



HIGH COURT OF AUSTRALIA

1 September 2010

PUBLIC TRUSTEE OF QUEENSLAND v FORTRESS CREDIT CORPORATION (AUS) 11
PTY LTD & ORS [2010] HCA 29

Section 266 of the *Corporations Act* 2001 (Cth) provides that a charge, or a variation to the terms of a charge, will be void as a security unless notice of the charge or its variation is lodged with the Australian Securities and Investments Commission ("ASIC"). Today the High Court held that a deed, which did not amend the terms of a charge but, when read with the charge, had the effect of increasing the liabilities secured under it, did not trigger the operation of s 266.

On 31 May 2007, Fortress Credit Corporation (Aus) 11 Pty Ltd ("Fortress") entered into a loan agreement with Young Village Estates Pty Ltd as borrower. The loan was guaranteed ("the YVE guarantee") by the second respondent, Octaviar Limited ("Octaviar"). No security was given for repayment of the loan. On 1 June 2007, Fortress entered into another loan agreement with Octaviar's subsidiary, Octaviar Castle Pty Ltd ("Octaviar Castle"), as borrower ("the Castle Facility Agreement"). Octaviar and another of its subsidiaries, Octaviar Administration Pty Ltd ("Octaviar Administration"), guaranteed that loan. Octaviar provided security for its guarantee by way of a fixed and floating charge. Notice of the charge was lodged with ASIC, in accordance with s 263 of the *Corporations Act*.

Under clause 2.1 of the charge, Octaviar charged all its present and future property for payment of "Secured Money", defined in the charge as "all money, obligations and liabilities...owing or payable...under or in relation to a Transaction Document". The term "Transaction Document" was to have the meaning given to it in the Castle Facility Agreement, which provided that a "Transaction Document" included each document that Fortress and Octaviar agreed in writing was a Transaction Document. On 22 January 2008, Fortress, Octaviar and Octaviar Castle executed a deed acknowledging that the YVE guarantee was a "Transaction Document" for the purposes of the Castle Facility Agreement and thus within the terms of the charge. This had the effect of increasing the liabilities secured by the charge. No notice of any charge created or varied was lodged with ASIC.

In late 2008, administrators were appointed to Octaviar and Octaviar Administration and each subsequently executed a deed of company arrangement. On 19 February 2009, the Public Trustee of Queensland applied to the Supreme Court of Queensland for orders terminating each deed. It contended that each deed had been premised on the validity in all respects of the charge, which, in the absence of a notice lodged with ASIC, did not validly secure the YVE guarantee. The Public Trustee submitted that the deed of 22 January 2008 was a new charge, or a variation in the terms of an existing charge, requiring lodgement of a notice with ASIC in accordance with s 263 or s 268 respectively of the *Corporations Act*. In the absence of such notice, a new charge would be void pursuant to s 266(1), and a varied charge void pursuant to s 266(3), of the *Corporations Act*.

At first instance, McMurdo J ordered that the question of the validity of the charge be determined separately from the applications to terminate the deeds. His Honour held that the deed of 22 January 2008 amounted to a variation in the terms of the charge, by bringing the YVE guarantee

within its coverage, and was void for failure to lodge notice of the variation. The Court of Appeal unanimously allowed an appeal from that decision. On 12 March 2010, the Public Trustee was granted special leave to appeal to the High Court.

The Court unanimously dismissed the appeal, finding that the deed of 22 January 2008 was neither a new charge nor a variation in the terms of the charge. As a result of the 22 January 2008 deed, the YVE guarantee was now a "Transaction Document". However that did not vary the meaning of "Transaction Document" in the Castle Facility Agreement and consequently the meaning of "Secured Money" in the charge. The effect of the deed was that the YVE guarantee now fell within the class of liabilities secured by the charge; 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. Where parties elect that a term of a charge will be variable or ambulatory in operation, there is no variation in the terms each time its operation is, as a matter of fact, altered or modified. The *Corporations Act* requires notice only for variations in the terms of the charge, and not to modifications in the way in which those terms apply to the circumstances from time to time during the currency of the charge.

The Court dismissed the appeal and ordered the Public Trustee to pay Fortress's costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*