

Supreme Court
New South Wales

Case Name: In the matter of Allied Master Chemists of Australia Limited

Medium Neutral Citation: [2020] NSWSC 291

Hearing Date(s): 20 March 2020

Date of Orders: 20 March 2020

Decision Date: 20 March 2020

Jurisdiction: Equity - Corporations List

Before: Rees J

Decision: Extend time under section 588FM of Corporations Act 2001 (Cth) to register security interests on Personal Property Securities Register.

Catchwords: Security interests registered by reference to grantors' Australian Business Number rather than Australian Company Number – inadvertence – evidence of solvency of grantors – secured creditors not affected by order sought – unsecured creditors affected – whether Guardian Securities condition appropriate – principles at [16]-[20] – grantors include publicly listed company – uncertainty inherent in such a condition unhelpful and unwarranted – condition not imposed.

Legislation Cited: Corporations Act 2001 (Cth), ss 588FL(2)(b)(iv), 588FM(1),
Personal Properties Securities Act 2009 (Cth), ss 62, 153(1), 293
Personal Properties Securities Regulation 2010 (Cth)

Cases Cited: Re Transurban CCT Pty Ltd [2014] NSWSC 1909
Re Cardinia Nominees Pty Ltd [2013] NSWSC 32
In the matter of Appleyard Capital Pty Limited; 123
Sweden AB v Appleyard Capital Pty Limited (2014) 101
ACSR 629; (2014) 32 ACLC 14-041; [2014] NSWSC

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Re Application of Guardian Securities Ltd (1984) 8

ACLR 822; [1984] 1 NSWLR 95

Re Joplin Brewery Co Ltd [1902] 1 Ch 79

In the matter of Accolade Wines Australia Limited

[2016] NSWSC 1023

In the matters of 4 in 1 Wyoming Pty Ltd [2017]

NSWSC 407

In the matter of Psyche Holdings Pty Limited [2018]

NSWSC 1254

Squadron Resources Pty Ltd v Highlake Resources Pty

Ltd [2018] FCA 1292

Category: Principal judgment

Parties: Westpac Banking Corporation (Plaintiff)
Allied Master Chemists of Australia and the other
Defendants listed in Schedule A of the Originating
Process dated 19 March 2020 (1st to 15th Defendants)

Representation: Counsel:
Mr T Castle (Plaintiff)
No appearance (1st to 15th Defendants)

Solicitors:
Dentons (Plaintiff)

File Number(s): 2020/88733

EX TEMPORE JUDGMENT

1 **HER HONOUR:** This is an application by Westpac Banking Corporation under section 588FM(1) of the *Corporations Act 2001* (Cth) for an order fixing a later time for the purpose of section 588FL(2)(b)(iv) to register security interests on the Personal Property Securities Register (*PPSR*). The security interests in question were granted by 15 companies which form part of the Sigma Healthcare group of companies. The security interests were granted some time ago – on 17 December 2018 – and registered at the time but by reference to the Australian Business Number (ABN) of the companies rather than their Australian Company Number (ACN). It is the latter which is required: section 153(1), *Personal Properties Securities Act 2009* (Cth); regulation 5.5, Schedule 1, clause 1.3, Item 3, *Personal Properties Securities Regulation 2010* (Cth).

This error has since been remedied and the security interests registered again on 5 March 2020.

- 2 The defendants, being the 15 companies concerned, have been notified of this application and consent to the orders sought. The proposed orders do not affect any secured creditors and thus none have been joined.

Facts

- 3 Westpac has been the primary lender to the Sigma Healthcare group of companies for many years, at least from 1999, including under a Receivables Purchase Agreement. In 2018, this facility was due for renewal and Westpac instructed its solicitors to act in relation to the matter.
- 4 On 17 December 2018, Westpac, the defendants and two other companies in the Sigma Healthcare group executed a General Security Deed (All Assets) pursuant to which each of the defendants agreed to secure the payment of 'Secured Money' and to grant to Westpac a security interest in and over all 'Secured Property', being all present and after-acquired property of the grantor with some exceptions which are not relevant for the present purposes.
- 5 'Secured Money' meant all amounts owing or payable in respect of a "Tranche C Facility". This facility is described in the most recent annual report of Sigma Healthcare Ltd published on 20 March 2019 as a cash advance facility of \$115 million. The annual report stated that the facility was secured using a general security arrangement over the assets of Sigma Healthcare Limited and its subsidiaries, as well as eligible trade receivables of Sigma Healthcare Limited and Central Healthcare Services Pty Ltd.
- 6 The contact person for each of the grantors was specified in the General Security Deed (All Assets) to be Samuel Lawson, general counsel and company secretary of each company. Mr Lawson has been informed of this application and has provided consent on behalf of each of the grantors / defendants to the orders now sought.
- 7 Also on 17 December 2018, the security interest granted by each of the defendants was registered on the PPSR but, as mentioned, by reference to the companies' ABN rather than its ACN. How this came about was explained by

