shareholders and creditors would be left exposed to an obvious risk. It would be

> an extraordinary state of affairs if those who actually determine the course of a company's financial affairs could avoid responsibility for their conduct by the simple expedient of deliberately eschewing any formal designation of their responsibilities.[8]

Therefore, Mr King was deemed to be an "officer" of MFSIM, despite not holding a formal "office" in MFSIM at the time of the transaction.

Cassimatis v ASIC

On 27 March 2020, the Full Federal Court of Australia, by a 2:1 majority, upheld the finding in *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)*[9] that the directors of Storm Financial Pty Ltd (Storm) breached their duty of care and diligence under s 180(1) of the Act by causing or permitting inappropriate advice to be given to vulnerable investors.[10]

Storm provided financial advice to clients in relation to a "double gearing" investment model, and many of these clients suffered catastrophic losses when the market collapsed during the global financial crisis. The Cassimatises (the appellants) were the directors of and sole shareholders in Storm and were intricately involved in the formulation and deployment of the investment model. They supervised the risk profiling of the clients, had control over the day to day affairs of Storm, and supervised in a granular way all aspects of the Storm business.

ASIC brought proceedings against the appellants for breaching their duty under s 180(1) of the Act to exercise their power and discharge their duty with the degree of care and diligence that a reasonable person would exercise if they were in the same position by causing financial advice to be given to vulnerable investors which exposed Storm to foreseeable risks. ASIC's case rested on the fact that Storm had contravened the Act by not sufficiently considering or investigating the subject matter of the advice given to the vulnerable investors, which was not appropriate having regard to all the circumstances.

At first instance, the primary judge held that Storm had breached the Act in relation to the appropriateness of advice given to the vulnerable investors and concluded that each appellant contravened s 180(1) of the Act by exercising their powers without care and diligence by permitting the inappropriate advice to be given.[11]

Appeal to the Full Federal Court

The appellants appealed the primary judgment on several grounds, including, in relation to s 180(1), that:

- the primary judge failed to carry out an adequate balancing exercise of the risks and benefits of the conduct engaged in by Storm for the purpose of determining whether s 180(1) of the Act was contravened by the appellants
- the primary judge erred in holding that, when construing s 180(1) of the Act, consideration is to be had to the interests of the corporation in complying with the law and
- the primary judge erred in not holding that the interests of Storm and the interests of Storm's shareholders were effectively identical, because:
  - — Storm was solvent at the time the conduct was engaged in and
  - — the appellants acted honestly and in accordance with the unanimous wishes of the shareholders (being themselves)

The Full Federal Court, by a 2:1 majority (Greenwood and Thawley JJ, Rares J dissenting), upheld the initial finding that the appellants breached their duty of care and diligence under s 180(1), saying that when considering the duty in s 180(1), a balancing exercise is to be undertaken between the foreseeable risks of harm to a company and the potential benefits of engaging (or not engaging, as the case may be) in the impugned conduct and the ability to take alleviating actions, from the perspective of a reasonable person in the position of, and with the same responsibilities as, the director of the company in the company's circumstances.[12] In considering the scope of the care and diligence duty, the majority observed the following:

- When assessing the risk of harm to a company, a reasonable director would have had consideration for the "real possibility" that contraventions of the Act by Storm would expose the company to action from ASIC and jeopardise its very existence.[13]
- The interests of a company and its shareholders are not always identical. Shareholder interests are relevant when considering the interests of the company and may have some influence over the content of s 180. However, shareholders cannot approve their own contravention of s 180(1), as was the submission of the appellants, nor can shareholders release directors from their statutory duties.[14]
- Although when considering a breach of s 180(1) a contravention of the law by a company may be a relevant fact, the liability of directors under s 180(1) is direct and not derived from a contravention of the law by the company, and a "stepping stone" approach to determining liability under s 180(1) is inappropriate.[15]

ASIC commentary

On 16 April 2020 in a note to the Australian Institute of Company Directors, ASIC Commissioner John Price commented on director duties in the context of COVID-19, reminding directors and officers that any temporary changes to the law to facilitate the operation of businesses during the pandemic do not alter a director's fundamental duties to act with due care, skill and diligence and to act in the best interests of the company.[16]

Commissioner Price also noted that whether ASIC takes action will "[depend] on the assessment of all relevant circumstances, including what a director or officer could reasonably have foreseen at the time of taking relevant decisions".[17]

What do these developments mean for directors and officers of Australian Financial Services Licensees?

