

HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, KIEFEL AND BELL JJ

PUBLIC TRUSTEE OF QUEENSLAND

APPELLANT

AND

FORTRESS CREDIT CORPORATION (AUS) 11
PTY LTD & ORS

RESPONDENTS

*Public Trustee of Queensland v Fortress Credit Corporation
(Aus) 11 Pty Ltd [2010] HCA 29
1 September 2010
B9/2010*

ORDER

1. *Appeal dismissed.*
2. *Appellant to pay first respondent's costs.*

On appeal from the Supreme Court of Queensland

Representation

W Sofronoff QC, Solicitor-General of the State of Queensland with
D B O'Sullivan for the appellant (instructed by Clayton Utz Lawyers)

D F Jackson QC with M J Luchich for the first respondent (instructed by Baker
& McKenzie Solicitors)

Submitting appearance for the second, third and fourth respondents

No appearance for the fifth respondent

Notice: This copy of the Court's Reasons for Judgment is subject to
formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd

Corporations – Charge – Registration – First respondent ("Fortress") obtained fixed and floating charge over assets of second respondent ("Octaviar") – Charge secured all moneys payable under or in relation to certain documents, including such documents as Fortress and Octaviar agreed in writing – Fortress and Octaviar subsequently agreed by deed ("Deed") that charge secured liability of Octaviar to Fortress under guarantee – Whether charge void, to extent it secured Octaviar's guarantee, under s 266 of the *Corporations Act* 2001 (Cth) ("the Act") – Whether execution of Deed required notice to be lodged under s 268 of the Act – Whether Deed effected "variation in the terms of the charge" – Relevance of legislative policy expressed in Ch 2K of the Act – Whether Deed created new charge requiring registration under s 263 of the Act.

Words and phrases – "charge", "terms of the charge", "variation in the terms".

Corporations Act 2001 (Cth), ss 263, 266, 268.

1 FRENCH CJ, GUMMOW, HAYNE, KIEFEL AND BELL JJ. This appeal from the Court of Appeal of the Supreme Court of Queensland (Holmes and Muir JJA and White J)¹ concerns the construction and application of Ch 2K of the *Corporations Act* 2001 (Cth) ("the Act"). Chapter 2K (ss 261-282) is headed "Charges" and Pt 2K.2 (ss 262-277) deals with the registration of charges on company property.

2 The Court of Appeal set aside a declaratory order made on 6 March 2009 by the primary judge (McMurdo J)². His Honour held that a fixed and floating charge over the assets of the second respondent ("Octaviar") in favour of the first respondent ("Fortress Credit"), granted by instrument dated 1 June 2007 ("the Charge"), was void to the extent that it would secure the liability of Octaviar to Fortress upon the guarantee of the indebtedness of Young Village Estates Pty Ltd ("YVE"). Fortress contended that the Charge had, at least from 22 January 2008, secured the liability of Octaviar on the guarantee of the indebtedness of YVE ("the YVE Guarantee"). YVE had purchased assets with funds advanced to it by Fortress from a managed investment scheme then managed by a subsidiary of Octaviar.

3 Initially the Charge had secured the liability of Octaviar to Fortress Credit upon Octaviar's guarantee of the obligations to Fortress Credit of a subsidiary, Octaviar Castle Pty Ltd ("Octaviar Castle"). The Charge was registered as required by ss 262 and 263 of the Act on 6 June 2007. However, the indebtedness of Octaviar Castle was paid in full on or about 29 February 2008. The terms of the Charge then would have entitled Octaviar to a discharge, and s 269 of the Act would have entitled Octaviar to seek from Fortress Credit, and lodge, a memorandum acknowledging the discharge of the liability. But Fortress Credit contended that the Charge remained on foot because since 22 January 2008 it also secured the still current liability of Octaviar to Fortress Credit on the YVE Guarantee and that, as at 17 December 2008, the amount secured by the Charge was in excess of \$59 million.

4 In September 2008 administrators were appointed to Octaviar and another subsidiary, the third respondent ("Octaviar Administration"). Each company subsequently executed a deed of company arrangement under Pt 5.3A of the Act (ss 435A-451D). The appellant ("the Public Trustee") is trustee for certain

1 (2009) 74 ACSR 156.

2 (2009) 69 ACSR 621.

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Hayne J
Kiefel J
Bell J

2.

noteholders. It applied to the Supreme Court on 19 February 2009 for orders under s 445D terminating each deed. The Public Trustee contended that each deed had been premised upon the validity in all respects of the Charge, whereas it did not validly secure the YVE Guarantee.

