

All asset security interests revisited

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Key Issues

- Changing attachment rules and resulting priority consequences
- Is PMSI “super priority” available under an ALLPAP?
- New concepts - circulating and non-circulating assets

Attachment and priority – 3 Stages of enquiry:

Stage 1

Does the grantor have any rights in the collateral?

Stage 2

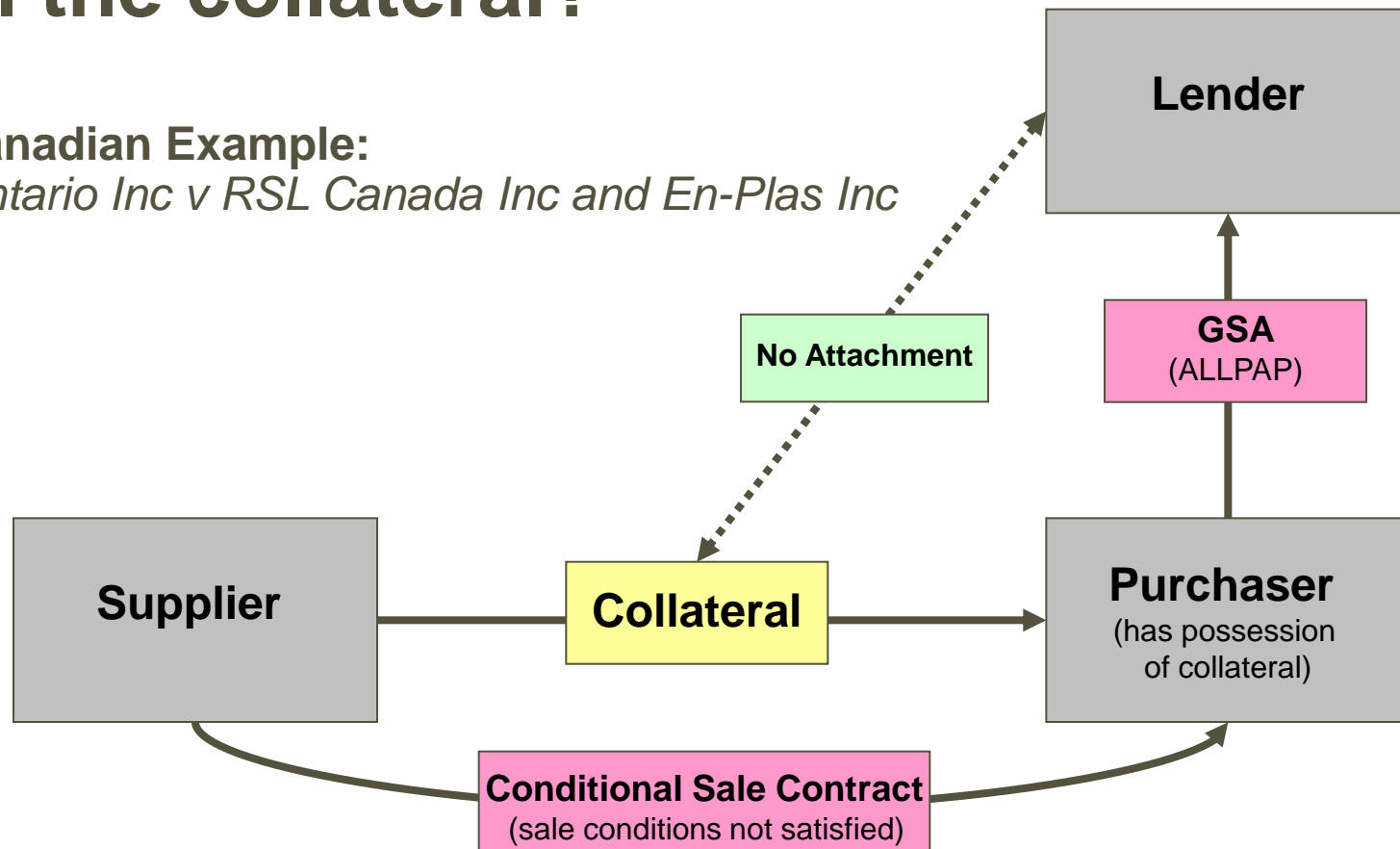
What is the nature of the grantor's rights?

Stage 3

What are the competing interests for priority purposes? Are they both PPSA security interests?