- Senior employees, directors and officers of financial services companies that are part of a corporate group should also consider the extent of their capacity to influence the actions of other companies within the group and whether they might be considered an officer of any other group companies for which they don't otherwise have a designated role.
- Directors and officers should be aware that they can be liable in relation to their duties under s 180 of the Act without a breach by the company of any other law being proved. They are responsible for their own actions irrespective of the actions of the company.
- They should be alive to risk and detriment that could be "reasonably foreseen".
- When dealing with uncertainty created by the COVID-19 pandemic and adapting corporate strategies to the new statutory and economic environment, directors and officers should continue to be guided by their duties enumerated in s 180 of the Act.

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Footnotes

1. *Australian Securities and Investments Commission (ASIC) v King* (2020) 376 ALR 1; [2020] HCA 4; BC202001632.
2. *Cassimatis v ASIC* (2020) 376 ALR 261; [2020] FCAFC 52; BC202002848.
3. *Australian Securities and Investments Commission (ASIC) v Managed Investments Ltd (No 9)* (2016) 308 FLR 216; 112 ACSR 138; [2016] QSC 109; BC201603867.
4. *King v ASIC* (2018) 134 ACSR 105; [2018] QCA 352; BC201812353.
5. Above, at [240].
6. Above n 1, at [24].
7. Above n 1, at [91].
8. Above n 1, at [46].
9. *Australian Securities and Investments Commission (ASIC) v Cassimatis (No 8)* (2016) 336 ALR 209; [2016] FCA 1023; BC201607349.
10. Above n 2, at [212]–[213] per Greenwood J; and [495] per Thawley J.
11. Above n 9, at [833].
12. Above n 2, at [474].
13. Above n 2, at [176]–[179] per Greenwood J; and [488] per Thawley J.
14. Above n 2, at [196]–[197] per Greenwood J; and [472] per Thawley J.
15. Above n 2, at [79] per Greenwood J; and [465] per Thawley J.
16. J Price, ASIC Commissioner John Price on directors duties in the context of COVID-19, 16 April 2020, https://aicd.companydirectors.com.au/resources/covid-19/asic-commissioner-john-price-on-directors-duties-covid-19.
17. Above.

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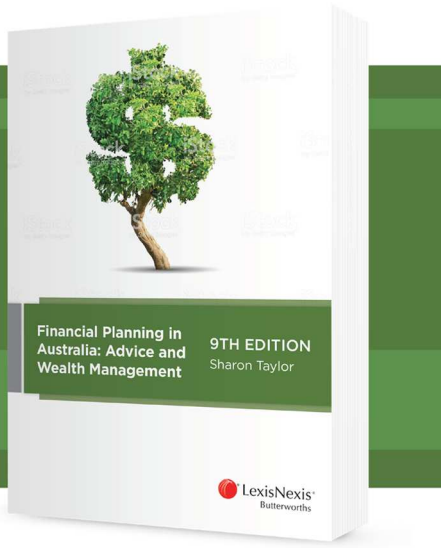

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- Gives substantial treatment to behavioural finance to cover the FASEA requirements in this area

About the Author

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Table of Contents

Publication Date: December 2019

ISBN: 9780409351422 (softcover)
RRP * incl. GST: $160.00

ISBN: 9780409351439 (eBook)
RRP * incl. GST: $160.00

*Prices include GST and are subject to change without notice.
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Electronic signatures, remote witnessing and COVID-19

Andrea Beatty *and* ***Gabor Papdi*** *PIPER ALDERMAN*

Despite advances in electronic authentication methods, wet signatures on paper documents are the primary means of indicating agreement to the contents of a document. Whilst each Australian jurisdiction has legislation permitting transactions by electronic means, that and other state/territory pieces of legislation contain key exclusions which substantially reduce the scope of their application.

