Ambulatory clauses can be safely used in registered charges

Market relief at High Court decision

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TO THE GREAT RELIEF OF THE capital markets, on 1 September 2010 the High Court, in *Public Trustee of Queensland v Fortress Credit Corporation (Aus)* 11 Pty Ltd [2010] HCA 29, confirmed that ambulatory clauses (the most common being "all monies clauses") may safely be used in registered charges without the need to register a variation under s.268(2) of the *Corporations Act 2001* each time a new liability is added to the security.

Capital markets had been alarmed when the Public Trustee of Queensland obtained a declaration that a charge was void because a variation had not been lodged when an additional facility was subsequently brought within its ambit through an ambulatory clause. The capital markets rely extensively on ambulatory clauses and so there was great relief when the trial judge's decision was overturned by the Queensland Court of Appeal. Relief turned to anxiety, however, when the Public Trustee appealed to the High Court.

The case involved the two guarantees of two different loans given by the second respondent Octaviar to Fortress Credit. At the time of the giving of the charge only one of the guarantees was secured by it. The first loan was repaid, but Fortress Credit did not release the charge, claiming that it now secured the previously unsecured guarantee on the basis that:

- Octaviar had charged all of its present and future property as security for the repayment of the "secured money";
- "Secured money" was defined as amounts owing under any "transaction document";
- "Transaction document" was defined to include new documents deemed to be "transaction documents" by agreement between the parties;
- A subsequent deed had deemed the unsecured loan to be a transaction document.

The validity of the charge, insofar as it applied to the unsecured loan, was challenged by the Public Trustee on the basis of s.268(2) of the *Corporations Act* which requires: "Where, after a registrable charge on property of a company has been created, there is a variation in the terms of the charge having the effect of:

"(a) increasing the amount of the debt or increasing the liabilities (whether present or prospective) secured by the charge; [or ...]

"(b) the company must, within 45 days after the variation occurs, ensure that there is lodged a notice setting out particulars of the variation."

The Public Trustee argued that the definition of transaction document (insofar as it provided for the subsequent deeming of documents to be transaction documents) merely foreshadowed the securing by the charge of future liabilities, and to that extent was a mere agreement to agree. The subsequent deed, therefore, had the effect of varying the terms of the charge by adding a new liability to the class of liabilities already secured by it, and was therefore a variation for the purposes of s.268(2).

The High Court, in a unanimous decision, and to the relief of lenders, rejected this analysis, and affirmed the view of the Queensland Court of Appeal, holding (at [23-24]): "There was no variation made to the terms of the charge, either in their text or in the rights and obligations to which those terms gave rise. To focus upon the effect of the January 2008 deed, as opposed to whether its execution varied the terms of the charge, is to misconceive the operation of s.268(2). Section 268(2) does not apply to any increase in the debt or liabilities secured. If the parties have chosen that a term of the charge will be variable or ambulatory in its factual operation, as is, for example, common with 'all moneys' clauses and the imposition of variable rates of interest, there is no variation in the terms each time its operation is, as a matter of fact, altered or modified."

Thus the High Court affirmed that the register does not purport to be a perfect and complete record of the nature and extent of all liabilities; rather it warns persons who may become creditors of the company merely of the existence and maximum liability of any encumbrances over its property. It follows that all monies clauses and other clauses which refer to documents extraneous to the register – past, present or future – do not, when used, constitute a variation of the charge nor, by extension, are those extraneous documents required to be registered. ❑

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