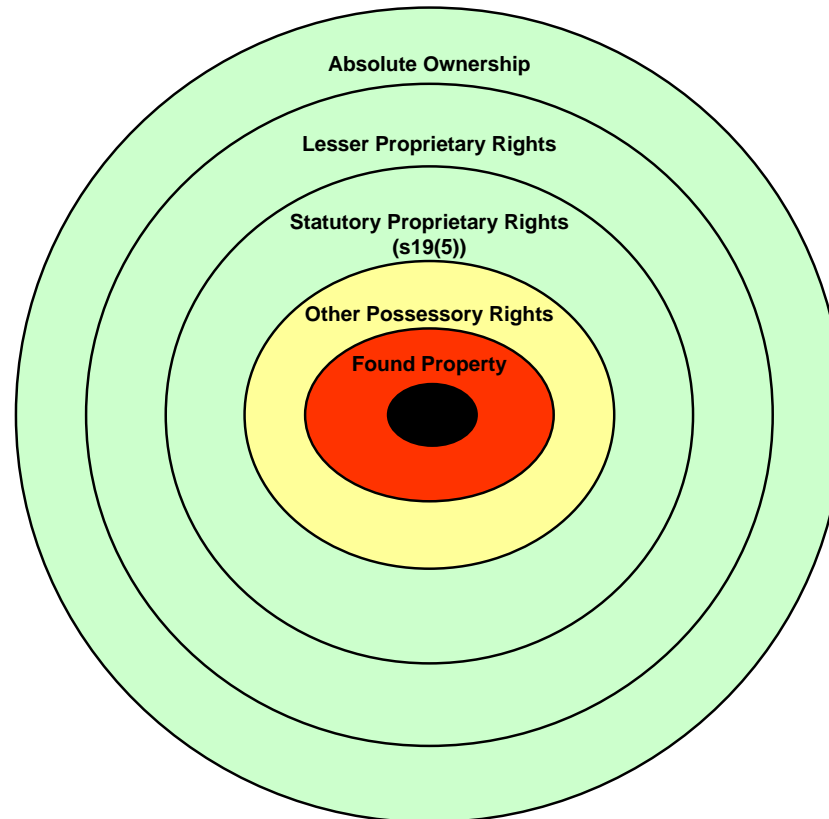
Stage 1: Does the grantor have any right in the collateral?