Restrictions on movement and gatherings in response to the COVID-19 pandemic have made arranging for wet signature execution, and the witnessing of such signatures where necessary, impractical, if not effectively impossible, in many cases. They have brought into focus the limitations of wet signature execution of documents. Law reforms in the various Australian jurisdictions have sought to overcome this problem, albeit temporarily. This article provides an overview of those reforms.

Commonwealth

Under the Commonwealth Electronic Transactions Act 1999, a requirement for a signature under a Commonwealth law is taken to have been met in relation to an electronic communication if, in general terms, a method is used to identify the person and their intention in respect of the information communicated, that method is reliable and appropriate in the circumstances or is proven in fact to have identified the person and indicated their intention in relation to the information communicated, and the method complies with the requirements stipulated by the recipient or is otherwise consented to by the recipient[1] However, many Commonwealth laws are excluded from the operation of the Electronic Transactions Act, including the Corporations Act 2001 (Cth).[2] This is problematic for the execution of documents by companies.

To overcome this problem, the Commonwealth Treasurer made the Corporations (Coronavirus Economic Response) Determination (No 1) 2020 (the Determination), modifying the operation of s 127(1) of the Corporations Act to permit remote and electronic execution of documents by companies. It provides that, in addition to methods currently permitted under s 127(1), a company may execute a document without a common seal if two directors, a director and a secretary or the sole director and secretary either:[3]

- sign a physical copy or counterpart, or
- use an electronic method to identify themselves and indicate their intention in respect of the contents of the document, and that method is either reliable or appropriate in the circumstances or is proven in fact to have fulfilled the functions of identifying the person and indicating their intention (essentially mirroring s 10(1)(b) of the Electronic Transactions Act)

The Determination also extends the entitlement to assume that a document apparently executed in accordance with s 127 has been duly executed by the company to documents executed in accordance with the modified requirements in the Determination.[4]

New South Wales

Australia's premier state also has an Electronic Transactions Act 2000 permitting signature by electronic means in substantially the same terms as its Commonwealth counterpart.[5] Unlike its Commonwealth counterpart, however, the list of exclusions from it is not as extensive, being largely limited to the lodgement, filing or production of documents in connection with court processes, documents under certain public administration statutes, personal or postal service of documents and documents to be verified or attested to under signature by someone other than their author. The NSW legislation also specifically permits deeds to be made in electronic form, though witnessing and attestation of a signature is problematic if done remotely.

Shortly after the announcement of COVID-19 restrictions, on 25 March 2020 the NSW Parliament enacted omnibus legislation amending the Electronic Transactions Act to include a temporary regulation-making power specific to the COVID-19 pandemic.[6] Pursuant to that power, regulations[7] were made permitting:

- a signature to be witnessed by audio-visual link and

- arrangements (eg, verifying the identity of the signatory or swearing/affirming an affidavit) in relation to witnessing signatures and the attestation of documents to be performed by audio-visual link

The witnessing of a signature must be performed in real time and the witness must endorse the document, or a copy of the document, with a statement specifying the method of witnessing and that it was witnessed in accordance with the COVID-19 regulation. The witness can confirm the signature was witnessed by either signing a separate counterpart of the document or a scanned copy of the signed document sent electronically by the signatory.

These provisions apply to deeds, wills, powers of attorney and affidavits, among other documents. They overcome the problems that physical distancing poses for witnessing and attestation. However, they do still retain the primacy of wet signatures, eschewing the opportunity to implement reforms permitting secure electronic authentication methods to replace the authentication function that witnessing currently serves. These provisions also lapse after 6 months, though they can be extended by regulation for up to 12 months in total.