5 McMurdo J then ordered the separate determination of the question of the validity of the Charge, before the trial of the s 445D applications.

6 Section 266(3) of the Act states:

"Where, after there has been a *variation in the terms of a registrable charge* on property of a company *having the effect of increasing the amount of the debt or increasing the liabilities* (whether present or prospective) *secured by the charge*:

- (a) an order is made, or a resolution is passed, for the winding up of the company; or
- (b) an administrator of a company is appointed under section 436A, 436B or 436C; or
- (ba) a company executes a deed of company arrangement;

the registrable charge is void as a security on that property to the extent that it secures the amount of the increase in that debt or liability unless:

- (c) a notice in respect of the variation was lodged under section 268:
 - (i) within the period of 45 days specified in subsection 268(2) or that period as extended by the Court under subsection (4) of this section; or
 - (ii) not later than 6 months before the critical day; or
- (d) the period of 45 days specified in subsection 268(2), or that period as extended by the Court under subsection (4) of this section, has not ended at the start of the critical day and the notice is lodged before the end of that period." (emphasis added)

As will appear, the critical phrase in s 266(3) is "a variation in the terms of a registrable charge ... having the effect of ...".

3.

7 By a deed dated 22 January 2008 ("the January 2008 Deed"), the parties to which were Fortress, Octaviar and Octaviar Castle, it was provided that "the YVE Guarantee is a Transaction Document for the purposes of the Facility Agreement". The Facility Agreement was dated 1 June 2007 and was made between Fortress Credit as lender, Octaviar Castle as borrower, and Octaviar and Octaviar Administration as guarantors³. The term "Transaction Document" was defined in the Facility Agreement in terms to include each document which Fortress Credit and Octaviar agreed in writing was a Transaction Document.

8 The Charge bore the same date, 1 June 2007, as the Facility Agreement. By cl 2.1 Octaviar charged to Fortress Credit all of the "Secured Property" (being all of its present and future property) as security for payment of the "Secured Money" (defined to include all moneys that became payable by Octaviar to Fortress Credit "under or in relation to a Transaction Document").

9 Upon the appeal to this Court the only active disputants were the Public Trustee and Fortress Credit. Two questions arise. The first is whether the January 2008 Deed was a "variation in the terms" of the Charge to which s 268(2) of the Act applied. The second is whether the January 2008 Deed created a new charge to which the registration provisions of ss 262 and 263 applied.

10 For the reasons which follow, both questions should be answered in the negative and the appeal by the Public Trustee should be dismissed with costs.

Chapter 2K of the Act

11 The provisions of Ch 2K relating to the giving of notice in relation to, and the registration and priorities of, charges apply to those kinds of charges identified in s 262(1). These include floating charges (whether legal or equitable) on the whole or part of the property, business or undertaking of a company (s 262(1)(a)).

3 Octaviar, Octaviar Castle and Octaviar Administration previously were differently named; the corporate styles in these reasons reflect the changes that had been made.

French CJ
Gummow J
Hayne J
Kiefel J
Bell J

4.

12 Section 266(3), set out above, refers to lodgment of a notice under s 268. Section 268(2) of the Act provides:

"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) prohibiting or restricting the creation of subsequent charges on the property;

the company must, within 45 days after the variation occurs, ensure that there is lodged a notice setting out particulars of the variation and accompanied by the instrument (if any) effecting the variation or a certified copy of that instrument." (emphasis added)

13 A "charge" is defined to mean "a charge created *in any way* and includes a mortgage and an agreement to give or execute a charge or mortgage, whether on demand or otherwise" (emphasis added) (s 9). The phrase "in any way" indicates that the creation need not be by written instrument. Section 261(1) defines the concepts of "present" and "prospective" liabilities in relation to charges. A "present liability" means "a liability that has arisen, being a liability the extent or amount of which is fixed or capable of being ascertained, whether or not the liability is immediately due to be met", while a "prospective liability" means "any liability that may arise in the future, or any other liability, but does not include a present liability".

