

Landlords and property owners may not be as protected as they think they are!

Unless the terms of the arrangement that provide one party with security to ensure compliance with the other party's obligations are clearly documented and registered on the PPS Register, the security that a party believes they have may not be valid and enforceable.

In a recent decision involving **Dura (Australia)** and **Hue Boutique Living**,¹ the Victorian Court of Appeal found that for a party to have a valid enforceable "security interest" under the PPSA in monies held in a trust account, such interest must have arisen from a consensual transaction between the parties. The decision has important consequences for landlords of commercial leases, for property owners who enter into building contracts and for a range of other commercial conditional arrangements where monies are held in a trust account pending completion of specified obligations under a contract.

The facts of the Dura case:

- In April 2012 a judge in the Supreme Court of Victoria entered judgment in favor of Hue Boutique Living Pty Ltd (**Hue**) against Dura (Australia) Constructions Pty Ltd (**Dura**) for over \$6m.
- Dura appealed the decision and applied for a stay of execution.
- The Court granted the stay and ordered \$1m. be paid into interest bearing account in the joint names of the solicitors both parties pending the hearing and determination of the appeal.
- The monies were placed in an account with the NAB in the joint names of the parties' solicitors pending the hearing and determination of the appeal.
- The Court of Appeal dismissed Dura's appeal but Dura sought leave to appeal to the High Court
- Dura was then placed into liquidation and Receivers were also appointed.
- Directions were sought from the Court of Appeal regarding the monies that were held by the solicitors in the joint trust account.

The Court of Appeal's decision:

Hue was held to be entitled to the money that had been held in the NAB account. It was held that:

- S 12 of PPSA defines a "security interest" to mean an interest in personal property provided for by a transaction that in substance secures payment or performance of an obligation.
- Hue's interest in the trust account was not "provided for by a transaction" and was not a valid "security interest" under s 12 of the PPSA.
- *The Court held that the interest of Hue in the moneys paid into Court did not arise out of a "consensual transaction" between the parties. There was no contractual or any other transaction or arrangement between the parties.* Their interest arose as a result of Dura complying with a condition imposed by the Court of Appeal to pay the money into an interest bearing account pending the hearing and determination of the appeal.
- The Court also held that Hue had "an equitable charge" over the moneys in the joint account and was "created, arises is provided by operation of the general law" (by reason of the Court order) and was therefore exempted under the PPSA. (s.8 (1) (c).)
- The Court also noted that at the time of the winding up of Dura, no security interest in the monies held in the joint account had been granted by Dura to Hue and so s 267 (2) of the PPSA did not apply and accordingly the monies did not vest in the liquidator of Dura .

¹ **Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd**
(Supreme Court of Victoria (Court of Appeal) 17 December 2014

The take away message from the Dura case

- For a party to have an enforceable “security interest” within s12 of the PPSA, the security interest must be the subject of a “consensual transaction” and that interest should be registered on the PPS Register.
- Accordingly, in situations where monies are held in a nominated account (such as occurs with security deposit or bond monies) for the purposes of securing the payment or performance of an obligation (such as the payment of rent or other obligations under a lease), the parties should document a “consensual transaction” that clearly spell out their intentions regarding the ownership and use of the monies (and any interest earned) that are held in the nominated account.

Implications of the Dura decision for landlords

- Landlords (and their lawyers and estate agents who act for them) should ensure that commercial leases include clauses that:
 - (a) Make clear that the consensual nature of the transaction is to create a “security agreement” in respect to the trust monies or other personal property (such as landlord’s chattels and landlord’s installations) for the purposes of the PPSA;
 - (b) Spell out the landlord’s right to register their “security interests” in the security deposit/bond and other personal property on the PPS Register;
 - (c) Define the circumstances in which the landlord can enforce their security interests in the event of the tenant’s default or at the conclusion of the lease and
 - (d) Spell out the tenant’s rights in relation to any monies that they pay into an account (eg. their right to interest on the monies deposited and their right to the return of the monies at the expiration of the lease provided they meet their lease obligations).
- We are aware that many standard commercial leases and other commercial agreements do not properly deal with the above issues. Urgent action should be taken by landlords to review their existing commercial lease documents to ensure that they are properly protected under the PPSA. In particular, they should ensure that their leases contain appropriate PPSA clauses and clauses that protect their personal property and any security deposits in the event of a tenant’s default. They should also take steps to ensure that such interests are registered on the PPS Register immediately a lease is signed.
- If the above steps are not taken, the landlord may not be able to enforce their claim to utilize the trust monies or recover their personal property if the tenant subsequently defaults, becomes bankrupt or goes into Liquidation or Administration.

Conclusion

As was shown by the recent Dura decision, a party’s failure to clearly spell out their PPSA rights to trust monies that are intended to be used to secure some future obligation and to register such interest may well prove fatal to their right to claim a legal or equitable entitlement to the monies - even if that was their intention at the time the funds were paid into the account.

Philip Sheezel
13 January 2015

This article has been prepared by Philip Sheezel of PS Law (www.pslaw.com.au). It may not be reproduced or copied without the express authorization of the author.

For further information any of the matters raised in this article or for advice on any issues relating to the PPSA, contact Philip on 0412578240 or email him at: philip@pslaw.com.au