

FEDERAL COURT OF AUSTRALIA

Alleasing Pty Ltd, in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd [2017] FCA 656

File number: VID 491 of 2017

Judge: **DAVIES J**

Date of judgment: 9 June 2017

Catchwords: **BANKRUPTCY AND INSOLVENCY** – administration – application for an order pursuant to s 588FM of the *Corporations Act 2001* (Cth) for an extension of time for registration for the purposes of s 588FL(2)(b)(iv) – whether it is just and equitable to make an order granting an extension of time for registration for the purposes of s 588FL(2)(b)(iv) – application for an order pursuant to s 293 of the *Personal Property Securities Act 2009* (Cth) for an extension of time for the purposes of s 62(3)(b) – whether just and equitable to make an order granting an extension of time for registration for the purposes of s 62(3)(b)

Legislation: *Corporations Act 2001* (Cth) ss 588FL, 588FM
Personal Property Securities Act 2009 (Cth), ss 62, 293

Cases cited: *K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325
Re Accolade Wines Australia Limited [2016] NSWSC 1023
Re Appleyard Capital Pty Ltd [2014] NSWSC 782; (2014) 101 ACSR 629
Re OneSteel Manufacturing Pty Ltd [2017] NSWSC 21; (2017) 118 ACSR 307
Re 4 in 1 Wyoming Pty Ltd [2017] NSWSC 407

Date of hearing: 29 May 2017

Registry: Victoria

Division: General Division

National Practice Area: Commercial and Corporations

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Category:	Catchwords
Number of paragraphs:	25
Counsel for the Plaintiff:	P Kulevski
Solicitor for the Plaintiff:	Henry Davis York
Counsel for the Defendant:	J Vaatstra of Arnold Bloch Leibler
Solicitor for the Defendant:	Arnold Bloch Leibler

ORDERS

VID 491 of 2017

IN THE MATTER OF ONESTEEL MANUFACTURING PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 004 651 325

BETWEEN: **ALLEASING PTY LTD ACN 008 655 025**
Plaintiff

AND: **ONESTEEL MANUFACTURING PTY LTD (SUBJECT TO DEED OF COMPANY ARRANGEMENT) ACN 004 651 325**
Defendant

JUDGE: **DAVIES J**

DATE OF ORDER: **29 MAY 2017**

THE COURT ORDERS THAT:

1. Pursuant to paragraph 444E(3)(c) of the *Corporations Act 2001* (Cth) (“Act”), the Plaintiff be granted leave, nunc pro tunc, to proceed.
2. Pursuant to section 588FM of the Act, 12 May 2017 be fixed as the later time for the purposes of subparagraph 588FL(2)(b)(iv) in respect of any security interests granted by the Defendant in favour of the Plaintiff in connection with the Lease Agreement (effective date of 1 February 2017), such security interests corresponding to the registration numbers listed in “Annexure A” to these orders in the register established under the *Personal Property Securities Act 2009* (Cth) (“PPSA”).
3. Pursuant to paragraph 293(1)(a) of the PPSA the number of business days specified in paragraph 62(3)(b) of the PPSA be extended to the end of 12 May 2017 in respect of any purchase money security interests granted by the Defendant in favour of the Plaintiff in connection with the Lease Agreement (effective date of 1 February 2017), such security interests corresponding to the registration numbers no. 1 and 2 listed in “Annexure A” to these orders in the register established under the PPSA.
4. Pursuant to section 37AF of the *Federal Court of Australia Act 1976* (Cth) and subject to any further order made on the application of a person interested in the proceeding, the following documents, and parts of documents, be kept "confidential", be placed in a sealed envelope on the Court file and are not to be published or accessed except pursuant to

an order of the Court, or by the parties to the following documents in accordance with the terms of those documents:

- (a) the Settlement Deed dated 9 May 2017, a copy of which is Exhibit “DB-2” to the Affidavit of Daniel Blizzard filed in this proceeding;
- (b) the Deed of Release of Security, a copy of which is Exhibit “JTV-3” to the Affidavit of Justin Taede Vaatstra sworn on 26 May 2017 filed in this proceeding; and
- (c) page 6 at lines 30-33 of the transcript of the hearing of the proceeding on 29 May 2017 beginning from the word that follows the word “exactly” in line 30, up to the word that is prior to the word “that’s” in line 33.