Westpac's solicitor, Stanley Mok. On the day that the security interests were registered, the solicitor with conduct of the matter was not available and the task was completed by a legal administrative assistant who used a schedule containing information in respect of the companies containing, variously, ACN and ABNs. The significance of ACN and ABNs does not appear to have been appreciated by the legal administrative assistant. For two companies, the ACN number was used.

- 8 The error was not detected for a little time. In the meantime:
 - (a) on 10 October 2019, other security interests were registered on the PPSR in respect of Sigma Healthcare Limited by SE Rentals Pty Ltd; and
 - (b) on 25 February 2020, other security interests were registered on the PPSR in respect of MPS Hold Co Pty Ltd by Sigma Company Ltd.
- 9 Also in the meantime, the Sigma Healthcare group of companies continued to perform profitably. In the annual report of Sigma Healthcare Ltd already mentioned, the net profit after tax as at 31 January 2019 according to audited financial statements was \$36.5 million and EBITDA of \$76.5 million with consolidated revenue of \$3.9 billion and net assets of \$514 million. More recent announcements to the Australian Securities Exchange (ASX) suggest no adverse events.
 - (a) On 7 February 2020, Sigma Healthcare Ltd announced that it remained on target to deliver underlying EBITDA for the financial year 2020 of approximately \$46 to \$47 million. The chief executive officer and managing director, Mark Hooper, stated, "We continue to expect accelerated earnings growth in FY21 from our core business".
 - (b) The most recent ASX announcement on 18 March 2020, entitled "Securing our longer-term future", contained announcements about current or future business plans implicitly premised on continued operation of the group in the foreseeable future.
- 10 There is no suggestion that the Sigma Healthcare group is insolvent or likely to become insolvent, nor does Westpac intend to cease to provide or to call up any of its lending facilities to the group in the foreseeable future. Adam Carroll of Westpac gave evidence that none of its facilities provided to the Sigma

Healthcare group are in arrears and it intends to continue to remain the primary lender to the group.

- 11 In February 2020, the error in the registration of the grantors' security interests on the PPSR was detected by KPMG, which was conducting an independent review of the Sigma Healthcare group at the request of Westpac. The error was identified on 27 February 2020 and Westpac's solicitors were informed on 28 February 2020. Westpac's solicitors reviewed the position and give advice to Westpac as to how it should proceed on 4 March 2020. On 5 March 2020, Westpac instructed its solicitors to take the necessary steps to remedy the error and, that day, the solicitors re-registered or amended registered financial statements for the 15 companies in the Sigma Healthcare group where the ABN had been recorded on the register rather than the ACN. On 16 March 2020, PPSR searches were conducted to identify any other creditors who may be affected by the orders now sought. On 17 March 2020, Westpac's solicitors wrote to Mr Lawson and sought his consent to the orders, which was readily provided.

Requirements of section 588FM

- 12 Ordinarily, a security interest must be registered within 20 days of creation, failing which the security interest will vest in the company if a liquidator or administrator is appointed or the company executes a deed of company arrangement within six months of its creation: section section 588FL(2) and (4). Thus, Westpac seeks these orders to ensure that, if any of the defendants go into external administration in the next six months – which is thought improbable – then Westpac does not lose the benefit of its security.
- 13 As to when the Court may make the orders sought, section 588FM(2) and (3) provides:
- (2) On an application under this section, the Court may make the order sought if it is satisfied that:
- (a) the failure to register the collateral earlier:
- (i) was accidental or due to inadvertence or some other sufficient cause; or
- (ii) is not of such a nature as to prejudice the position of creditors or shareholders; or

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

(3) The Court may make the order sought on any terms and conditions that seem just and expedient to the Court.

14 I consider that failure to register the security interests by reference to the ACN was “inadvertence” as that term has been explained by Brereton J in *Re Transurban CCT Pty Ltd* [2014] NSWSC 1909 and Black J in *Re Cardinia Nominees Pty Ltd* [2013] NSWSC 32.

