WAYS AND MEANS OF TAKING SECURITY OVER BANK DEPOSITS

Comment by

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I have been asked to address this topic with a broader perspective than those following me, ignoring the implications of Broad's case ([1980] 2 NSWLR 40) and, also, to consider the question of security over bank deposits where those deposits are held by a third party bank. To start with, I thought it worthwhile identifying a number of practical issues that always have to be borne in mind when considering any form of security over bank deposits.

For example, a party taking security would like to be sure that the money does in fact belong to the depositor in his own right; that it does not constitute trust money, that the depositor does not hold the money as agent. There is not much that you can really do about this. You can, of course, obtain a warranty as to title. The practical significance of the difficulty, will really depend on the circumstances in which the security has been sought.

Another practical issue is, of course, the mis-matching of maturities; that is, where the deposit matures before the secured liabilities fall due. That is perhaps a rather obvious issue, but it is one that does admit of a number of arrangements which need to be considered when drafting the particular security document.

I want to turn now to the question of registration, assuming that we have got a valid charge on property of a company, whether that charge is created in favour of the debtor bank or a third party bank. And to do so, I will look at some of the heads of registration in sub-section 200(1) of the Companies Code and consider how they might have application to a charge over a bank deposit.

The first, dealing with them in order, is paragraph 200(1)(a) of the Code, which requires registration of a floating charge, whether that charge relates to the whole or only a part of the property of the company. In my view, where the charge is created over a fluctuating or current account, rather than a fixed term deposit, it may be argued that you have a floating charge, in

which case it would be necessary to register under that particular head.

Another head requiring consideration is contained in paragraph 200(1)(f), which requires registration of a charge on a book debt. Sub-section 200(4) defines "book debt" as a debt due or to become due at some future time on account of or in connection with a profession, trade or business and includes future debt.

As WJ Gough points out in Company Charges An Australian Supplement (Butterworths, 1983), at page 24, book debts have traditionally been considered debts "due and growing due" in the course of business. That is, they essentially arise from normal trading. Accordingly, Gough goes on the suggest that particular investments of a company's surplus monies for the time being (such as credit bank balances and deposit accounts), although represented by debts, should not be regarded as book debts.

However, the definition in sub-section 200(4) of the Code, in my view, extends beyond the traditional view of a book debt. The wisest course may, therefore, be to register, particularly where the deposit concerned is a deposit account.

That leads me to a couple of other heads of registration which, perhaps, concern more particularly certificates of deposit. The first is the requirement to register a charge on a marketable security, to which there are two exceptions (see paragraph 200(1)(g) of the Code):

(1) A charge created in whole or in part by the deposit of a document of title to a marketable security does not require registration.

(2) In addition, a mortgage of a marketable security under which the marketable security is registered in the name of the mortgagee, or its nominee need not be registered.

Under sub-section 5(1) of the Companies Code, "marketable security" is defined to include debentures and bonds. If a certificate of deposit should be so executed as to constitute a bond it may be a "marketable security" as defined, notwithstanding the exclusionary provisions of paragraph (aa) of the definition of "debenture" in sub-section 5(1). In any event, if not a marketable security, consideration will need to be given to whether a certificate of deposit is a negotiable instrument. I will come back to the "marketable security" category in a moment to look at the specific exemption for pledges.

I made reference to exception, in paragraph 200(1)(g), for charges created by deposits of the "documents of title" to marketable securities. That term is defined in section 199 of the Code and, amongst other things, includes documents that are, or evidence title to, marketable securities, which would cover a certificate of deposit.

The second important head of registration concerning certificates of deposit is the requirement to register a charge on a negotiable instrument. I think it can be seen that, generally,

bank certificates of deposits are negotiable. The possibility of overlap between requirements of registration of charges with respect to marketable securities and those concerning negotiable instruments, though perhaps not immediately apparent, will depend very much on the form of and terms and conditions applicable to the certificate of deposit.

Negotiability, of course, requires the existence of a number of criteria. It requires the ability to negotiate title by delivery and endorsement; the holder must be able to sue in his own name, and a holder in good faith for value must take clear of any defects of the previous holder.

Accordingly, there is a possibility that both heads of registration may have to be considered depending on the particular certificate of deposit concerned.

I mentioned earlier the specific exemption for pledges of marketable securities. The only property capable of being pledged is that property capable of being delivered and, therefore, a certificate of a deposit must be transferable by delivery for the exemption to apply. A charge by way of a pledge of a negotiable instrument is also specifically exempt: section 200(2)(c) of the Code.

Where does that leave us? In my view, that means, in summary that if you have a deposit account, a floating charge over that deposit is registerable. If the charge is fixed, then it is arguable that it does not constitute a charge of a book debt thereby requiring registration, but I would suggest that it is wise to register. Where you have got a certificate of deposit, in my view, in most situations you are likely to be able to avoid registration.

One particular matter, that I failed to refer to earlier, was the exemption for a charge by way of letter of hypothecation of a negotiable instrument: section 200(2)(c) of the Companies Code. Perhaps "letter of hypothecation" may have to be read down having regard to other provisions of the Code. Hypothecation normally refers to an equitable charge.

Those drafting the Code may have used the word "letter" there to suggest that it means something akin to a letter of trust.

In conclusion, I wish to refer briefly to two other issues. The first concerns the question of notice. Notice is unnecessary to effect an equitable charge, but it becomes important if you want to cause the debtor bank to respect the assignment, and, of course, if you wish to preserve priority as against other assignees under the rule in Dearle v Hall (1828) 3 Russ 1.

My final point concerns the issue of consideration. It is most important to ensure that an equitable charge is supported by consideration; the rights of the assignee being founded in contract, an equitable charge is ineffective in its absence.