5. There be no order for costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

“ANNEXURE A”

No.	Registration Numbers
1.	201705120069759
2.	201705120069326
3.	201705120069873
4.	201705120069498

REASONS FOR JUDGMENT

DAVIES J:

1 The plaintiff (“**Alleasing**”) has applied for:

- (a) an order under s 588FM of the *Corporations Act 2001* (Cth) (“**the Corporations Act**”) fixing 12 May 2017 as the “later time” for the purposes of s 588FL(2)(b)(iv) of the Corporations Act in respect of the registration of any security interests granted by the defendant (“**OneSteel**”) in favour of Alleasing under a new lease agreement; and
- (b) an order under s 293 of the *Personal Property Securities Act 2009* (Cth) (“**PPSA**”) extending the period for the purposes of s 62(3)(b) of the PPSA to 12 May 2017 in respect of the registration of any purchase money security interests (“**PMSIs**”) granted by OneSteel in favour of Alleasing in connection with that lease.

2 The application was heard urgently on 29 May 2017 and I pronounced those orders. These are my reasons.

BACKGROUND

3 Alleasing is an independent provider of asset finance and leasing solutions and OneSteel operates the Iron Knob mine site in South Australia. On 16 October 2014, Alleasing entered into a lease agreement with OneSteel and, pursuant to the lease, OneSteel commenced leasing crushing and screening equipment (“**the crusher**”) from Alleasing on or about 1 May 2015. Prior to the commencement of the lease of the crusher, Alleasing advanced funds to the manufacturer of the crusher, Striker Australia Pty Ltd, for the construction of the crusher. On or about 1 July 2015, OneSteel commenced renting spare parts for the crusher from Alleasing.

4 The crusher lease and the parts lease were PPS leases within the meaning of s 13 of the PPSA. On 17 October 2014, Alleasing registered a financing statement in respect of the crusher on the Personal Property Securities Register (“**PPSR**”) and on 7 July 2015 Alleasing registered a financing statement in respect of the parts. The registrations identified OneSteel by its ABN, not by its ACN.

5 OneSteel is a member of the Arrium Group of companies. On 7 April 2016 Onesteel (along with other companies in the Arrium Group) appointed administrators and on 4

November 2016, entered into a deed of company arrangement under which the administrators were appointed as the deed administrators.

6 On 10 June 2016 the administrators informed Alleasing that they considered the registrations in respect of the crusher and the parts were defective and, as a result of s 267(2) of the PPSA, that Alleasing's interests in the crusher and the parts had vested in OneSteel. A dispute arose between the parties and Alleasing commenced proceedings in the New South Wales Supreme Court on 11 August 2016 seeking declarations to the effect that security interests in the crusher and the parts were validly perfected and had not vested in OneSteel pursuant to s 267 of the PPSA. In the alternative, Alleasing sought an order pursuant to s 588FM of the Corporations Act fixing a later time as the registration time for the registration of the security interests and an order pursuant to s 293(1)(a) of the PPSA extending the period for registration of the PMSIs for the purposes of s 62(3)(b) of the PPSA.

7 The proceedings were heard by Brereton J on 19 and 20 December 2016 and on 31 January 2017 Brereton J delivered judgment: *Re OneSteel Manufacturing Pty Ltd* [2017] NSWSC 21; (2017) 118 ACSR 307 ("**Re OneSteel**"). His Honour held that the registrations were ineffective because of the omission of OneSteel's ACN. His Honour also held that relief was not available under s 588FM of the Corporations Act or s 293(1)(a) of the PPSA and in consequence Alleasing's security interest in the crusher and the parts had vested in OneSteel pursuant to s 267 of the PPSA.

8 On 27 February 2017 Alleasing filed a Notice of Appeal in the New South Wales Court of Appeal and on 23 March 2017 OneSteel filed a Notice of Contention raising additional or alternative grounds upon which it was claimed the decision of the primary judge should be upheld.