Victoria

The signature provisions in Victoria's electronic transactions statute[8] mirror those of NSW and the Commonwealth.

COVID-19 omnibus legislation enacted by the Victorian Parliament permits regulations to be made for the witnessing, execution or signing of legal documents, including deeds, powers of attorney, contracts and wills. Regulations[9] were also made, permitting deeds and mortgages (among other things) to be signed electronically and for the signature (or any other thing that needs to be observed, such as identity documents as part of a verification of identity procedure) to be witnessed remotely by audio-visual link. An extended meaning of "transaction" is prescribed for in the Electronic Transactions (Victoria) Act 2000, for which a requirement for a signature can be satisfied in accordance with s 9 of that Act.[10]

Similarly to the NSW provisions, a person who witnesses something remotely must include with their signature a statement that the witnessing was done by audio-visual link in accordance with the COVID-19 regulation.[11]

The Victorian regulation also expressly contemplates the signing of a document electronically in counterparts, imposing an additional requirement that each person whose signature is required on the document or whose consent to electronic signing is required receives a copy of each signed counterpart.[12] As with its NSW counterpart, this latter requirement seems designed for wet signatures as opposed to fully electronic authentication methods.

The omnibus legislation also amended the Oaths and Affirmations Act 2018 (Vic), dealing with oaths, affirmations, affidavits and statutory declarations, to permit:

- a deponent or authorised affidavit taker to meet a requirement for signature or initialling by electronic means[13]
- something required to be done by the deponent or authorised affidavit taker in each other's presence to be done by means of audio link or audio-visual link[14] and
- a scanned hard copy or electronic copy to be signed or initialled instead of the original affidavit or other document[15]

Queensland

The signature provisions in Queensland's electronic transactions statute[16] mirror those of the jurisdictions discussed above.

Following a similar model to Victoria (although Queensland made its statute over a month before Victoria did), the Queensland Parliament enacted omnibus legislation[17] conferring a broad regulation-making power in relation to, among other things, the signing of documents, witnessing of signatures, verification of identity and attestation of a document. At the time of writing almost a month later, specific regulations have been made in relation to wills, enduring powers of attorney and advance health directives permitting presence and witnessing by audio-visual link. However, general regulations facilitating electronic signature and attestation of broad effect similar to NSW and Victoria have not yet been made.

South Australia

The signature provisions in South Australia's electronic transactions statute[18] mirror those of the jurisdictions discussed above.

Like Victoria and Queensland, South Australia enacted omnibus legislation[19] that contains a general regulation-making power in relation to the "signing, witnessing, attestation, certification, stamping or other treatment of any document".[20] However, at the time of writing, the only use of this regulation-making power has been to allow a greater range of persons to take a statutory declaration under South Australian law.[21] Broader permission for electronic signatures and remote witnessing or attestation as in other jurisdictions has not been enacted. In relation to remote witnessing, the COVID-19

Emergency Response Act 2020 (SA) specifically provides that a requirement for two or more persons to be physically present will be satisfied if the persons meet or the transaction takes place remotely using audio link, audio-visual link or any other means of communication prescribed by the regulations.[22] However, the regulations specifically exclude any:

> … requirement that a person be physically present to witness the signing, execution, certification or stamping of a document or to take any oath, affirmation or declaration in relation to a document[23]

from the remote meeting permission, thereby preventing the kind of remote witnessing and attestation of signatures or verification of identity permitted in NSW and Victoria.

Tasmania

The signature provisions in Tasmania's electronic transactions statute[24] mirror those of the jurisdictions discussed above.

