

Comply with the PPSA or Risk Losing Your Property!

Introduction

The first significant Australian judgement relating to determining priorities between competing creditors under the *Personal Property Securities Act 2009* (Cth) (**PPSA**) sends a clear message that what matters is having what is known as a 'perfected' security interest not 'title'.

The New South Wales Supreme Court in *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 [2013] NSWSC 852* (the **Maiden Civil Case**) confirms that if an owner of goods leases them to someone else, then the owner:

"...cannot rely on its title to protect its interest in the goods, instead, the owner must register its interest on the PPS register. Failure to do so may result in the owner losing the goods to other creditors;..."

What does this mean? Simply put, all owners who lease or hire out goods to third parties should take steps to protect their interest in those goods under the PPSA or risk losing them. Mere title over these goods in itself will not necessarily protect an owner's security interest.

The Maiden Civil Case confirms the (unsurprising) reality of the PPSA and highlights the importance for lessors and owners to perfect their security interests or risk losing their ownership rights.

Maiden Civil Case – the facts in brief

Queensland Excavation Services Pty Ltd (**QES**) purchased certain caterpillar brand

Who does this affect?

- Principals
- Contractors

Article Highlights

- Emphasis on the importance for lessors and owners to perfect their security interests or risk losing their ownership rights.
- Under the new PPSA law, when there are 2 competing security interests in the same goods, ownership becomes irrelevant in determining who might be entitled to the goods.



wheel loaders and excavators (**Caterpillars**) and leased the Caterpillars to Maiden Civil (P&E) Pty Ltd (**Maiden**) on an informal basis (no agreement in writing).

QES did not register its interest on the relevant Northern Territory register that was applicable prior to the PPSA coming into effect. Had it done so, that registration would have been 'migrated' across to the Personal Property Securities Register (**PPS Register**) and QES would have had a perfected security interest.

In about March 2012, Maiden sought short term finance from Fast Solutions Pty Ltd (**Fast**). Maiden granted security to Fast over all its assets under a General Security Deed (**GSD**), and included the Caterpillars in the list of assets to be charged under the GSD. Fast registered its interest on the PPS Register.

Maiden subsequently went into administration and then liquidation.

Decision

The Court held that the arrangement between QES and Maiden was a 'PPS Lease' which gave QES a deemed security interest under the PPSA (s 12(3)). As QES did not register its security interest, it held an unperfected security interest in the Caterpillars.

Fast had registered its security interest and held a perfected security interest in the Caterpillars.

Under the new PPSA law, when there are 2 competing security interests in the same goods, ownership becomes irrelevant in determining who might be entitled to the goods. Instead priorities are determined based on the statutory rules – in this case, the relevant rule is that a perfected security interest 'beats' (has priority over) an unperfected security interest. On this basis, Fast had a perfected security interest and QES did not and so QES essentially 'lost' its ownership rights.

In addition, pursuant to section 267 of the PPSA, QES's unperfected security interest 'vested' in Maiden upon the company going into administration. The Court confirmed that the practical effect of this section is that QES's security interest is extinguished and Maiden held the Caterpillars subject only to Fast's perfected security interest.

Lessons learned and action to take

The Maiden Civil Case reinforces the fundamental changes to the laws relating to ownership of all personal property (basically, property other than land). The key messages are:

- a) all owners of goods who enter into an arrangement to let a third party operate or use or otherwise have access to their property (**Leases or Bailments**) should take steps to ensure that if they have a 'deemed' security interest in those goods (i.e. a PPS Lease) then they must protect that interest or risk losing their ownership rights. This area of law is complex and the rules are very precise – although the PPSA website

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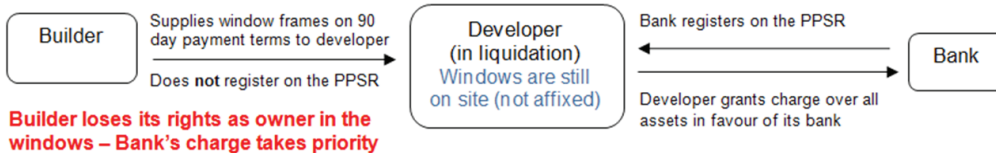
encourages people to register themselves, we recommend taking legal advice as we have seen a lot of registrations that are incorrect and would be likely to fail.

b) if an owner was to supply a company with goods under a Lease or Bailment recognised by the PPSA as being a 'PPS Lease' (an arrangement that is capable of existing for more than one year or 90 days for serial numbered goods) and that company still possessed those goods when it went into liquidation then:

- (i)** mere title will not of itself protect an owner's rights and trump other competing interests in all circumstances; and
- (ii)** whereas under the old laws an owner would go in and repossess goods that were not paid for, this is no longer a remedy available to them if they do not have a perfected security interest in the goods when the liquidation occurs.

The rules relating to what is 'serial numbered' goods are complex. The term itself has a particular meaning and we recommend you seek advice. For example, a large crane would not be serially numbered goods but a trailer with a VIN would be;

c) whilst not relevant to the facts in the Maiden Civil Case, the same rules would apply in a situation if an owner supplied goods under a retention of title arrangement (**ROT**); in a liquidation scenario, if the owner did not have a perfected security interest, the owner could lose its interest in those goods. As an example:



d) if you have an existing Lease or Bailment or ROT contract dated earlier than 30 January 2012, you have 'temporary perfection' status until the end of January next year. If the Maiden Civil case had been this time next year, registration would not have been enough to protect the owner's rights because the security agreement was not in writing. It is essential that you make sure all your security agreements are in writing and otherwise comply with the rules in section 20 of the PPSA (enforceability against third parties). If not, you will have an unperfected security interest (even if you register on the PPSR).

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