9 OneSteel, the deed administrators and Alleasing have since agreed to settle those proceedings and have documented the terms in a deed which was executed on 9 May 2017. The settlement provides for OneSteel and the deed administrators transferring the crusher and the parts to Alleasing and OneSteel and Alleasing entering into a new lease under which security interests registerable on the PPSR will arise. The key terms of the settlement are not operative unless Alleasing obtains orders from this Court granting relief under s 588FM of the Corporations Act from the vesting of the new security interest pursuant to s 588FL.

10 If the new lease becomes operative, Alleasing will become a secured party in relation to the crusher and the parts and so on that basis, pursuant to s 151(1) of the PPSA, Alleasing registered financing statements on the PPSR in respect of the crusher and the parts on 12 May 2017. The new security interests will be PMSIs under the PPSA: s 14(1)(c) of the PPSA.

11 Section 588FL applies where, relevantly, the grantor company (here, OneSteel) has executed a deed of company arrangement, and a security interest granted by the company in collateral is covered by subs (2) of 588FL.

12 A security interest will be “covered by subs (2)” if each of the following conditions is met:

(1) at the critical time (in this case, 7 April 2016 being the commencement of the administrations), or if the security interest arises after the critical time, when the security interest arises (in this case, 9 May 2017), the security interest is:

- (a) enforceable against third parties under the law of Australia; and
- (b) perfected by registration, and by no other means; and

(2) the registration time for the collateral is after the latest of the following times, relevantly:

- (a) six months before the critical time (in this case, 7 October 2015);
- (b) the time that is 20 business days after the security agreement which gave rise to the security interest came into force, or the time that is the critical time, whichever is earlier (in this case, the “critical time” is earlier so the relevant date is 7 April 2016);
- (c) a later time ordered by the Court under s 588FM of the Act.

13 Section 588FL(4)(b) provides that the PPSA security interest which, as in this case, first becomes enforceable against third parties after the critical time, vests in the company at the time it becomes so enforceable.

14 In *K.J. Renfrey Nominees Pty Ltd (Trustee), in the matter of OneSteel Manufacturing Pty Ltd v OneSteel Manufacturing Pty Ltd* [2017] FCA 325 (“**K.J. Renfrey Nominees**”), it was held that s 588FL(2)(b)(ii) of the Corporations Act applies to security interests arising after the “critical time” and s 588FL(4) applies to vest the security interest in the grantor company when it first becomes enforceable against third parties, even if the security interest was registered within 20 business days after the security agreement came into force. Section 588FL(4) is subject to the Court making an order under s 588FM(2)(b) of the

Corporations Act fixing a later time for the purposes of s 588FL(2)(b). Accordingly, Alleasing sought an order pursuant to s 588FM(2)(b) fixing 12 May 2017 as the later time for the registration of its security interests to prevent the operation of s 588FL(4) of the Corporations Act causing the vesting of the new security interests in OneSteel. Alleasing also sought an order pursuant to s 293 of the PPSA to extend the time for the registration of the new security interest to 12 May 2017 so it can have priority granted to it in respect of the PMSIs under s 62(3) of the PPSA.

15 The evidence is that if the Court does not grant this relief, Alleasing will be prejudiced as it will be unable to effect the settlement it has reached with OneSteel and the deed administrators, and it will be obliged to continue the appeal proceedings to pursue its claim to the crusher and the parts, thus exposing it, OneSteel and the deed administrators to the cost and uncertainty of litigation.

