

JOURNAL OF BANKING AND FINANCE LAW AND PRACTICE

Volume 24, Number 1

March 2013

ARTICLES

The persistence of equitable doctrines with respect to the law relating to personal property securities: Assessing the impact of the Personal Property Securities Act 2009 (Cth) – *Nicholas Mirzai*

The Personal Property Securities Act 2009 (Cth) has had a profound impact on the legal profession affecting commercial law, corporate law, insolvency, securities law and equity and trusts amongst other practice areas. In seeking to understand what falls within the scope of the legislation it is equally important, if not more so, to understand its confines. Whilst commonly approached on the basis that the “new replaces the old”, this simplification, without qualification, serves to mislead. As the purported codification of the law with respect to security interests taken over personal property, the question remains: how self-sufficient is the Act in its application? In addressing this question, this article examines the continued role of equity under the statute focusing on the characterisation of security interests, the law of tracing and the residual jurisdiction of the general law in the determination of priority disputes.

3

Imposing proprietary interests in insolvencies – *Richard Calnan*

When a company enters into insolvency proceedings, a creditor with a personal claim against the company is normally unable to enforce that claim except by proving for a dividend in the company’s insolvency proceedings along with all other creditors. However, if a person has a proprietary interest in an asset held by the company, that person is generally entitled to enforce its proprietary interest in the company’s insolvency, thereby taking priority over the general creditors of the company. Proprietary interests are normally created by agreement, but they are sometimes imposed by the courts where there is no such agreement. This article discusses some of the situations in which the courts do impose proprietary interests in an insolvency. It argues that to do so creates problems both for property law and for insolvency law, and that the courts should limit the circumstances in which they impose proprietary interests in insolvencies.

18

Covered bonds: Their introduction and regulation in Australia – *Alicia Back*

The Banking Amendment (Covered Bonds) Act 2011 (Cth) represents an important change to the Australian financial system in facilitating the issuance of covered bonds. A type of debt instrument characterised by dual recourse to both the issuing financial institution and a segregated cover pool of assets, covered bonds had been subject to a strict prohibition on the basis of their perceived inconsistency with principles of depositor preference, entrenched in Australian banking law since the commencement of the Banking Act 1959 (Cth). The new statute adopts securitisation technology to facilitate an Australian covered bond market. This article analyses the contextual matrix that has motivated this significant law reform, drawing on historical analysis as well as international regulatory developments in light of the Global Financial Crisis. Further, this article deconstructs the Banking Amendment (Covered Bonds) Act, critically analysing the framework that has been created for covered bond issuance by single ADIs and groups of ADIs engaging in

aggregation techniques. Ultimately, it is concluded that the Australian covered bond regime is legislatively less stringent than international equivalents – in particular that of the United Kingdom – and the potential consequences of this are explored. 29

Case note: Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq) [2012] FCA 1028 – Lesa Bransgrove

Australian councils and charities were found by the Federal Court to be the victims of mis-selling of financial products by Grange, subsequently acquired by the now defunct Lehman Brothers. There were four claims pleaded by the applicants, namely misleading and deceptive conduct, negligence, breach of contract and breach of fiduciary duty on the part of Grange in recommending and selling these complex financial products to the applicants. The court found that Grange's role as trusted adviser to the applicants informed the content of their obligations in contract, tort and under statute to disclose the material risks of the financial products, which made them inherently unsuitable for the applicants and as a fiduciary, to frankly and fully disclose the size of its profits from its dealings with the applicants and the way these profits were earned. Disclaimers negating Grange acting as an adviser in the product documentation and marketing materials were held to be irrelevant given Grange's role as trusted adviser. The court rejected any contributory negligence on the part of the applicants because the court found that the applicants did not have a duty to second guess Grange's advice. The court also refused to find the rating agencies contributory negligent, given Grange's misuse of ratings was done by Grange alone and not by the rating agencies. The decision has important lessons for banks regardless of whether they act as a trusted adviser or a mere seller vis-à-vis clients. 52

BANKING LAW AND BANKING PRACTICE

Deferred payment letters of credit 66

COMMERCIAL AND FINANCE LAW

Charges over insurance monies: Steigrad v Bridgecorp 69

INSOLVENCY LAW AND MANAGEMENT

A step back from universalism: Rubin and New Cap Re in the UK Supreme Court 74

RECENT PUBLICATIONS 77

TOKYO

Amendments to the Financial Instruments and Exchange Act 81

NEW ZEALAND

New Zealand's AML/CFT regime – the countdown to implementation 85