

NCO Finance Australia v Australian Pacific Airports

Pieter Oomens and John Bennett | January 2014 | Commercial Disputes and Transactions

Summary

An abandoned Holden Astra Hatchback at a Melbourne Airport car park seems an unlikely 'spark' for a priorities dispute under the *Personal Property Securities Act 2009* (Cth) ('PPSA'). Nonetheless, the Federal Circuit Court of Australia recently dealt with such an event in *NCO Finance Australia Pty Ltd v Australian Pacific Airports (Melbourne) Pty Ltd* [2013] FCCA 2274 (24 December 2013). The court had some interesting things to say about competing transitional security interests.

Car loan

On 16 April 2009, St George Finance Limited ('St George') advanced a loan (the 'Loan') to Ms Susan Ann Bessalem ('Purchaser') for the purchase of the Holden (the 'Loan Agreement'). On 19 April 2010, St George entered into an arrangement with NCO Finance Australia Pty Ltd ('NCO') under which St George could assign bad debts to NCO.

The Purchaser defaulted under the Loan Agreement and a default notice pursuant to section 88 of the *National Credit Code* was forwarded to her. St George assigned the loan to NCO (the 'Assignment') who by written notice dated 26 July 2011 notified the Purchaser of the Assignment.

On 12 August 2011, NCO registered its security interest on the Queensland Register of Encumbered Vehicles (the 'Encumbered Vehicles Register').

Car park

On 27 September 2011, the Holden was driven into the car park of Australia Pacific Airports (Melbourne) Pty Ltd (the 'Operator'). The Holden remained in the car park and on 14 December 2011, the Operator deemed the Holden abandoned. During this time, car parking fees had accrued along with fees for towing the Holden. The Operator through its terms and conditions claimed a lien in the Holden until all parking fees and other costs incurred had been paid.

Transitional security interests

Under section 12(1) of the PPSA, a security interest means an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property).

In respect of the Loan Agreement, Judge O'Dwyer was satisfied that the Holden was 'personal property' as defined in section 10 of the PPSA and there was a transaction not excluded by section 8 of the PPSA. Because of the Assignment, NCO had a security interest.

Since the Encumbered Vehicles Register was a 'transitional register' under section 330 of the PPSA and the security interest was also defined as a 'migrated security interest' under sections 10 and 332 of the PPSA, NCO's security interest was a transitional security interest perfected by registration.

Judge O'Dwyer also found that the parking of the Holden in the Operator's car park and the acceptance of the terms by the entry into that car park constituted a consensual 'transaction' under the PPSA. Accordingly the Operator also had a security agreement and a consequent security interest in the Holden. His Honour held that the Operator's security interest was perfected when the Operator took possession of the Holden on 21 September 2011. He also accepted the Operator's contention that under section 322(1) of the PPSA, the Operator's transitional security interest could be registered without loss of priority until 1 February 2014.

Priorities

Generally under the PPSA a security interest registered first in time has priority over security interests registered subsequently. However because NCO and the Operator both had continuously perfected transitional security interests, their priority time under subsection 55(4) of the PPSA was identical being that moment immediately before the registration commencement time.

Because there were two continuously perfected transitional security interests in the Holden with the same priority time, the interests had the priority between them that they would have had under the law that applied to such priority immediately before the registration commencement time as if the PPSA had not been enacted: PPSA s 323.

To establish its priority, the Operator relied on section 10(4) of the *Chattel Securities Act 1987* (Vic), which provides: '*A repairer's lien on goods, whether or not registered under Part 3, ranks in priority to any registered security interest in respect of those goods irrespective of the date and time of the registration of that registered security interest*'. Judge O'Dwyer accepted the Operator had a 'repairer's lien' (that term being duly defined under *Chattel Securities Act*) and accordingly, the Operator had a superior security interest over NCO notwithstanding NCO's earlier registration of its security interest.

Notable features

Consensual security interests

Because a security interest under section 12 of the PPSA must be 'provided for by a transaction', security interests under the PPSA must be consensual.¹ Therefore it was a key finding that the Operator's security interest arose 'out of its consensual terms and conditions'. An issue not mentioned in the judgment however is whether there was evidence to show that the Purchaser was actually the person who drove the Holden into the car park. This is interesting as pursuant to section 20(2)(a)(ii) of the PPSA, it is the Purchaser who would need to have adopted or accepted the Operator's terms and conditions.

Liens

Section 8(1)(b) of the PPSA excludes statutory liens unless the person who owns the property in which the interest is granted agrees to the lien. Liens created by the general law are also excluded under section 8(1)(c) of the PPSA. As stated, the Operator relied on statute at least to assert its priority. The lien itself arose from the application of the terms and conditions of entry into the car park. In either case, it was critical that the judge should find consent by the owner of the Holden to the existence of the lien. Judge O'Dwyer held that the security agreement (ie the Operator's terms and conditions) was not disqualified under section 8 of the PPSA. Judge O'Dwyer's reasoning is consistent with the New Zealand authority *McKay v Toll Logistics (NZ) Ltd* [2010] 3 NZLR 700 (HC) that a contractual lien qualifies as a security interest under the PPSA.

Lessons

This case is a useful guide as to how to navigate through the PPSA, especially when dealing with competing transitional security interests.

The case also underscores the importance of establishing the proof that a grantor has consented to the grant of a security interest.

¹ Anthony Duggan & David Brown, *Australian Personal Property Securities Law* (LexisNexis Butterworths Australia, 2012), [3.42]

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