

## update

17 April 2009

## Friday Facts: Notification of variations to charges – the Octaviar decision

*In the recent decision of Re Octaviar Ltd; Re Octaviar Administration Pty Ltd [2009] QSC 37, the Supreme Court of Queensland held that a charge on the property of Octaviar Ltd (**Octaviar**) which secured a guarantee was void because there had been a variation of the terms of the charge and no notice of variation had been lodged with ASIC. This decision highlights the importance of notifying ASIC of variations to registered charges.*

The Public Trustee of Queensland originally brought proceedings against Octaviar for the termination of a Deed of Company Arrangement under s.445D of the *Corporations Act 2001 (the Act)*. However, these proceedings raised a question as to the effect of a charge held by Fortress over the assets of Octaviar and the court decided that this issue ought to be determined separately and prior to the trial.

By way of background, Fortress Credit Corporation (Australia) Pty Ltd (**Fortress**) agreed to loan money to Young Village Estates Pty Ltd and this loan was guaranteed by Octaviar but no security was provided (**YVE Guarantee**). Fortress then entered into a second loan agreement with Octaviar Castle Pty Ltd (**Castle**), which was guaranteed by Octaviar and secured by a fixed and floating charge dated 1 June 2007.

The Deed of Charge secured obligations under or in relation to a 'Transaction Document' and that term was defined in the related Facility Agreement. According to subparagraph (c), the lender and the borrower were able to agree that a new document was a 'Transaction Document'. Fortress, Octaviar and Castle agreed by a letter dated 22 January 2008 that the YVE Guarantee was a 'Transaction Document' for the purposes of the Facility Agreement. Accordingly, Fortress contended that the YVE Guarantee was a 'Transaction

Document' and that the money owing under the YVE Guarantee was secured money pursuant to the Deed of Charge dated 1 June 2007.

The Public Trustees contended that the agreement dated 22 January 2008 created a new charge or, alternatively, constituted a variation of the terms of the existing charge which resulted in an increase to the secured liability. If a new charge was created, then notice would need to be lodged with ASIC pursuant to s. 263 of the Act. If the existing charge was varied such that the secured liabilities increased then notice would need to be lodged pursuant to s. 268(2) of the Act.

The Court found that it was open to the parties to agree that the YVE Guarantee was a 'Transaction Document' and the YVE Guarantee was thereafter secured by the charge. The Court then turned to the question of whether a new charge was created or whether the existing charge was varied.

Justice McMurdo considered the effect of Chapter 2K of the Act and found that the increase in liabilities secured by the charge amounted to a variation of the existing charge, rather than the creation of a new charge. His Honour held that the agreement between Fortress, Octaviar and Castle constituted a variation in the terms of the charge having the effect of increasing the amount of the debt or increasing the

liabilities secured by the charge. It was therefore held that

s. 268(2)(a) of the Act applied and a notice of the variation should have been lodged with ASIC pursuant to that section. As the required notice was not lodged with ASIC, Justice McMurdo made a declaration pursuant to s. 266(3) that the charge was void to the extent that it secured the liability of the chargor under the YVE Guarantee.

This decision is somewhat surprising in that, generally speaking, notices pursuant to s. 268(2) were previously only lodged where there had been a direct variation to terms of the registered charge. An appeal was recently lodged but until that appeal is successfully determined, the decision is binding authority and will have a number of ramifications for lenders and insolvency practitioners.

ASIC will now need to be notified within a strict timeframe whenever security obligations are varied by additional documents which are not referred to in the original charge. In certain circumstances, an application can be made to the Court for an extension of time within which to notify ASIC.

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