Omnibus legislation enacted by the Tasmanian Parliament permits the Minister to, by notice, declare that notwithstanding what is provided by any legislative instrument, any action that is required to be taken by means of a physical action such as signature or personal service, or evidenced in a physical document, may be taken or evidenced by the electronic means specified in the notice.[25] At the time of writing, only one notice was made under this power, applying only to local councils in the exercise of their functions. There is therefore no special accommodation for electronic contracting in response to COVID-19.

Western Australia

The signature provisions in Western Australia's electronic transactions statute[26] mirror those of the jurisdictions discussed above.

At the time of writing, Western Australia has not enacted any legislation providing for electronic signatures or remote witnessing and attestation in connection with the COVID-19 pandemic.

Australian Capital Territory

The signature provisions in the ACT's electronic transactions statute[27] mirror those of the jurisdictions discussed above.

The ACT's COVID-19 legislation[28] contains a provision permitting the signing of a document to be witnessed by audio-visual link, a document to be attested or certified by audio-visual link and for anything required to be done in the presence of another person to be done if that other person is present by audio-visual link.[29] It also contains a requirement seemingly copied from its NSW counterpart regulation requiring a person witnessing the signing of a document by audio-visual link to observe the signing in real time and to endorse the document, or a copy of the document, with a statement specifying the method of witnessing and that it was witnessed in accordance with the COVID-19 section.[30] These provisions cease to have effect 3 months after there has no longer been a COVID-19 state of emergency in force (under ACT legislation, of course).

Northern Territory

The signature provisions in the NT's electronic transactions statute[31] mirror those of the jurisdictions discussed above.

At the time of writing, the NT has not enacted any legislation providing for electronic signatures or remote witnessing and attestation in connection with the COVID-19 pandemic.

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Footnotes

1. Electronic Transactions Act 1999 (Cth), s 10(1).
2. Electronic Transactions Regulations 2000 (Cth), Sch 1.
3. Corporations (Coronavirus Economic Response) Determination (No 1) 2020 (Cth), s 6(3).
4. Above, s 7.
5. Electronic Transactions Act 2000 (NSW), s 9.
6. Above, s 17.
7. Electronic Transactions Regulation 2017 (NSW), Sch 1.
8. Electronic Transactions (Victoria) Act 2000 (Vic), s 9.
9. COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic).
10. Above, Pt 2 reg 7.
11. Above n 9, Pt 2 reg 10.
12. Above n 9, Pt 2 reg 12.
13. Oaths and Affirmations Act 2018 (Vic), s 49B.
14. Above, s 49C.
15. Above n 13, s 49D.

16. Electronic Transactions (Queensland) Act 2001 (Qld), s 14.
17. COVID-19 Emergency Response Act 2020 (Qld).
18. Electronic Communications Act 2000 (SA), s 9.
19. COVID-19 Emergency Response Act 2020 (SA).
20. Above, s 16.
21. COVID-19 Emergency Response (Section 16) Regulations 2020 (SA).
22. Above n 19, s 17.
23. COVID-19 Emergency Response (Section 17) Regulations 2020 (SA), s 4.
24. Electronic Transactions Act 2000 (Tas), s 7.
25. COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 (Tas), s 17.
26. Electronic Transactions Act 2011 (WA), s 10.
27. Electronic Transactions Act 2001 (ACT), s 9.
28. COVID-19 Emergency Response Act 2020 (ACT).
29. Above, s 4(2).
30. Above n 28, s 4(3).
31. Electronic Transactions (Northern Territory) Act 2000 (NT), s 9.

