

Landmark Australian Court case sends warning to the Hire and Rental Industry and their financiers

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If your business is hiring out equipment to customers, you must register against each of your customers on the new Personal Property Securities Register or you could lose your ownership rights if your customer is insolvent or faces financial problems.

How can we be certain about this?

On 27 June 2013, the Supreme Court of NSW handed down a decision in favour of the Receivers and Managers of Maiden Civil (P & E) Pty Ltd (**"Maiden"**) that will have far reaching affects on businesses involved in the hire and rental industry and on financiers of plant and equipment. It will also impact manufacturers and suppliers of goods who sell or consign goods on a retention of title basis.

This is the test case that lawyers and industry have been waiting for. For the first time an Australian superior Court has given careful consideration to some of the key concepts that underpin the Personal Property Securities Act 2009 (Cth) (**"PPSA"**) that became operative on 30 January 2012. Not unexpectedly, the court followed the principles that have been handed down in similar cases some years ago in New Zealand and Canada.

The Maiden case involved a determination of the rights of the financier of equipment on the one hand against the rights of the owners of that equipment that had leased it to third parties on the other hand.

The court confirmed that the rights of the financier who had registered their interest in the property that had been used by the borrowing company as security for a loan prevailed over the rights claimed by the "true owners" of that property that had claimed a "security interest" in that property but had failed to register their interest on the PPS Register. The failure of the "true owners" to register their interests resulted in them losing their property.

THE FACTS

In May and August 2010 Queensland Excavation Services Pty Ltd (**"QES"**) purchased certain equipment (a Caterpillar Wheel Loader and 2 Caterpillar Excavators) (**"the caterpillars"**) using third party finance provided by Esanda & Westpac.

About the same time, QES leased the caterpillars to Maiden. This lease was not in writing. Maiden used the caterpillars in its business (civil construction work in the Northern Territory) and paid QES for the caterpillars an amount equal to the finance charges QES was paying plus 10%. QES did not register its security interest in the caterpillars on either the NT Register of Interests or the PPS Register.

In March 2012 Maiden borrowed \$250,000 from Fast Financial Solutions Pty Ltd) (**"Fast"**). It executed a loan agreement with Fast and a General Security Deed (**"GSD"**). (A GSD is the equivalent of what used to be a registered Mortgage Debenture or Fixed and Floating Charge prior to the PPS coming into effect). Under the GSD Maiden granted Fast a "security interest" over all of its assets including the caterpillars. (Details of the caterpillars were set out in a schedule to the GSD). The GSD was registered on the PPS Register.

In July 2012 Fast became aware of certain events of default under the GSD and appointed receivers and managers (**"the receivers"**) to all of Maiden's assets. (Maiden subsequently went into administration and then liquidation).

QES claimed to be the "true owners" of the caterpillars that it had leased to Maiden and later to a third party under a 3 month hire arrangement and the caterpillars remained in the possession of the third party lessee or one of the directors of QES. The receivers claimed possession of the caterpillars.

THE DECISION

Justice Brereton found in favor of the receivers. He found that:

1. QES' claim to a *"transitional security interest" in the caterpillars arising from its "PPS Lease" to Maiden* (that would have given it priority ahead of Fast) was rejected. The court held that to have a perfected security interest QES should have either:
 - (a) registered its lease on a relevant Northern Territory Register that was a mandatory register for this kind of transaction before the PPSA commenced (if QES had done this, its registration would have been *"migrated"* onto and would have appeared on the PPS Register); or
 - (b) registered a financing statement on the PPS Register claiming a transitional security interest.
2. Maiden was the *"true owner" of one of the caterpillars and QES was the "true owner" of 2 of the caterpillars.*
3. The leases of the caterpillars by QES were *"PPS Leases" within the meaning of the PPSA. Therefore, QES's interest in them as lessor was a "security interest" within the meaning of the PPSA.*
4. QES's claimed security interest with Maiden was *"vulnerable"* as it was not enforceable against third parties because the security agreements were not evidenced in writing as required by s. 20 (2) of the PPSA.
5. Maiden as a PPS Lessee in possession of the caterpillars had sufficient interest in the caterpillars to enable it to grant a *"security interest" to Fast under the GSD. That security interest in favor of Fast had "attached" to the caterpillars when Fast advanced funds to Maiden and had been "perfected" by registration on the PPS Register.*
- 6. Under the PPSA priority rules Fast's perfected and registered security interest in the caterpillars prevailed over QES's unperfected and unregistered interest. Importantly, the fact that QES "owned" the caterpillars was found to be irrelevant under the PPSA priority rules.**
7. QES' unperfected security interest *"vested"* in Maiden under s.267 of the PPSA upon Maiden going into administration and accordingly QES no longer had an interest in the caterpillars once the receivers were appointed. Maiden held them subject only to the perfected interest of Fast that prevailed over QES' unperfected interest.
8. As a result, the receivers were entitled to possession of the caterpillars under their contractual rights set out in the GSD and could sell them to satisfy the debt owed to Fast.

LESSONS FROM THE MAIDEN CASE

1. The decision demonstrates the dangers for businesses and financiers if they fail to take steps to obtain the benefit of the protection that is available to them under the PPSA.
2. In the Maiden case there was simply an informal arrangement between QES and Maiden regarding the lease of the caterpillars (the lease was not in writing) and QES's security interest was never registered. If a properly documented written security agreement been put in place between the parties, and if a financing statement relating to it had been registered, QES would not have lost its property.
3. The Maiden case sends a clear message to owners of plant and equipment that allow someone else to take possession of their property (eg by way of a lease, hire or bailment of their goods) to ensure:
 - a) That their *"security interests "* in their plant and equipment are well documented (eg in the form of hire terms that spell out the arrangements that are to apply under the PPSA) that are either agreed to in writing or accepted or adopted by the hirer in some way in accordance with the requirements of the PPSA and
 - b) That they register their *"security interests"* on the PPS Register.

Failure to attend to the above matters may result in the complete loss of the property of a lessor under a "PPS Lease" -even if they are the "true owners" of the property.

Simply being an owner of property will not protect you if you do not register your security interest on the PPS Register. You may lose out to a party who holds a security interest that ranks ahead of you under the PPSA rules (such as a financier with a registered GSD).

(The same principles also apply to suppliers of goods under retention of title (ROT) sale arrangements).

4. If you are a financier of plant and equipment and/or a manufacturer or a supplier who sell or consign goods on an ROT basis, you must ensure that:
- a) You have properly documented the finance or supply arrangements that you have made with your customer. Well drawn finance and supply agreements are essential. These documents should:
- Contain the terms of your security agreement;
 - Spell out the events of default and your rights of recovery in the event of the default of your borrower/customer;
 - Set out a clear description of the property that is provided as security; and
 - Include a condition requiring your borrower/customer to register their security interests if they part with possession of the property that is provided as security and, if they fail to do so, grant you a power of attorney to effect registration on their behalf.
- b) You register your security interest on the PPS Register as financier in the property that has been used as security for the finance that you have provided.
5. The decision shows that owners of property who think they are protected under a transitional security interest and have a 24 month “*temporary perfection*” may not have the protection they think they have if the interest was one that was registrable on a transitional register but was not registered before 30 January 2012.

If the security interest was not perfected when it should have been, it may be defeated by a perfected and registered security interest and the owner may lose their property.

CONCLUSION

If you lease, rent or finance plant and equipment or sell or consign goods under retention of title arrangements, you should urgently review your documents and your procedures to ensure that you are PPSA compliant and that you register your security interests on the PPS Register.

If you do not take these steps, you run the risk of losing your property to other businesses or financiers that have done so and have taken advantage of the protection that the PPSA now provides them.



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