Canadian Example:
Ontario Inc v RSL Canada Inc and En-Plas Inc



- *Nemo dat quod non habet* can still apply

Stage 2: Assessing nature of grantor rights

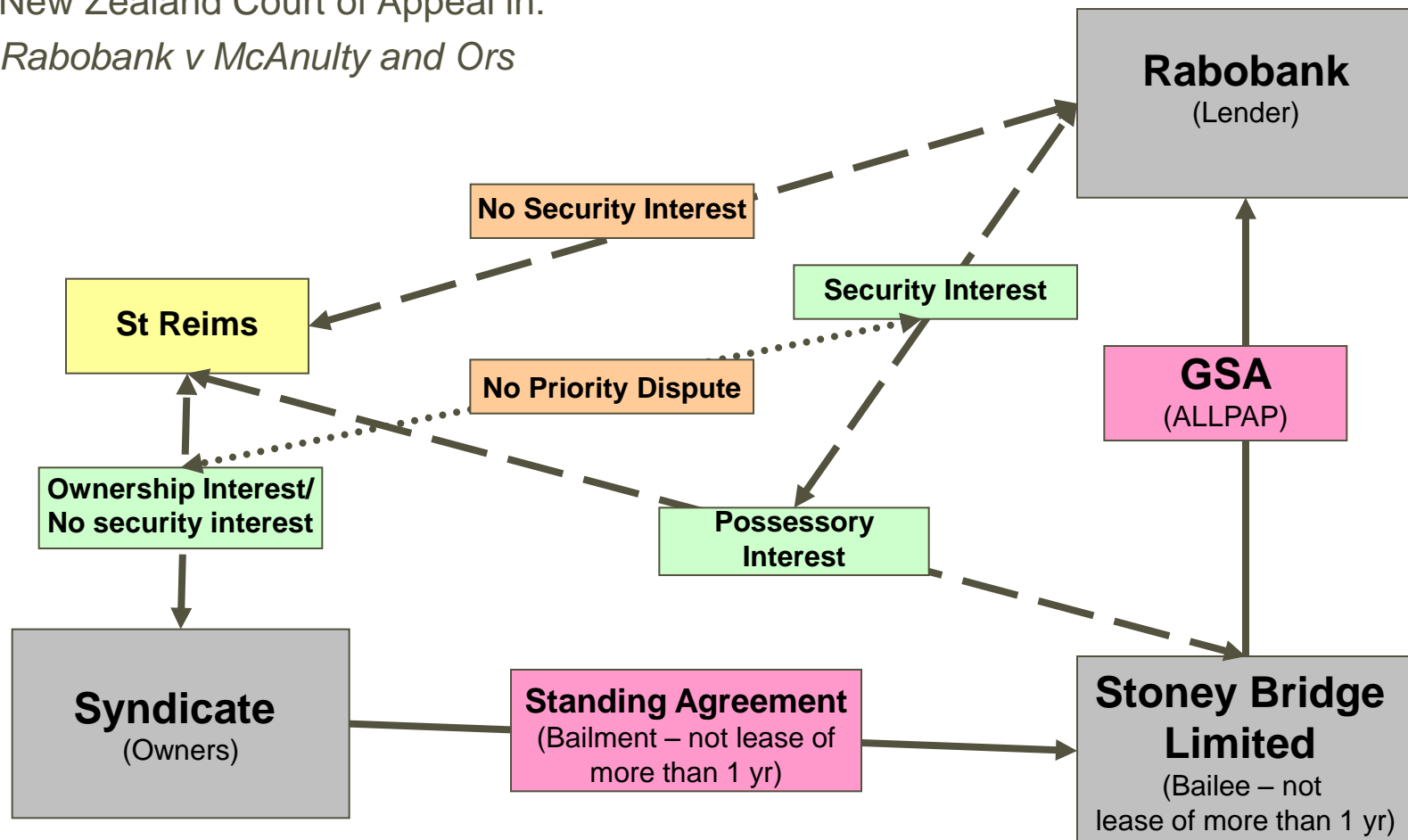


- What rights are sufficient to support attachment to the whole collateral?

Stage 3: Priority Disputes

Is there a competition between two security interests?

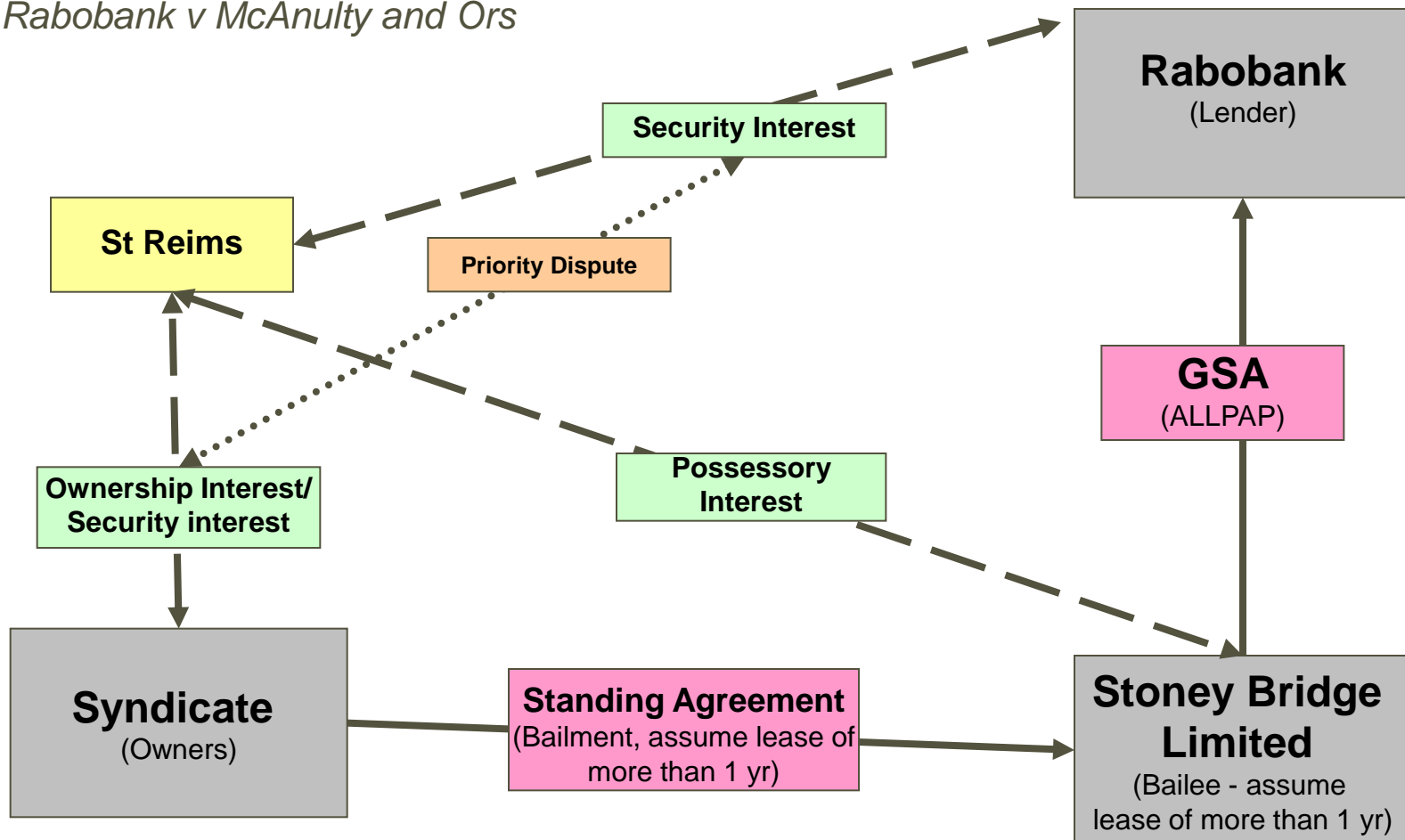
New Zealand Court of Appeal in:
Rabobank v McAnulty and Ors