The earlier companies legislation

14 None of the provisions dealing with the registration of charges in Pt III of the *Companies Act* 1948 (UK), or the various Australian Uniform Companies Acts (passed in 1961 and 1962) and their predecessors⁴, required or enabled the lodging of documents consequent on a variation of a registrable charge. Likewise the provisions in Pt 25 of the *Companies Act* 2006 (UK) do not deal with charge variations. The provisions of the present Act dealing with variations

4 See Wallace and Young, *Australian Company Law and Practice*, (1965) at 345-367.

5.

in the terms of a charge can be traced back to 1972 and the recommendations of the Eggleston Report⁵. The Committee stated in its report⁶:

"It has also been suggested that provision should be made for the registration of variations of the terms of the charge. We think that [the Uniform Companies Acts] should require the filing of particulars of any variation in the terms of the charge, and that priority should be accorded to the increased security given by the variation as from the date on which the particulars are filed."

However, the Committee did not further explain what was meant by the phrase "variation in the terms of the charge" or the words contained therein. Nor, as Holmes JA noted, does the draft provision recommended by the Committee assist in ascertaining the meaning to be given to that phrase⁷.

15 The Committee's recommendation, while preferring to deal with the consequence of non-registration of variations as a matter of priorities rather than of invalidity, appears to have resulted in the enactment of ss 205 and 206 of the *Companies Act* 1981 (Cth) ("the 1981 Act"). The 1981 Act dealt with the Australian Capital Territory and was accompanied by the enactment of parallel State laws. Sections 205 and 206 of the 1981 Act were largely re-enacted as ss 266 and 268 of the Corporations Law. Section 206(2) of the 1981 Act was in substantially the same terms as s 268(2) of the Corporations Law which in turn was substantially the same as s 268(2) of the present Act.

The January 2008 Deed

16 The January 2008 Deed was entered into for the purpose of ensuring that the Charge secured the liability of Octaviar under the YVE Guarantee. As noted above, the Charge secured payment of the "Secured Money" which was defined as "all money, obligations and liabilities of any kind that are or may in the future become due, owing or payable ... [by Octaviar to Fortress Credit] under or in relation to a Transaction Document".

5 Australia, Company Law Advisory Committee to the Standing Committee of Attorneys-General, *Registration of Charges*, Seventh Interim Report, July 1972.

6 At 14 [62].

7 (2009) 74 ACSR 156 at 170 [49].

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Hayne J
Kiefel J
Bell J

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17 The term "Transaction Document" was not defined in the Charge but in the Facility Agreement. The Charge provided that "[t]erms not otherwise defined in this Deed have the meaning given in the Facility Agreement" (cl 1.2). The definition of Transaction Document included "each other document which [Fortress Credit] and [Octaviar Castle] or [Octaviar] agree in writing is a Transaction Document for the purposes of [the Facility Agreement]".

18 The primary judge held that the January 2008 Deed affected the terms of the Charge by adding a liability which was previously unsecured⁸. His Honour referred for support to *Landers v Schmidt*⁹ and *Coast Securities No 9 Pty Ltd v Bondoukou Pty Ltd*¹⁰. But both decisions turned upon the quite different provision in s 73 of the *Property Law Act 1974 (Q)* which made it an offence for a vendor to mortgage, without consent of the purchaser, land under an instalment contract.

The reasons of the Court of Appeal

19 Holmes JA (with whom White J agreed) and Muir JA each delivered separate though broadly similar reasons allowing the appeal to the Court of Appeal. Each held that in establishing whether s 268(2) applies, there must first be a term of the charge which can be shown to have been varied before the effect of that variation becomes relevant under pars (a) or (b) of s 268(2)¹¹. Holmes JA concluded that s 268(2) is directed at variations in the terms of the charge and not changes imposed, in accordance with those terms, on the burden of liability under the charge¹². The execution of the January 2008 Deed was no more than the application of the mechanism in the Charge to identify particular liabilities as falling within the category of liabilities which the Charge, in general terms, already secured¹³. Muir JA held that there was no alteration or modification of

8 (2009) 69 ACSR 621 at 630-631 [33]-[35].

9 [1983] 1 Qd R 188.

10 (1986) 61 ALJR 285; 69 ALR 385 (PC).

11 (2009) 74 ACSR 156 at 170 [49], 181 [96].

12 (2009) 74 ACSR 156 at 173 [61].

13 (2009) 74 ACSR 156 at 172-173 [59].

7.

the written terms of the Charge; after execution of the January 2008 Deed those terms were the same in word and operation as before¹⁴.