15 The priority of the security interests registered in the intervening period, described at [8], will not be affected by the orders which I am asked to make today. Each of these security interests are non purchase money security interests (non-PMSIs) and appear to be associated with a purchase money security interest (PMSIs) and thus have priority over an “all present and after acquired property” (ALLPAP) registration in any event: section 62, *Personal Properties Securities Act*. Nor is Westpac seeking to retrospectively alter the priorities under section 293 of the *Personal Property Securities Act*. As Brereton J explained in *In the matter of Appleyard Capital Pty Limited*; 123 *Sweden AB v Appleyard Capital Pty Limited* (2014) 101 ACSR 629; (2014) 32 ACLC 14-041; [2014] NSWSC 782 at [15]:

... an s 588FM order has no effect on the priority of security interests registered before the plaintiff's charge inter se, as their priorities are established under Pt 2K.3. ... As the secured creditors will not be affected, there is no need to make an order or impose a condition in that respect, nor any utility in doing so [*Re Guardian Securities Ltd* [1984] 1 NSWLR 95, 97; *Douglas-Brown v Standard Chartered Finance Ltd* (1990) 2 ACSR 737, 740; *Bevillesta Pty Ltd v Imagine UN Ltd* [2009] VSC 50; 69 ACSR 574, 581 [28]].

16 The orders sought will, however, affect the interests of any unsecured creditors of the grantor companies. As McLelland J explained in *Re Application of Guardian Securities Ltd* (1984) 8 ACLR 822; [1984] 1 NSWLR 95 at 97:

... since an order extending time for registration of a charge ... might have a substantial and adverse effect on the interests of unsecured creditors of the company by withdrawing the property charged from assets otherwise available for realization and distribution to unsecured creditors in the event of a winding up, unsecured creditors had a legitimate interest in the question whether an extension of time should be granted.

17 Where unsecured creditors are not present at a hearing of an application such as this, their interests were commonly protected by granting the relief sought subject to a condition – referred to as the *Guardian Securities* condition or

Joplin condition after *Re Joplin Brewery Co Ltd* [1902] 1 Ch 79 – reserving a right to the company or any unsecured creditor or any person representing the interests of unsecured creditors to apply at a later stage to discharge or vary the order: at 98. However, as McLelland J explained in *Re Guardian Securities* at 97:

If the evidence established a degree of solvency sufficient to remove any such prospect [of an order extending time operating to the prejudice of existing unsecured creditors] then, as a matter of practice, it was not considered necessary to take any other steps to protect the interests of unsecured creditors.

In *Re Guardian Securities* itself, there was “no evidence whatsoever as to the solvency or otherwise of the company creating the charges”, thus his Honour imposed such a condition on the relief granted: at 98-99.

- 18 Authorities on the *Guardian Securities* condition were comprehensively reviewed by Brereton J in *Appleyard Capital*, who concluded at [25]:

The Australian authorities establish that the interests of the unsecured creditors are a relevant consideration, so that the court must have regard to the financial position of the company as at the time of the application for extension. If the company is shown to be financially secure, then it is unlikely that a “critical day” will arise in the foreseeable future and the grant of relief will not likely affect any person adversely [*Hewlett Packard Australia Pty Ltd v GE Capital Finance Pty Ltd* [2003] FCAFC 256; (2003) 135 FCR 206; 47 ACSR 589, [29]]; indeed, if solvency is established that is likely to be the end of the matter [*Investa Properties Pty Ltd v Westpac Property Funds Management Ltd* [2001] NSWSC 1089, [31]]. But otherwise, where the court is not satisfied that there is no risk that unsecured creditors could be adversely affected, the unsecured creditors (or their representative) are entitled to be heard against the making of an order, though this may sufficiently be achieved by suspending the operation of the order, or by imposing a term reserving leave to apply to set it aside in the event of a liquidation or administration (“a *Guardian Securities* condition”) [*Re Guardian Securities*, 97; see also *Re Cinema Art Films* [1930] NZLR 500 at 502–3; *Re L H Charles & Co Ltd* (1935) WN (Eng) 15; *Bevillesta Pty Ltd v Imagine UN Ltd* [2009] VSC 50; 69 ACSR 574, [58].

His Honour imposed a *Guardian Securities* condition in that case where there was a high degree of likelihood that Appleyard Capital was insolvent and would go into external administration within six months: at [32].

- 19 Likewise in *In the matter of Accolade Wines Australia Limited* [2016] NSWSC 1023, Brereton J noted at [18]-[19] (citations omitted):

18 While the potential for prejudice to creditors or shareholders is a relevant consideration in the exercise of the discretion, relevant prejudice is not

necessarily established merely by showing that the dividend to unsecured creditors will be less if the security interest does not vest in the company, as the unsecured creditors may well have been in no different a position had the security interest been the subject of a timely effective registration. As explained in *Appleyard Capital*, the type of prejudice that is of particular relevance is prejudice attributable to the delay in registration, rather than prejudice from making the order (which is inevitable); and the period of delay in effecting registration is relevant, because the shorter the delay the less likely that the failure to register within time will have had any impact. The significance of the passage of time is mainly related to the possibility of competing interests having arisen, in particular, through others having dealt with the company on the footing that the collateral was unencumbered.

