



AUGUST 2013

LITIGATION UPDATE

RECENT DECISION REINFORCES THE IMPORTANCE OF PERFECTION UNDER THE *PERSONAL PROPERTIES SECURITIES ACT 2009*

On 27 June 2013, Brereton J of the Supreme Court of NSW gave judgement in the matter of *Maiden Civil (P&E) Pty Ltd; Richard Albarran and Blair Alexander Pleash as receivers and managers of Maiden Civil (P&E) Pty Ltd & Ors v Queensland Excavation Services Pty Ltd & Ors* [2013] NSWSC 852, a case that dealt with priorities under the *Personal Properties Securities Act 2009* (PPSA). This decision highlights the dangers of not perfecting a security interest and confirms that Australian courts will look to decisions of the Canadian and New Zealand courts for guidance when interpreting the PPSA.

THE FACTS

In May and August 2010, the first defendant, Queensland Excavation Services (QES), purchased caterpillar excavators (Excavators). Concurrently, QES leased the Excavators to Maiden Civil (P&E) Pty Ltd (Maiden) for civil construction work in the Northern Territory (Leases). The Leases were not registered by QES under the PPSA or by any other means.

In March 2012, Maiden entered into a loan agreement and a general security deed (Deed) with a third party, Fast Financial Solutions Pty Ltd (Fast). The Deed purported to grant Fast a security interest in all of Maiden's assets, including the Excavators. Fast registered its security interest under the PPSA (Fast Security Interest).

In July 2012, Fast sought to enforce its rights under the Fast Security Interest by appointing the plaintiffs as receivers over Maiden (Receivers) as Maiden had defaulted under the Deed. The Receivers then sought possession of the Excavators.

In August 2012, QES's principal terminated the Leases and made alternative hire arrangements for the Excavators, and Maiden went into voluntary liquidation.

THE FINDINGS

Brereton J decided in favor of the Receivers after consideration of the following issues:

- Security interests: QES, being the owners of the Excavators and lessors of a PPSA lease under s13 of the PPSA, had a security interest.

In addition, pursuant to s 19(5) of the PPSA, Maiden, as a PPSA lessee in possession of the Excavators, had proprietary rights and pursuant to the Deed, Fast also had such proprietary rights.

- **Priorities:** As the dispute was about competing security interests not ownership, it must be resolved according to the system of priorities in the PPSA. Under the PPSA, the default position is that a perfected security interest has priority over an unperfected security interest (s 55(3) of the PPSA).
- **Transitional security interests:** QES had a transitional security interest because the Leases were entered into prior to the commencement of the PPSA. In most circumstances, this results in such an interest being automatically transferred to the PPSA Register and perfected provided that the interest was registered on a transitional register prior to the commencement of the PPSA. However, in this instance, protection was not granted because the interests in the Excavators granted by the Leases were not registered on a transitional register (for example, the Northern Territory register of interests in motor vehicles and other goods) in circumstances where those interest were capable of being registered on the transitional register. The exception in s 322(3) of the PPSA applied and QES did not have priority (s 322(3) states that if a transitional security interest is registrable on a transitional register then it is not automatically perfected).
- **Perfection:** a security interest can be perfected by possession, control or the registration of a financing statement on the PPSR. QES did not perfect its security interest by registration on the PPSA, but Fast, by registering the Fast Security Interest, did. In addition, because of the Deed, Fast was contractually entitled to enforce the Fast Security Interest against third parties, including QES.
- **Possession:** The termination of the Leases meant Maiden no longer had the right to possession, however, this did not affect the outcome for two reasons. Firstly, because of s 267 of the PPSA, as any unperfected security interest vested in Maiden upon commencement of administration. Secondly,

the Fast Security Interest was granted to Fast pursuant to the terms of the Deed, and the PPSA does not affect the operation of the Deed or derogate in any way from the rights and remedies that Fast has under it.

Therefore, it was Fast who had a perfected security interest and therefore, had priority to the Excavators over any other parties claiming an interest in the Excavators.

THE EFFECTS

The case may be considered a somewhat harsh decision. If we look back at earlier decisions in Australia under the PPSA, such as *In the matter of Cardinia Nominees Pty Ltd* [2013] NSWSC 32 and *Carson, in the matter of Hastie Group Limited* (No 3) [2012] FCA 71 we have been reminded consistently of the importance of registration at the creation of a security interest in personal property.

The perfection rules under the PPSA represent a marked departure from pre-PPSA regime. Although the importance of registering company charges with the Australian Securities and Investment Commission has always been known, the PPSA regime has extended similar importance to retention of title, leases and other transactions that grant an interest in personal property to secure obligations. Without diligent perfection of security interests, the rights of the secured party (including owners or lessors) are extinguished upon the insolvency of the grantor if these transactions secure obligations.

Although we have not seen a fact scenario like this one previously in Australia, New Zealand cases such as *New Zealand Bloodstock v Waller* [2006] 3 NZLR 629, have followed this same path: "The fact that [Bloodstock] may have legal title to [the asset] is simply irrelevant in a situation where, as here, [Bloodstock] holds an unperfected security interest and is in competition with a party which has a perfected security interest. The lessor's interest in the collateral takes or cedes priority as the case may be according to the Act's priority rules, not according to the dictates of the common law relating to legal title. It is the lessee who is to be treated as the owner of goods for registration and priority purposes and not the lessor."

In this decision, Brereton J also considered the intention of Parliament when it enacted the PPSA. At [32] he states: "The Commonwealth Parliament,

in enacting legislation that was modelled on the New Zealand and Canadian legislation, should be taken to have intended the same approach, which was by then well-established in Canada and New Zealand, to apply."

Accordingly, Australian courts will look to the decisions of Canadian and New Zealand courts for guidance when interpreting the PPSA.

Overall, this decision highlights the importance of perfecting a security interest at the time it is created. While the best form of perfection is by control, this is not always a plausible option. Therefore, the most common form of perfection is by registration under the PPSA.

The consequence of not perfecting one's registration is that an owner of personal property may lose their right to "their" property. We can also see potential positives for a third party security interest holder, in that- they may be able to realise personal property that is owned by a third party but which is in the possession of the grantor and or the lessee.

But whatever side you're on, registration is essential.

MORE INFORMATION

For more information, please contact:



Scott McDonald
Partner
T +61 2 9286 8331
scott.mcdonald@dlapiper.com

Contact your nearest DLA Piper office:

BRISBANE

Level 29, Waterfront Place
1 Eagle Street
Brisbane QLD 4000
T +61 7 3246 4000
F +61 7 3229 4077
brisbane@dlapiper.com

CANBERRA

Level 3, 55 Wentworth Avenue
Kingston ACT 2604
T +61 2 6201 8787
F +61 2 6230 7848
canberra@dlapiper.com

MELBOURNE

Level 21, 140 William Street
Melbourne VIC 3000
T +61 3 9274 5000
F +61 3 9274 5111
melbourne@dlapiper.com

PERTH

Level 31, Central Park
152–158 St Georges Terrace
Perth WA 6000
T +61 8 6467 6000
F +61 8 6467 6001
perth@dlapiper.com

SYDNEY

Level 38, 201 Elizabeth Street
Sydney NSW 2000
T +61 2 9286 8000
F +61 2 9286 4144
sydney@dlapiper.com

www.dlapiper.com

DLA Piper is a global law firm operating through various separate and distinct legal entities.

For further information, please refer to www.dlapiper.com

Copyright © 2013 DLA Piper. All rights reserved.

1201550848 | JPS | 0813