

Banking & Finance Alert

Australia's first major PPSA decision

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Thomsons recently acted for the successful Plaintiffs in a significant decision under the Personal Property Securities Act 2009 (Cth) (**the PPSA**) - *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 (**the Maiden Civil Case**).

Since the commencement of the PPSA there has been considerable discussion, but very little authority, concerning the Act's application. It is in this context that a recent decision of His Honour Justice Brereton is of some significance as it provides some clear guidance as to how the PPSA operates in practice in resolving priority disputes.

The Maiden Civil Case addressed some of the key concepts underpinning the PPSA, none more so than the displacement of the *nemo dat* rule (that one cannot give what is not theirs), consistent with authority from Canada and New Zealand. The Maiden Civil Case should also sound a warning to those seeking to rely upon the 24 month transitional provisions to properly consider their position.

The facts of the *Maiden Civil Case*

Maiden Civil (P & E) Pty Ltd (ACN 134 402 618) (**Maiden Civil**) was a company engaged in civil construction works in the Northern Territory. Amongst the assets that it used to undertake these works were three Caterpillar excavators (**the Caterpillars**).

Queensland Excavation Services Pty Limited (**QES**) was a company said to be engaged in the business of leasing earthmoving vehicles. QES claimed to be the legal owners of the Caterpillars and the lessor of the Caterpillars to Maiden Civil. However, QES did not register the leases against Maiden Civil on the Personal Property Securities Register (**PPSR**).

Maiden Civil and the Second Plaintiff, Fast Financial Solutions Pty Ltd (**Fast Financial**), entered into a Loan Agreement which was secured by a General Security Deed whereby Maiden Civil granted Fast Financial a security interest in all present and after acquired property of Maiden Civil. Significantly, the property secured by Maiden Civil included the Caterpillars.

Subsequent to entering into the General Security Deed, Fast Financial registered its security interests on the PPSR in all present and after acquired property of Maiden Civil.

A default under the Loan Agreement by Maiden Civil subsequently led to the appointment of Receivers and Managers over the assets of Maiden Civil in accordance with the terms of the General Security Deed.

Despite Fast Financial's registered security interest, QES nonetheless demanded that the Receivers deliver up possession of the Caterpillars to QES on the basis that QES claimed to be the legal owner of the Caterpillars.

Whilst legal ownership was not conceded by the Plaintiffs, it was not the determinative issue with respect to two of the Caterpillars as the matter fell to be determined by the operation of the PPSA.

The judgment

The Plaintiffs' priority prevails

His Honour determined that QES' leases were (as ultimately conceded by QES) PPS leases within the meaning of s13 of the PPSA, by reason of:

- the hire of the Caterpillars being continuous for a period of more than one year, satisfying ss13(1)(b) and/or 133(1)(d) of the PPSA; and
- the Caterpillars being goods that may or must be described by serial numbers and were in Maiden's possession for more than 90 days, thereby satisfying ss13(e)(ii) and/or (iii) of the PPSA.

By reason of the leases being PPS leases, QES' interest as lessor was a security interest within the meaning of s12 of the PPSA. Because Maiden Civil as a PPS lessee had rights in the Caterpillars to which a security interest could attach, His Honour held that Maiden Civil had granted an enforceable security interest in the Caterpillars to Fast Financial. This attachment took place when Fast Financial gave value for those interests in accordance with s19(2) of the PPSA.

In reaching his conclusion, His Honour, with reference to equivalent legislation in Canada and New Zealand, confirmed with respect to the PPSA that the *nemo dat* rule had been displaced by the PPSA. In this respect, reference was made to the well known New Zealand cases of *Graham v Portacom New Zealand Ltd* and *Waller v New Zealand Bloodstock Ltd*.

This then meant that the priority contest was to be determined in accordance with section 55 of the PPSA, irrespective of who had title to the goods, as would have previously been the common law position. This contest was won by the Plaintiffs by reason of their security interest being perfected by means of registration.

Section 112 of the PPSA

QES sought to distinguish the PPSA from the equivalent legislation in Canada and New Zealand by reference to s112(1) of the PPSA, there being no equivalent provision in those jurisdictions. Section 112 essentially says that in exercising remedies provided by the PPSA under Chapter 4, a secured party may deal with collateral only to the same extent as the grantor would be entitled to deal

with the collateral. Put another way, QES contended that even if the interest of the financier was perfected they would be limited to enforcing it to the extent of Maiden Civil's rights under the relevant PPS Lease.

This argument did not find favour with His Honour who held that it was not the intention of the legislature to effectively reinstate the *nemo dat* rule by the inclusion of this provision, but rather to impose other limitations on a grantor's ability to deal with the collateral, the example given being the requirement in a license that it not be assigned without the consent of the licensor. His Honour also held that the Plaintiffs were not seeking to exercise powers under Chapter 4 of the PPSA, but rather powers under the General Security Deed, and section 112 does not limit powers of a secured creditor under their security agreements.

No protection under transitional provisions

QES also contended that its security interest was entitled to priority as a 'transitional security interest' under s308 of the PPSA, the effect of which would be that its interests were perfected by force of the PPSA immediately before the commencement of the PPSA and would remain so during the 'transactional period' (24 months after the commencement date) even though not registered.

However, in this case, the transitional provisions did not afford QES any protection. Whilst it was conceded by the Plaintiffs that the interest held by QES was a transitional security interest, it was nonetheless held that the exception provided for under s322(3) of the PPSA applied to exclude QES' interest from protection under section 322. The reason for this was that QES' interest was registrable on a transitional register (the relevant register being the Northern Territory Register of Interests in Motor Vehicles and Other Goods), but had not been registered on the relevant register prior to the PPSA registration commencement time.

Important matters arising from the Maiden Civil Case

- The *Maiden Civil Case* confirms that the *nemo dat* rule has been displaced in Australia where the PPSA applies.
- In certain circumstances, entities that have an interest in personal property that is less than ownership can grant security interests to third parties, which can ultimately take priority over the interest of the true owner if the owner has not perfected their interest in

the goods under the PPSA. An interest in goods as a PPS Lessee is one such example.

- Banks, financiers, and parties that are in the business of leasing personal property, or selling goods on a retention of title basis, must register their interests on the PPSR in accordance with the provisions of the PPSA if they are to avoid the risk of losing their priority to the goods.
- Parties who seek to rely upon the 24 month transitional provisions would do well to ensure that their interest was not registrable on a transitional register prior to the commencement of the PPSA. If it was, they lose the benefit of any protection.

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