



## Appointment of administrators by a secured creditor - take care

### Key Summary

- The Supreme Court of NSW has ruled that the failure to pay mortgage duty on a security instrument forming the basis for the appointment of a voluntary administrator can invalidate that appointment
- Care must be taken therefore to ensure that any mortgage duty payable on a security instrument has been paid before administrators are appointed under s436C of the Corporations Act 2011

On 2 April 2015, Justice Robb of the Supreme Court of NSW published his judgment dealing with a preliminary question of significant practical importance for insolvency practitioners and their legal advisers: *Photios v Cussen and Anor [2015] NSWSC 336*

#### The facts

On 14 July 2014 voluntary administrators were appointed to two companies, Griffith and Beechworth, by an alleged secured creditor pursuant to the terms of section 436C of the Corporations Act 2001 (**the Act**).

On 4 August 2014 the validity of these appointments was challenged by the plaintiffs (**Photios Parties**) on a number of grounds, including the failure to pay mortgage duty on the security instruments that were the basis for the appointments.

In relation to the Griffith appointment, well after the commencement of the removal proceedings, the full amount of the mortgage duty was paid.

#### The law

Section 436C(1) provides:

*"A person who is entitled to enforce a security interest in the whole, or substantially the whole, of a company's property may by writing appoint an administrator of the company if the security interest has become, and is still, enforceable".*

#### The question to be decided

The preliminary question before Robb J was whether the word 'enforceable' had the meaning that the security interest must actually be enforceable as a matter of law at the date of enforcement, or whether it was sufficient if the security interest is not enforceable as at that date, but by reason of some subsequent event (payment of the mortgage duty), it is deemed as a matter of law to have been enforceable from the date of enforcement.

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### The decision

Robb J concluded that the word 'enforceable' in s 436C of the Act required that the security interest must be presently enforceable as a matter of law as at the date of appointment of the administrator.

Thus, some 9 months after their appointment, the Court has ruled that the Griffith administrators' appointment was ineffective because mortgage duty had not been paid on the relevant security interest.

### Further proceedings

Section 447A of the Act states:

*"The Court may make such order as it thinks appropriate about how this Part is to operate in relation to a particular company."*

The Court also ruled that it has power under s447A of the Act to make an order that the Griffith administrators had been validly appointed. Unsurprisingly, the Griffith administrators are now seeking a validation order from the Court, notwithstanding the failure to pay mortgage duty on the security instrument that was the basis for their appointment. The Photios Parties are opposing the making of any validation order and this application is yet to be determined by the Court.

### Lessons learned

The important lesson from this judgment - carefully check that any mortgage duty payable on a security instrument has been paid before administrators are appointed under s436C pursuant to a security interest, otherwise the administrators appointment is likely ineffective, with potentially serious consequences for the administrators.

Below is a link to the judgment of Robb J:

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSC/2015/336.html?stem=0&synonyms=0&query=PHOTIOS%20V%20CUSSEN>

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*This article was written by Michael O'Neill, a partner in our insolvency and reconstruction team. We invite you to contact Michael should you have any questions or require any further information about the matters discussed in this article.*

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