20 Both Holmes and Muir JJA agreed¹⁵ that the legislative policy expressed in Ch 2K was not defeated by acceptance of the interpretation of s 268(2) advanced by Fortress Credit, that the cases of *Landers v Schmidt* and *Coast Securities* were of little relevance¹⁶, and that the offence provision found in s 270(2) for default in complying with s 268(2) tended against the broad interpretation given by the primary judge¹⁷.

The appellant's submissions

21 In this Court, the Public Trustee submits that the January 2008 Deed had the effect of varying 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". It submits that use of that definition merely foreshadowed the securing by the Charge of future liabilities, and did not amount to an agreement to so secure liabilities falling within that definition. There could be no charge in respect of the YVE Guarantee until the January 2008 Deed, there being no "identified liability" agreed to be secured by the Charge; the definition of Transaction Document meant there was merely an agreement to agree. Hence, a new charge was said to have been created securing the YVE Guarantee.

A "variation in the terms of the charge"

22 Given its ordinary meaning, the phrase "agree in writing" in the definition of Transaction Document must be ambulatory and comprehend both "have already agreed" and "hereafter agree". The Charge, from the time of its creation, always encompassed a liability that might be or become owing under a document that was or became a Transaction Document by the parties agreeing so in writing.

14 (2009) 74 ACSR 156 at 180-181 [90].

15 (2009) 74 ACSR 156 at 170-171 [51], 173 [60], 177 [76]-[77], 179 [87], 183 [102].

16 And, in any event, those cases could be distinguished and *Sibbles v Highfern Pty Ltd* (1987) 164 CLR 214; [1987] HCA 66 provided a closer analogy.

17 See *Beckwith v The Queen* (1976) 135 CLR 569 at 576; [1976] HCA 55; *R v Adams* (1935) 53 CLR 563 at 567-568; [1935] HCA 62.

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The Charge always secured that "prospective liability". Thus, contrary to the Public Trustee's submission, the execution of the January 2008 Deed did not vary the terms of the Charge as those terms already encompassed the securing of a class of liabilities.

23 No doubt, as a result of the January 2008 Deed, the YVE Guarantee was now, but had not before been, a Transaction Document. However that did not vary the meaning of "Transaction Document" in the Facility Agreement and consequently the meaning of "Secured Money" in the Charge. Section 268(2) makes clear that there must first be a variation *in the terms of the charge* before it is necessary to consider whether that variation has the prescribed effect. The YVE Guarantee, as subject matter denoted by the Transaction Document definition, 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.

24 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.

25 Section 268(3) is consistent with the above reading of s 268(2). It provides that where a charge secures an unspecified amount, a payment or advance made by the chargee to the chargor in accordance with the terms is not taken to be a variation in the terms of the charge having the effect of increasing the amount or the liabilities secured. The chargor might, however, incur a liability to the chargee which would fall outside s 268(3) because it was not based upon a further advance. Would this liability therefore fall within s 268(2)? Counsel for Fortress Credit gave the examples of a charge providing for an early redemption fee or the automatic increase of interest rates upon the happening of a specified event. Both would have the effect of increasing the amount secured. Acceptance of the Public Trustee's construction of s 268(2) would require the giving of notice under s 268(2) in such circumstances. This, as Muir JA noted, would be an unlikely and unattractive result¹⁸. Section 268(2) requires notice

18 (2009) 74 ACSR 156 at 181-182 [96].

9.

only for variations in the terms of the charge, having the effect described in pars (a) and (b), 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.

26 It follows that there was no variation, within the meaning of s 268(2), in the terms of the Charge upon execution of the YVE Guarantee. For the same reasons, no new charge was created requiring registration under s 263(1).

The "terms of the charge"

27 We agree with Muir JA that "terms of the charge" as used in s 268(2), where the charge is created or evidenced by writing, could only be a reference to the terms contained in the written instrument and any terms which may be implied in fact¹⁹. Regardless of the means by which a registrable charge is created, it must have terms which can be identified, whether by oral agreement, implication or otherwise. It is unnecessary to decide, as his Honour recognised, whether "terms of the charge" encompasses all of the terms of an instrument or only those relevant to its character as a charge.

