

## Article Information

Service: Dispute Resolution & Litigation, Restructuring & Insolvency

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# When duty calls: Will the failure to pay mortgage duty invalidate the appointment of voluntary administrators appointed pursuant to section 436C of the Corporations Act 2001?

The recent Supreme Court of New South Wales decision of **Photios v Cussen (in their capacity as joint administrators of Beechworth Land Estates Pty Ltd (admins apptd) [2015] NSWSC 336**, is one of the few decisions that has considered and applied the influential 2011 decision of **Katzmann J in Arnautovic & Sutherland t/as Jirsch Sutherland & Co v Civitanovic (as trustee of the bankrupt estate of Adrian Lawrence Rosee) [2011] FCA 809 (Civitanovic)**.

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### ***The Background***

The case concerned the validity of the appointment of voluntary administrators to two companies by secured parties in circumstances where there were unpaid mortgage duties on the mortgages which were the subject of the securities at the time of the appointment of the administrators.

Vangory Holdings Pty Ltd (**Vangory Holdings**) appointed administrators to Beechworth Land Estates Pty Ltd (**Beechworth**), and Vangory Services Pty Ltd (**Vangory Services**) appointed the same administrators to Griffith Estates Pty Ltd (**Griffith**).

The secured parties had relied on section 436C of the *Corporations Act 2001* (Cth) (**the Act**) to appoint administrators when their security interests became enforceable. Section 436C provides that:

*“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 plaintiffs claimed that when the administrators were appointed, the security interests upon which the secured parties relied were not enforceable, as there was mortgage duty payable on the securities under the *Duties Act 1997* (NSW) (**the Duties Act**). Section 211 of the Duties Act provides:

*“A mortgage on which duty is required by this Chapter to be paid is unenforceable to the extent of any amounts secured by the mortgage on which duty has not been paid.”*

### ***The Decision***

Justice Robb concluded that ‘enforceable’ in section 436C meant that the Act required the security be presently enforceable, as a matter of law, as at the date of an administrator’s appointment. To be presently enforceable at the date of appointment, and prior to a default, mortgage duties should be paid. Were it otherwise, a secured party would be at liberty to control the validity of the administration by deciding whether or not to pay outstanding mortgage duties. However, his Honour also held that the language of section 211 of the Duties Act meant a mortgage was still enforceable if mortgage duties are only owed on part of the mortgage.

### ***Outcome for Griffith***

This meant that for Griffith, for which no mortgage duties had been paid as at the date of appointment of administrators, the relevant security interest was not enforceable, and the appointment of the administrators was ineffective for the purposes of section 436C of the Act.

However, after considering much judicial authority, his Honour considered that the fact the duties had subsequently been paid meant that section 211 of the Duties Act could operate retrospectively, and the security interest could be deemed enforceable from the date of execution, which would include the date administrators were appointed. His Honour at [147] placed considerable emphasis on Justice Katzmann's decision in *Civitanovic*, agreeing with her Honour's finding that the late payment of stamp duty cures the defect in the validity and enforceability of instruments or transactions liable to duty from their *inception*. At [149,] the question Justice Robb asked was whether the conclusion reached by Justice Katzmann was correct, to which his Honour succinctly and emphatically responded at [150]: "*In my view it is.*"

Flowing from the Court's determination that the late payment of mortgage duty could operate retrospectively, Justice Robb accepted that the administrators had access to the all-powerful section 447A of the Act to make orders validating the administrators' appointment. Section 447A of the Act confers jurisdiction on Courts to make orders to the effect that Part 5.3A of the Act is to operate in a particular manner. In this case, Justice Robb made orders that Part 5.3A of the Act was to operate as if the administrators had validly been appointed as administrators of Griffith.

### ***Outcome for Beechworth***

The situation concerning Beechworth was slightly different and perhaps somewhat simpler. Mortgage duties in respect of Beechworth were only owed in part. The security interest was enforceable to that extent for the purposes of s 211 of the Duties Act, and so the appointment of administrators to Beechworth under s 436 of the Act was *not* ineffective. Mortgage duties were only owed in part in respect to Beechworth as the main asset of Beechworth, Redhill Developments Pty Ltd, changed its address on 29 April 2014 from Victoria, where no duties were payable, to New South Wales, where duties were payable. Accordingly, the Court held that mortgage duties were only payable in relation to advances made by Vangory Holdings after 29 April 2014.

### ***Key Takeaway Points***

The decision demonstrates that failure to pay mortgage duties by a secured party is not necessarily fatal to an appointment of voluntary administrators to the grantor pursuant to that security. Provided that the mortgage duties are subsequently paid, a secured party can apply to the Court for orders retrospectively validating the appointment. Alternatively, if the mortgage duties are already partly paid, the mortgage is still enforceable to that extent, and so any appointment will be effective.