

## Variations to registrable charges

*Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd* [2010] HCA 29

In this decision, the High Court has provided guidance as to the operation of section 266 of the *Corporations Act 2001* (Cth) (Act) concerning variation in the terms of a registrable charge. In particular, the High Court has clarified that in determining whether there has been a variation to the terms of a registrable charge under section 266(3), there must be a variation to the actual wording and effect of the instruments effecting the charge, not merely an increase in the liabilities secured by the charge by virtue of an instrument executed after the entry into the charge.

In a joint judgment, French CJ, Gummow, Hayne, Kiefel and Bell JJ upheld the decision of the Court of Appeal of the Supreme Court of Queensland in which Holmes JA (Muir JA agreeing) and White JA set aside the declaratory order made by the trial judge (McMurdo J) that a fixed and floating charge over the assets of the second respondent (Octaviar) in favour of the first respondent (Fortress Credit) was void to the extent that it secured a particular liability not expressed to be secured by the charge at the time of its creation, but which was subsequently the subject of a deed which had the effect of including it within the liabilities secured by the charge.

### The facts

An understanding of the history of the charge is critical to an appreciation of the court's reasoning and decision. Under the charge granted by instrument in June 2007 (charge), Octaviar charged to Fortress Credit all of the 'Secured Property, (all of its present and future property) as security for payment of the 'Secured Money' (all moneys that became payable by Octaviar to Fortress Credit 'under or in relation to a 'Transaction Document'). On the same date as the entry into the charge, a facility agreement was entered into between Fortress Credit as lender, Octaviar Castle (an Octaviar subsidiary) as borrower, and Octaviar and Octaviar Administration (another Octaviar subsidiary) as guarantors. 'Transaction Document' was defined in the facility agreement to mean each document which Fortress Credit and Octaviar Castle or Octaviar agreed in writing to be a transaction document for the

purposes of the facility agreement. The charge was registered under the Act a few days later.

Octaviar then entered into a guarantee under which it guaranteed the indebtedness of Young Village Estates Pty Ltd (YVE) to Fortress Credit (YVE Guarantee). On 22 January 2008, Fortress Credit, Octaviar and Octaviar Castle entered into a deed under which the parties agreed that 'the YVE Guarantee is a Transaction Document for the purposes of the Facility Agreement' (deed), thereby purporting to bring the liability of Octaviar to Fortress Credit in relation to YVE under the purview of the charge.

After Octaviar and an associated entity entered into deeds of company arrangement, the Public Trustee of Queensland as trustee for certain noteholders applied to the Supreme Court for orders under s 445D terminating each deed on the footing that they had been premised upon the validity of the charge in all respects, but that the charge did not validly secure the YVE Guarantee.

### The High Court proceedings

Two questions arose for the court's consideration. First, whether the deed was a 'variation in the terms' of the charge to which s 268(2) of the Act applied, and secondly, whether the deed created a new charge to which the registration provisions of ss 262 and 263 applied. The High Court answered both questions in the negative.

The Public Trustee argued in the High Court that the deed varied the terms of the charge by adding a new liability to the class of liabilities already secured by the charge, thereby altering the terms of the charge by adding to the meaning of 'Transaction Document'.

The court rejected this argument. The court held (at [22]) that the phrase 'agree in writing' in the definition of 'Transaction Document' is ambulatory, meaning both 'have already agreed' and 'hereafter agree'. Although as a result of the deed, the YVE guarantee was now, but had not before been, a transaction document, that did not alter the meaning of 'Transaction Document' in the facility agreement or 'secured money' in the charge.

The court agreed with both Holmes JA and Muir JA that before section 268(2) can be applied, there must be shown to be a term of the charge that has been varied, and that s 268(2) is directed to variations in the terms of the charge, and not changes imposed pursuant to those terms upon the burden of liability under the charge. In this case, there was no variation to the terms of the charge by the entry into the deed, whether by wording or effect.

*This decision brings clarity to the interpretation of Ch 2K of the Act as to the circumstances in which a variation in the terms of a registrable charge will be effected.*

The court held (at [24]) that it was misconceived to focus upon the effect of the deed, as opposed to the question of whether the execution of the deed varied the terms of the charge, because s 268(2) does not apply to any increase in the debt or liabilities secured. Where a term of a charge is variable or ambulatory, there is no variation in the terms each time the operation of that term is as a matter of fact, altered or modified. For this reason, there was no variation in the terms of the charge, and no new charge was created.

The court rejected the Public Trustee's submission that such a result is contrary to the scope and purpose of the registration system established by Ch 2K, and emphasised that the provisions in that chapter do not purport to create a 'perfect and complete' register of all of the details of a registrable charge. Rather, the court recognised that the nature of liabilities which may be secured is an uncertainty incapable of being made

certain at the time of registration, and noted that it was unsurprising that the monetary obligations underlying the charge and the property comprising the security might change from time to time (at [29] – [30]).

Further, the court noted (at [31]) that all that was required under s 263(1)(a)(iv) when a new charge is created is a 'short description' of the liability, which was satisfied by the inclusion of the definitions of secured money and facility agreement and the charge itself. The court noted that the definition of secured money flagged a need to look elsewhere to determine the exact nature of the liabilities secured, and in those circumstances there was nothing objectionable to the policy of Ch 2K that notice of the deed was not required to be lodged.

#### **Conclusion**

This decision brings clarity to the interpretation of Ch 2K of the Act as to the circumstances in which a variation in the terms of a registrable charge will be effected. One issue left unresolved by the High Court's decision is whether the phrase 'terms of the charge' in s 268(2) encompasses all of the terms of an instrument or only those 'relevant to its character as a charge'. Holmes JA in the Court of Appeal had noted that 'terms of the charge' arguably included the terms of the facility agreement (at [48]). The High Court found that this question was unnecessary for the Court of Appeal to decide, and noted that the High Court's reasons should not be taken to endorse the proposition that they were (at [28]). The question is therefore open for the time being.

**By Victoria Brigden**