28 Holmes JA accepted that the "terms of the charge" are the rights and obligations which the charge creates, the latter encompassing the liabilities secured, which in the present case were to be found in the Charge itself²⁰. Her Honour also said that the "terms of the charge" arguably included the terms of the Facility Agreement. This observation may reveal some unease that the awkward drafting employed had given rise to the present litigation. The drafting technique involved may be criticised in that the pivotal definition of Secured Money in turn refers to another defined term, and one not to be found in the Charge but in a separate document, the Facility Agreement. However, as counsel for the Public Trustee accepted, the fact that the definition was not to be found in the Charge but in another document makes no difference in answering the question of whether there has been a variation in the terms of the Charge having the necessary effect. In allowing the appeal, the Court of Appeal did not need to decide whether terms of the Facility Agreement were "terms of the charge" for the purposes of s 268(2), and these reasons should not be taken to endorse the proposition that they were.

19 (2009) 74 ACSR 156 at 181 [92].

20 (2009) 74 ACSR 156 at 170 [48].

French CJ
Gummow J
Hayne J
Kiefel J
Bell J

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The system of registration under Ch 2K

29 The Public Trustee contends that the above result would be contrary to the scope and purpose of the registration system established by Ch 2K, if the parties to the Charge had not been required to lodge a notice of variation under s 268. That argument should also be rejected. *Wilde v Australian Trade Equipment Co Pty Ltd*²¹ concerned the registration provisions of one of the Uniform Companies Acts, the *Companies Act 1961* (Q). In that case Gibbs J, after referring to a number of English cases, said²²:

"As has been pointed out in the authorities, the requirement that a charge shall be registered is intended to enable persons who are minded to deal with companies to be able, by searching the register, to find out whether the company has encumbered its property or not. In other words the provisions are intended to protect persons who may become unsecured creditors of the company."

The majority, Stephen, Murphy and Wilson JJ, with whom Aickin J agreed, differed from Gibbs J as to the result in the particular appeal, but they noted that the authorities also established "that in order to discover the terms and effect of the charge one must look at the document creating the charge and not at the register"²³.

30 The registration provisions of the Act do not purport to create a perfect and complete register of all of the details of a registrable charge. Inherent in the types of charges that are registrable under the Act, and the nature of liabilities which may be secured, are uncertainties incapable of being made certain at the point of registration and at all times thereafter. Counsel for Fortress Credit correctly submitted that it is hardly surprising that the monetary obligations underlying the Charge and, given the Charge was both fixed and floating, the property comprising the security, might change from time to time.

21 (1981) 145 CLR 590; [1981] HCA 13.

22 (1981) 145 CLR 590 at 596-597.

23 (1981) 145 CLR 590 at 607. See also *In re Mechanisations (Eaglescliffe) Ltd* [1966] Ch 20 at 35-36 per Buckley J.

11.

31 Section 263(1) of the Act states, in relevant part:

"Where a company creates a charge, the company must ensure that there is lodged, within 45 days after the creation of the charge:

(a) a notice in the prescribed form setting out the following particulars:

...

(iv) a short description of the liability (whether present or prospective) secured by the charge; ..."

All that is required by par (a)(iv) of s 263(1) is a "short description" of the liability. In the present case, that description was provided by inclusion of the definitions of Secured Money and Facility Agreement, and the Charge itself, both annexed to the prescribed form. Muir JA rightly said²⁴ that upon registration of the Charge, there was no requirement that the particular amount of the liability secured be specified or that the nature of that liability be described in great detail²⁵. The short description required will necessarily, given the charge may secure prospective liability, often be of a general and ambulatory nature.

32 Paragraph (c) of s 263(1) requires that where a charge is created or evidenced by an instrument or instruments in writing, the originals or copies of such must also be lodged. So much was done in the present case by annexing a copy of the Charge to the prescribed form. Thus a person minded to search the register would be informed, by virtue of the definition of Secured Money and the existence of cl 1.2 of the Charge, of the need to look elsewhere to ascertain the precise nature and details of the liability or liabilities secured. That this would involve a step (locating the definition of Transaction Document in the Facility Agreement) preliminary to ascertaining whether there were any written agreements designating a document or documents as a Transaction Document was accepted by counsel for the Public Trustee to be immaterial in the resolution of this appeal. There is nothing objectionable to the policy of Ch 2K that notice of the January 2008 Deed was not required to be lodged where the particulars lodged for registration adverted to the possibility of its existence.

24 (2009) 74 ACSR 156 at 177 [76].

25 Compare s 103(1)(b)(ii) of the Uniform Companies Acts which required particulars of "the amount secured by the charge" to be entered on the register.

French CJ
Gummow J
Hayne J
Kiefel J
Bell J

12.

Order

33 The appeal should be dismissed with the appellant to pay the costs of the first respondent.

