Securing Victory against Liquidators, Preferably

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In a recent matter within the Insolvency, Restructuring and Debt Recovery group, we advised a liquidator in relation to an unfair preference claim against a creditor under s588FA of the *Corporations Act 2001* ("the Act").

In order for a transaction to be an unfair preference, it must satisfy a number of requirements under ss 588FA, 588FC and 588FE of the Act. One of those requirements is that the debt being repaid is an *unsecured* debt of the creditor (s588FA(1)(b).

In accordance with the defence *de jour,* the creditor rejected the liquidator's demand and claimed it was a *secured* creditor of the company as a result of a charge agreed to by the company contained in the creditor's terms and conditions of trade, even though this charge had not been registered on the Personal Property Security Register (and was therefore void against the liquidator).

Section 51B(b) of the Act states that a party can be a "secured party", in relation to a security interest, even if the security interest is not a PPSA security interest and therefore not registered, but consists of a charge in relation to the property therefore classing the party as a 'chargee'. This notion was referred to in the Federal Court matter of *Hussain v CSR Building Products Ltd* [2016] FCA 392 where it was held that a charging clause over property can still be effective despite it not being registered on the PPSR. The precise scope of the Court's decision in *Hussain* is controversial and awaits further judicial determination, but the secured cat, as they say, is well and truly amongst the preference pigeons.

Until this issue is further clarified it is at least arguable that certain security interests may not need to be registered on the PPSR in order to protect a creditor from a liquidator's unfair preference claims.

Read the *Hussain v CSR Building Products Ltd* [2016] FCA 392 judgment here

If you would like more information or advice in relation to insolvency, restructuring or debt recovery law, contact a Principal of the Matthews Folbigg Insolvency, Restructuring & Debt Recovery Group:

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