PPSA case law update

Martin Lovell *and* ***Oliver Radan*** *PIPER ALDERMAN*

Three recent decisions provide useful reminders for secured lenders and trust beneficiaries of the importance of accurately documenting and perfecting security interests under the Personal Property Securities Act 2009 (PPSA):

- The decision in *Keon Pty Ltd atf Keon Family Trust v Goldfields Equipment Pty Ltd (in liq)*[1] highlights the risks of entering into a secured loan agreement without a separate security deed or clear charging clause.
- Parker J, in *StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd*,[2] confirmed that the point in time from which a purchase money security interest (PMSI) must be perfected in order to enjoy super-priority is calculated from when the grantor obtains possession of the particular collateral as the grantor of the security interest, notwithstanding prior possession of the collateral.
- In *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia*,[3] the Supreme Court of Western Australia held that (1) a contingent equitable interest in funds held on trust pending an arbitral decision is a security interest under the PPSA and; (2) once a person becomes absolutely entitled to trust funds under a trust or escrow deed, that person's security interest may be perfected by "possession" under the PPSA, despite the funds remaining in the hands of the third party trustee.

Keon Pty Ltd atf Keon Family Trust v Goldfields Equipment Pty Ltd (in liq)

Keon Pty Ltd lent around $300,000 to Goldfields Equipment Pty Ltd. This loan was documented in a deed which said the loan was made "with an associated floating mortgage over all business assets" of the borrower and also contemplated the execution of a "charge" by the borrower. However, no separate charge or security agreement was executed.

When a liquidator was appointed to the borrower, the lender claimed that it had a security interest under the deed. The court disagreed, finding that the wording in the loan deed was not sufficient to create a floating charge. In doing so, the court took into account that, on the face of the deed, a further security document was clearly contemplated by the parties.

This decision makes it clear that finance documents must include wording which clearly and unambiguously creates a security interest or charge. It is not sufficient to simply refer to the loan as being secured or to contemplate that a security interest or charge will, or may, be granted by the borrower or security provider. In practice, it is often prudent to document security separately from the loan agreement and to ensure that the security document is duly executed and registered.

StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd

This case involved a dispute over a sum of money which Dairy Livestock Services Pty Ltd (DLS) received from selling several hundred cattle on behalf of Reid Agricultural.

Reid Agricultural had a credit account with a stock and station agent DLS which granted DLS a PMSI and a security interest over stock supplied by DLS. This security interest secured the purchase price for stock as well as feed and agistment. This was perfected by registration on the Personal Property Securities Register (PPSR) as a purchase money security interest (PMSI).

StockCo Agricapital Pty Ltd (StockCo) subsequently agreed to fund the purchase of certain cattle with DLS, acting as purchasing agent and charging a fee for its service. StockCo's financing documents provided that: (a) all stock were acquired by the customer as agent for StockCo; (b) StockCo had a security interest over any acquired stock, any product derived from stock and proceeds; and (c) StockCo also took a general security over any other stock of the customer, whether purchased under the facility or not. This was perfected by registration on the PPSR as both a PMSI and as a non-PMSI but lodged after the DLS registration was already in place.

DLS sold stock for Reid and there was a dispute over whether StockCo was entitled to the proceeds of that sale in priority to DLS.

The court found that StockCo held a perfected PMSI over the cattle, despite the fact that Reid (as purchaser) had already taken possession of the stock before the StockCo facility and PMSI registration was in place.

DLS contended that this meant that StockCo had not perfected its security interest in the cattle by registration at the time the purchaser obtained possession, as required under s 62(2)(b)(i). The court, however, applied the reasoning of the Supreme Court of South Australia — Full Court in *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd*,[4] restating the principle that the "possession" referred to in s 62(2)(b)(i) of the PPSA is possession as *grantor* of the security interest. Prior possession in another capacity does not count. The purchaser only obtained possession of the cattle, for the purposes of s 62(2)(b)(i), when the stock became subject to the security interest under the agreement between it and StockCo.

DLS had already been reimbursed for the purchase price of the initial stock out of the funds advanced by StockCo, and the other amounts for feed and agistment covered by the DLS security interest did not have PMSI priority. Accordingly, StockCo's PMSI had priority over DLS's non-PMSI security interest.

This is the first case in Australia to consider and uphold the view in *Samwise Holdings* that "possession" for the purposes of s 62(2)(b)(i) needs to be interpreted as possession as a *grantor* of a security interest, not possession *simpliciter*.

Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia

This case concerned the fate of $27 m held in a solicitor's trust account as security for a claim being arbitrated in Singapore and considered the status of those trust arrangements under the PPSA.

Dalian Huarui Heavy Industry International Company Ltd (Dalian) and Duro Felguera Australia Pty Ltd (Duro) were involved in a contractual dispute in relation to an iron ore project in Western Australia, with Dalian claiming payment for various goods supplied and delivered as a subcontractor to Duro. The dispute was the subject of arbitration in Singapore and a sum of $27 m had been deposited by Duro into an Australian trust account held by its solicitors, Clyde & Co Australia (**Clyde & Co**) to provide some assurance of available funds if Dalian's claim was ultimately successful. The parties entered into a trust agreement setting out the terms on which the $27 m could be dealt with or paid to Dalian, including in accordance with a direction of the tribunal (Trust Agreement).

Dalian was successful in obtaining an award from the tribunal and claimed that the $27 m should be transferred to it by Clyde & Co. However, Duro subsequently entered voluntary administration and the administrators' lawyers requested that the funds not be distributed until the administration had been finalised.

As part of the judgment, Kenneth Martin J had to consider the nature of the trust arrangements and whether they gave rise to a security interest under the PPSA. It was held that the arrangements for security initially conferred on Dalian an equitable interest in the trust amount by way of security in the form of an equitable charge or lien. While Dalian's interest was at first contingent on it winning its case against Duro, it was then "perfected to fully vest unconditionally" under the terms of the Trust Agreement on the tribunal's issue of an order directing Clyde & Co to immediately release the trust amount to Dalian's lawyers.

The court held that the transactions under the Trust Agreement gave rise to a security interest under s 12(1) of the PPSA with Duro, as grantor, creating a security interest in favour of Dalian over the trust amount held in Australia by Clyde & Co. Because the funds were held under a consensual arrangement in connection with the arbitration, the court held that it was not excluded by virtue of s 8.1(c) of the PPSA.

Dalian never registered this security interest on the PPSR and consequently there was an argument that it was unperfected and subject to the vesting rule under s 267 of the PPSA at the time that Duro went into administration on 28 February 2020.

However, applying the extended definition of "possession", by reference to s 24(2) of the PPSA, the court considered that the trustee (ie Clyde & Co) held the funds on behalf of Dalian and that the security interest was therefore perfected under the PPSA by possession by Clyde & Co holding the funds for Dalian absolutely. This is despite the fact that the collateral was intangible property which is not generally subject to perfection by "possession" and that at the time of the administration, Duro did not have any continuing interest in the funds.

This decision suggests that a party with a right to funds held under an escrow or trust arrangement has a security interest under the PPSA which needs to be perfected against the party who retains the residual beneficial interest (not against the trustee or escrow agent itself). It also suggests that once a party becomes absolutely entitled to payment of funds held in escrow, that security interest may be treated as perfected by possession for the purposes of the PPSA, notwithstanding that the funds are intangible property and still held by the trustee or escrow agent.

We anticipate that this decision will be subject to considerable debate.