16 The application was supported by the deed administrators. The deed administrators are currently in the process of negotiating with potential purchasers for the sale of the Arrium Group's mining, steel production and steel distribution and steel recycling business ("**the Arrium Australia Business**"). The sale is proposed to be by way of a sale of the shares in certain Arrium Group companies including OneSteel. The selected bidders have been asked to submit final bids by the end of May 2017, with the intention that a sale contract will be entered into with final completion occurring by no later than 30 June 2017. Based on the feedback received from potential bidders, the deed administrators believe that the dispute regarding the crusher has been causing uncertainty in the sale process, particularly because Alleasing, in its appeal, is seeking orders requiring OneSteel to deliver up the crusher to Alleasing. The evidence is that the crusher is a critical piece of infrastructure at the Iron Knob mine site and is in constant use. It is the only crushing equipment and could not be readily replaced, if at all, if OneSteel was required to deliver up the crusher to Alleasing. Moreover, although, as a result of the decision of Brereton J in *Re OneSteel*, OneSteel is the owner of the crusher and no longer liable for rental payments for the crusher, potential bidders for OneSteel and the Arrium Australia Business have not been prepared to recognise the associated increase in the value of OneSteel due to the increase in its assets and reduction in its liabilities because of the uncertainty as to whether Alleasing's appeal will be successful. The deed administrators concluded that the most certain way of obtaining value for the result of the Supreme Court proceedings would be to negotiate a settlement with Alleasing under which the crusher would be re-transferred to Alleasing in return for a new lease at a reduced

rent and containing an option for OneSteel to increase the term of the lease period. The deed administrators believe that entering into the settlement deed is likely to be in the best interests of the Arrium Group's creditors because it would be likely to increase the amount bidders are prepared to pay for OneSteel due to the certainty that the crusher would not be repossessed by Alleasing and, therefore, that the Iron Knob mining operations would continue as normal, with reduced rent payable for the crusher and the ability of OneSteel to extend the term of the lease without any increase in the rent payable. It is a crucial part of the deed administrators' settlement strategy that the settlement be finalised in advance of the deadline of the end of May 2017 for the selected bidders to submit their final bids and the value of the settlement can be reflected in any final bids.

CONSIDERATION

Section 588FM order

17 Under s 588FM the Court may make an order fixing a later time for the purposes of s 588FL(2)(b) if the Court is satisfied that it is just and equitable to grant that relief. As the purpose and effect of an order under s 588FM is to avoid the vesting of the security interest in the company and preserve the secured creditor's security, it is relevant in determining whether it is just and equitable to fix a later time to consider the interests of the creditors: *Re Appleyard Capital Pty Ltd* [2014] NSWSC 782; (2014) 101 ACSR 629 at [29]-[30]; *K.J. Renfrey Nominees* at [28]. As Brereton J observed in *Re Appleyard Capital Pty Ltd* at [30] whilst "the presence or absence of prejudice to unsecured creditors is a relevant discretionary consideration, 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; the unsecured creditors may well have been in no different a position had the security interest been timely registered". His Honour stated that the type of prejudice that is of particular relevance is prejudice attributable to the failure to effect registration earlier where the delay in the registration of the security interest causes prejudice to creditors who have transacted with the company to their detriment, being unaware of the creation of a security interest.

18 In the present case, registration was made promptly after the entering into the settlement agreement and the prejudice to creditors of the kind referred to in *Re Appleyard Capital Pty Ltd* does not arise. The deed administrators are empowered under clauses 7.6(b)(xv) and 7.6(b)(xliv) of the OneSteel deed of company arrangement to grant security

interests and the new security interests have been created as part of a commercial settlement of the dispute between the deed administrators and Alleasing relating to the security interests arising under the earlier lease agreement in respect of the crusher and the parts that OneSteel uses in its mining operations. That equipment is crucial to those mining operations and the deed administrators have provided cogent reasons as to why they consider that entering into the settlement deed is likely to be in the best interests of the Arrium Group's creditors. In the circumstances, I was satisfied that it is just and equitable to fix 12 May 2017 as the later time for the registration of the new security interests.

Section 293 order

19 I was also satisfied that an order under s 293(1)(a) of the PPSA should be made. Section 293(1)(a) confers on the Court the power to make an order extending the number of business days in a period specified in s 62(3)(b) of the PPSA if the Court is satisfied that it is just and equitable to do so. An order under s 293(1)(a) may be made even if the period referred to in s 62(3)(b) has ended: s 293(2) of the PPSA. Under s 62(3), a PMSI has priority over other security interests if:

- (a) the interest is in personal property, or its proceeds, other than inventory;
- (b) the PMSI is perfected by registration before the end of 15 business days after whichever of the following days applies: for goods – the day the grantor, or another person at the request of the grantor, obtains possession of the property; and for any other property – the day the interest attaches to the property; and
- (c) the registration that perfects the PMSI states, in accordance with item 7 of the table in s 153, that the interest is a PMSI.

