

# ALERT

2 SEPTEMBER 2010

## Octaviar Appeal Dismissed

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

Undoubtedly to the relief of banking and finance lawyers and their clients, the High Court on 1 September 2010 dismissed the Public Trustee of Queensland's appeal of the decision in the matter of *Octaviar Ltd (No 7)* [2009] QCA 282.

The case concerns the construction and application of Ch 2K of the Corporations Act 2001 (Cth) (**Act**) in respect of charges over company property, and whether a deed entered into between the parties was a 'variation in the terms' of an existing charge to which s268(2) of the Act applied, or whether the deed created a new charge to which the registration provisions of ss262 and 263 applied.

The deed dated January 2008 (**January 2008 Deed**) had the effect of securing by a charge already in existence a liability which was previously unsecured. This was enabled by a drafting technique in the charge, in which the definition of 'secured money' in turn referred to another defined term, a 'transaction document', not to be found in the charge but in the January 2008 Deed, a separate and subsequent document.

### Decision

The court held that the January 2008 Deed did not vary the terms of the charge, nor create a new charge, and accordingly the parties' entry into the deed did not require registration under the Ch 2K regime.

The court rejected the view that the January 2008 Deed varied the terms of the charge by adding a liability which was previously unsecured to the class of liabilities already secured by the charge, finding that the charge had always encompassed a liability that might be owing under a document that became a 'transaction document' by the parties agreeing so in writing. The charge always secured this 'prospective liability'. Further, the January 2008 Deed did not have the effect of altering or modifying the written terms of the charge.

### Implications

The High Court's decision is consistent with market practice and the accepted view of banking and finance lawyers.

The court went on to consider examples which occur frequently in practice where the amount secured under a charge is increased, such as the early



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redemption fee or the automatic increase of interest rates upon the happening of a specified event. The court confirmed that it would be an unlikely and unattractive result if notice under s268(2) was required to be given in these instances.

The court also highlighted that the onus of making proper enquiries is on those relying on the Ch 2K regime, commenting that the regime 'does not purport to create a perfect and complete register of all of the details of a registrable charge'. Where particulars lodged for registration suggest the possibility of the existence of other documents that set out the total liability under the charge, it is up to the individual to make further inquiries regarding the extent of that liability, which the regime is not intended to specify in detail.

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