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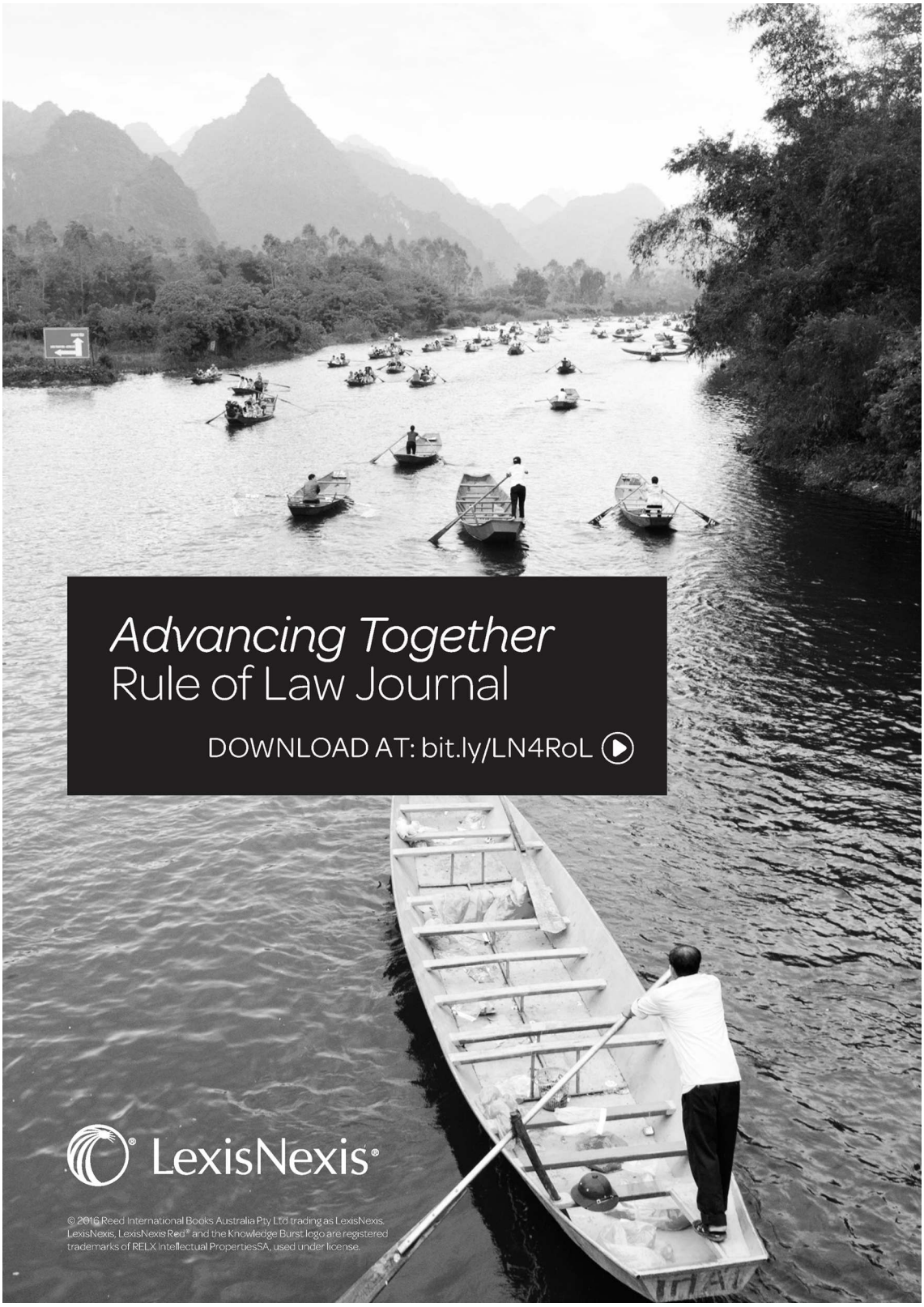
Footnotes

1. *Keon Pty Ltd atf Keon Trust v Goldfields Equipment Pty Ltd (In Liq)* [2020] WASC 61; BC202001251.
2. *StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd* [2020] NSWSC 318; BC202002572.
3. *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia* [2020] WASC 132; BC202003300.
4. *Samwise Holdings Pty Ltd v Allied Distribution Finance Pty Ltd* (2018) 131 SASR 506; 341 FLR 321; [2018] SASCFC 95; BC201808504.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Cite this issue as (2020) 19(4) *FSN*
SUBSCRIPTION INCLUDES: 10 issues per volume plus binder www.lexisnexis.com.au
SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067
CUSTOMER RELATIONS: 1800 772 772
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ISSN: 1035-2155 Print Post Approved PP 25500300764