19 Where the grantor is shown to be financially secure, then it is unlikely that a “critical day” will arise in the foreseeable future, and the grant of relief will not likely affect any person adversely; indeed, if solvency is established that is likely to be the end of the matter. However, if the Court is not satisfied that there is no risk that unsecured creditors could be adversely affected, the unsecured creditors (or their representatives) are entitled to be heard against the making of an order, though this may sufficiently be achieved by suspending the operation of the order, or by imposing a term reserving leave to apply to set it aside in the event of a liquidation or administration (a *Guardian Securities* condition).

In that case, there was evidence as to solvency such that his Honour was satisfied that the prospect of a critical event occurring within six months was remote: at [20]-[21]. Nonetheless, Brereton J granted the relief subject to the *Guardian Securities* condition, which may be explicable by reference to the fact that relief was also sought under section 293 thereby altering the priority of registered security interests.

20 The *Guardian Securities* condition was imposed by Gleeson JA in *In the matters of 4 in 1 Wyoming Pty Ltd* [2017] NSWSC 407 where the plaintiff had not sought to demonstrate by evidence the financial position of each of the grantors or their ability to pay their debts as and when they fell due: at [57]. Likewise in *In the matter of Psyche Holdings Pty Limited* [2018] NSWSC 1254, Ward CJ in Eq imposed the condition where there was no evidence of the financial position of the defendant: at [42]. Perhaps in contrast, in *Squadron Resources Pty Ltd v Highlake Resources Pty Ltd* [2018] FCA 1292, McKerracher J did not impose the condition nor does it appear that evidence of solvency was canvassed.

21 Returning to the case at hand, Westpac asks for an order under section 488FM without a *Guardian Securities* condition. It was submitted that such a condition will have the consequence that the security position between the defendants

and Westpac will remain subject to an uncertainty during the six month period from 5 March 2020. Such uncertainty is unhelpful and may assume a particular importance where Sigma Healthcare Ltd is a publicly listed company on the ASX and the current market and business environment is one of some uncertainty as to the future.

- 22 I agree. There is comprehensive evidence before the Court that the Sigma Healthcare group of companies is solvent and indeed profitable. The existence of Westpac's general security arrangement is public knowledge, detailed in the most recent annual report. It would come as no surprise to the shareholders or any unsecured creditors of the group if the registration of Westpac's security interest is regularised in the orders sought; indeed, the only surprise may be that it was not properly registered in 2018. I consider it important that uncertainty be removed where there is sufficient evidence to enable the Court to conclude that the prospects of a critical event occurring in the next six months is remote and, on the basis of the evidence before me, would be a most surprising event.
- 23 It is relevant also that Westpac, which has lent a substantial sum of money to this group of companies for a significant period of time, should be entitled to have uncertainty removed and be confident that, if the unexpected should happen, it should have the benefit of the security interest which each of the grantors agreed in 2018 should be provided to it. Of far less relevance, Westpac's solicitors who made the error should have some comfort that not only has the error been remedied but there is no potentially substantial contingent liability hanging over their head if there is no good reason to hold them in suspense.
- 24 For these reasons I make following the orders in the consent orders, signed by both Westpac and the defendants, which are initialled by me dated today and placed with the papers:
- (1) Upon the undertaking of the Plaintiff's solicitor to pay all applicable filing fees, grant leave to the plaintiff to file in Court:
 - (a) Originating Process dated 19 March 2020;
 - (b) affidavit of Stanley Mok sworn 19 March 2020; and

- (c) affidavit of Adam Carroll sworn 19 March 2020.
- (2) The Originating Process is returnable *instanter*.
 - (3) Service on the defendants of the Originating Process and the Mok affidavit and Carroll affidavit is dispensed with.
 - (4) Pursuant to section 588FM of the *Corporations Act 2001* (Cth), 5 March 2020 is fixed as the time for the registration by the plaintiff of the PPSA Security Interests as defined in section 51 of the *Corporations Act* arising under and/or by reason of the Security Agreement entered into between the plaintiff and the defendants on 17 December 2018, being each of the PPSR Registrations for the respective defendants as referred to in Schedule B to the Originating Process and annexed to this Order, for the purpose of section 588FL(2)(b)(iv) of the *Corporations Act*.
 - (5) No order as to costs.