20 The order under s 293(1)(a) was sought by Alleasing out of an abundance of caution to ensure that registration as a PMSI is effective and that the PMSIs will have priority over other security interests. As explained by Brereton J in *Re Accolade Wines Australia Limited* [2016] NSWSC 1023 (“*Re Accolade Wines*”) at [23], “unless PMSIs were afforded priority, in respect of the specific collateral to which they relate, over existing security interests which may attach to the same collateral but are not PMSIs, a prudent third party would never lease goods to a grantor who had already granted a security interest in ‘all of the present and after-acquired property’ (“*AIIPAP*”), unless an express subordination agreement was obtained from the AIIPAP holder”. Section 62(2) of the PPSA gives that priority provided the requirements of the section are met. An order under s 588FM of the Corporations Act would have no

effect on the priority of the security interests but merely avoids the consequence of the vesting of the security interest in the grantor company by operation of s 588FL(4) of the Corporations Act.

21 In making an order under s 293(1) to extend the 15 business days specified in s 62(3)(b), s 293(3) requires the Court to take into account the following:

- (a) whether the need to extend the period arises as a result of an accident, inadvertence or some other sufficient cause;
- (b) whether extending the period would prejudice the position of any other secured parties or other creditors; and
- (c) whether any person has acted, or not acted, in reliance on the period having ended.

22 In *Re Accolade Wines*, Brereton J stated at [27] in respect of the requirements of s 293(3)(b):

The authorities on CORPA, s 588FM, and its predecessors provide some assistance, but, there is an important distinction. As explained in *Appleyard Capital*, in s 588FM(2)(a)(ii), the prejudice referred to is prejudice to the position of creditors or shareholders from “the failure to register the collateral earlier” – in other words, prejudice attributable to not making a timely registration. That means that, to evaluate prejudice for the purposes of s 588FM, one compares the position of the creditors if an extension is granted, with their position if there had been an effective timely registration; often there will be no difference. However, the prejudice referred to in s 293(3)(b) is prejudice from “extending the period”. This directs attention not to the impact on other secured parties or creditors of the delay in registration, but to the impact of making an order extending the period; to evaluate prejudice for that purpose, one compares the position of creditors if an extension is granted, with their position if no extension is granted, and usually there will be a difference because priorities will be disturbed.

In relation to s 293(3)(c), Brereton J stated at [31]:

At the time when any Earlier AllPAP holder took security from the relevant Grantors, the property the subject of the Plaintiffs’ security interests was not property of the relevant Grantor. An AllPAP secured party whose security interest was registered prior to the Plaintiffs’ initial registrations could not have “acted, or not acted, in reliance on the period having ended”, as its interest was acquired prior to the existence of the Plaintiffs’ PMSI. Only a Later AllPAP holder – one whose interest was acquired after the Plaintiffs’ initial registration – could potentially fall within s 293(3)(c).

See also in *Re 4 in 1 Wyoming Pty Ltd* [2017] NSWSC 407 at [64]-[72].

23 Sufficient cause has been shown and no relevant prejudice or reliance has been demonstrated.

24 Evidence was furnished to show that there are four AllPAP security interests registered in respect of OneSteel. Two are held by BGC Contracting Pty Ltd (“**BGC**”), one is held by Export Finance and Insurance Corp (“**EFIC**”) and one is held by National Australia Bank Limited (“**NAB**”). The evidence also shows that BGC has released the crusher from its AllPAP security, EFIC has agreed to the relief sought by Alleasing in its originating process and the crusher has been excluded from the NAB security. In the circumstances, none of those creditors will be prejudiced by an order under s 293(1)(a) and none of them come within s 293(3)(c). Accordingly I was satisfied that it is just and equitable to make an order extending the period for the purposes of s 62(3)(b) to 12 May 2017.

25 Accordingly, the orders sought were made.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Davies.

Associate:

Dated: 9 June 2017