Stage 3: Priority Dispute

What if there was a lease of more than 1 year?

Rabobank v McAnulty and Ors



Is PMSI priority available under an ALLPAP?

Requirements	Issues to consider
1. Giving value to enable the grantor to acquire rights in the collateral	<ul style="list-style-type: none"> ▪ Undertaking to apply loan proceeds to acquire collateral
2. Value is actually applied to acquire collateral	<ul style="list-style-type: none"> ▪ Evidence that loan proceeds have in fact been applied ▪ What if the customer doesn't? <ul style="list-style-type: none"> ▪ Loss of PMSI status and defective registration
3. Financing statement lodged claiming PMSI over collateral within time limits	<ul style="list-style-type: none"> ▪ Cannot claim PMSI in ALLPAP registration ▪ Separate financing statement claiming PMSI ▪ Time limits

- Previously the PPS Regulations prohibited claiming PMSI in respect of an ALLPAP security interest
- Priority of PMSIs already recognised in Australian law

Circulating and non-circulating assets

- Policy decision to maintain status quo
- New definition of circulating security interest:
 - “a security interest that is:
 - (a) a PPSA security interest, if:
 - (i) the security interest has attached to a circulating asset within the meaning of the Personal Property Securities Act 2009; and
 - (ii) the grantor (with the meaning of that Act) has title to the asset; or
 - (b) a floating charge”
- Relevance of distinction:
 - “Charges” in Commonwealth and State legislation
 - Post PPS security agreements

Circulating Assets

- Statutory codification of existing case law on floating charges
- Applies to all security interests not just all asset security interests

Presumed circulating assets

1. Book debts which do not arise from sale of property
2. Book debts that are the proceeds of sale of inventory
3. ADI accounts which are not term deposits
4. Currency
5. Inventory (given ordinary meaning)
6. Negotiable Instruments

Catch-all

Express or implied authority to dispose in the ordinary course of business

Non-circulating Assets

1. Security interests in goods perfected by possession
2. Deemed security interests arising from a transfer of account or chattel paper
3. Control of presumed circulating assets and registration claiming control
 - Control test does not apply to other non presumed circulating assets
4. Property to which the grantor does not have title
 - Conditional sale agreements
 - Commercial consignments
 - PPS leases

Corporations Act – floating charge

- Priority of employee entitlements and other preferred claims in receivership (s 433)
- Presumption of insolvency by reason of appointment of a receiver (s 459C(2)(c))
- Administrator's right to deal with property (s 442)
- Priority of administrator's rights of indemnity and lien (s 443E & 443F)
- Priority of employee entitlements and other preferred claims in winding up (s 561)
- Voidable security interests created within 6 months of insolvency (s 588FJ)

Corporations Act – Circulating Security Interest

- Is the status quo maintained?
 - Definition of “**floating charge**” negates crystallisation affecting preferential creditors
 - Definition of “**circulating security interest**” does not negate conversion to non-circulating asset
 - Is conversion of a circulating asset to a non-circulating asset possible?
 - Can this conversion by control be registered?

Time for attachment to circulating assets

- There are two possible times:
 1. Time when security interest first attaches to circulating assets
 2. Time when receiver or administrator appointed or when winding up commences
- First interpretation accords with legislative intent to maintain status quo
- Second interpretation is a black letter interpretation and may result in preferential creditors being defeated
 - High Court decision in *Stein v Saywell*