HIRE PURCHASE AGREEMENTS, UNPERFECTED SECURITY INTERESTS AND THE PPSA VESTING RULES

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An area of uncertainty that existed prior to the introduction of the PPSA was whether the vesting of unperfected security interests in the grantor (who is usually the debtor) would be held to be an acquisition of property on unjust terms under the Commonwealth Constitution and therefore invalid. Jason Harris of UTS, and an academic member of ARITA, reports on a recent decision that the PPSA vesting provisions are not constitutionally invalid.

The provision that dealt with unregistered charges under the pre-PPSA law in Chapter 2K of the Corporations Act (s 266 - now repealed) rendered them void against a liquidator or an administrator. However, this provision was subject to the power of the court to grant an extension of time if an application was made under s 266(4) prior to the insolvency appointment. The PPSA regime has replaced the former s 266 with a new s 588FL in the Corporations Act which largely replicates the former provision (with some timing differences) but the PPSA itself contains new provisions that did not previously exist in Ch 2K of the Corporations: PPSA ss 267 and 267A. These are the vesting provisions of the PPSA which 'vest' the secured party's security interest in the relevant collateral in the grantor if the security interest is unperfected at the time of the insolvency appointment.

The vesting rules were considered briefly in the first major PPSA decision *Re Maiden Civil* [2013] NSWSC 852, where the court held that a lessor's *unperfected* security interest in large Caterpillar vehicles was 'extinguished' upon the appointment of voluntary administrators. The grantor company held the assets subject to the rights of the competing secured party with a *perfected* security interest.

This gives rise to the question whether the secured party is being forced by legislation to give up its property rights in the collateral and to rely merely on its contractual rights as an unsecured creditor in the insolvency. If a secured party is being compelled to give up its property rights without compensation by federal legislation then this may mean that the vesting rules of the PPSA are an "acquisition of property" other than on "just terms" and a breach of s 51(xxxi) of the Australian Constitution. This would mean that the vesting provisions would be invalid.

A recent WA decision has answered this question with a firm "no". *White v Spiers Earthworks Pty Ltd* [2014] WASC 139 (16 April 2014) considered a situation where Spiers entered into a hire purchase contract with another company BEM Equipment Pty Ltd as part of a purchase agreement with BEM buying the business previously operated by Spiers. The hire purchase agreement involved a number of vehicles and trailers used in construction that were worth over $1 million. The agreement was entered into in 2010, but Spiers did not register its interest in the vehicles and trailers under the former REVS scheme operating in Western Australian under the *Chattel Securities Act 1987* (WA) even though they were property that was registrable under that Act. This register was one of the "migrated registers" over to the PPS Register, but as Spiers had not registered its interest under REVS, no registration was transferred to the PPSR. Spiers also did not register a security interest on the PPSR after the PPSA commenced on 30 January 2012.

In 2011 BEM obtained secured finance from the NAB, and following the appointment of voluntary administrators (from Ernst & Young) by the company on 24 July 2013 the NAB appointed receivers on 31 July 2013. Spiers (the hiring company) then served a notice of termination of the hire purchase contract and repossessed some of the property.

NAB's receivers (from KPMG) sought court declarations that the collateral covered by the hire purchase contract had vested in the company as grantor pursuant to s 267 of the PPSA because Spiers had failed to perfect its security interest by the time of the appointment of the voluntary administrators. The receivers argued that the vesting rule meant that the property came within the security interest held by the NAB and that they had a superior right to the property than Spiers even though Spiers owned the assets. There was no discussion in the case of whether the NAB had registered its interest on the PPSR, but assuming its company charge was registered with ASIC it would have been migrated onto the PPSR and the NAB would have thereby been perfected.

Spiers argued that the vesting rule did not apply to it because such vesting was an unjust acquisition of its property rights in the collateral and constitutionally invalid. However the WA Supreme Court held (at [37]-[40]) that the vesting rule is not an acquisition of property but rather is 'an adjustment of the competing rights, claims

or obligations of persons in a particular relationship or area of activity' (applying the High Court's constitutional law decision in *Australian Tape Manufacturers Assoc Ltd v Cth* (1993) 176 CLR 480).

In this case Spiers was unable to rely upon the deemed temporary perfection rule in PPSA s 322 because of the operation of s 322(3) and PPS Regulation 9.2, which provide that deemed temporary perfection for transitional security interests does not apply where the transitional security interest was registrable at the time immediately before commencement (which Spiers' interest in the property was) but was not properly registered on the migrated register.

Thus, in similar fashion to the security interest of QES as lessor in the construction vehicles in *Re Maiden Civil*, in this case Spiers had its security interest vested in the grantor under s 267 because it failed to comply with the pre-PPSA law.

Although the transition period has now passed, it is likely that further disputes concerning the validity of pre-PPSA actions will continue to arise in the courts for some time. The *White v Spiers* decision provides useful guidance on both transitional issues and on the constitutional validity of the vesting rules.

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