

Vested interests?

The PPSA and multi-tiered security interests

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5 August 2012

Introduction

- Scope of section 267 of the PPSA
 - a security interest granted by a company or body corporate that is unperfected on the grantor's relevant insolvency event
vests in the grantor
- Issue in a nutshell
 - Secured party perfects security interest in goods
 - Grantor sells/leases the goods
 - Buyer/lessee becomes insolvent
- Complications
 - Sale/lease may also be a security interest
 - Sale/lease may occur without secured party's consent
 - Third party security interest may attach to goods

Scenarios

Scenario 1

- Lease by the grantor in the ordinary course of grantor's business

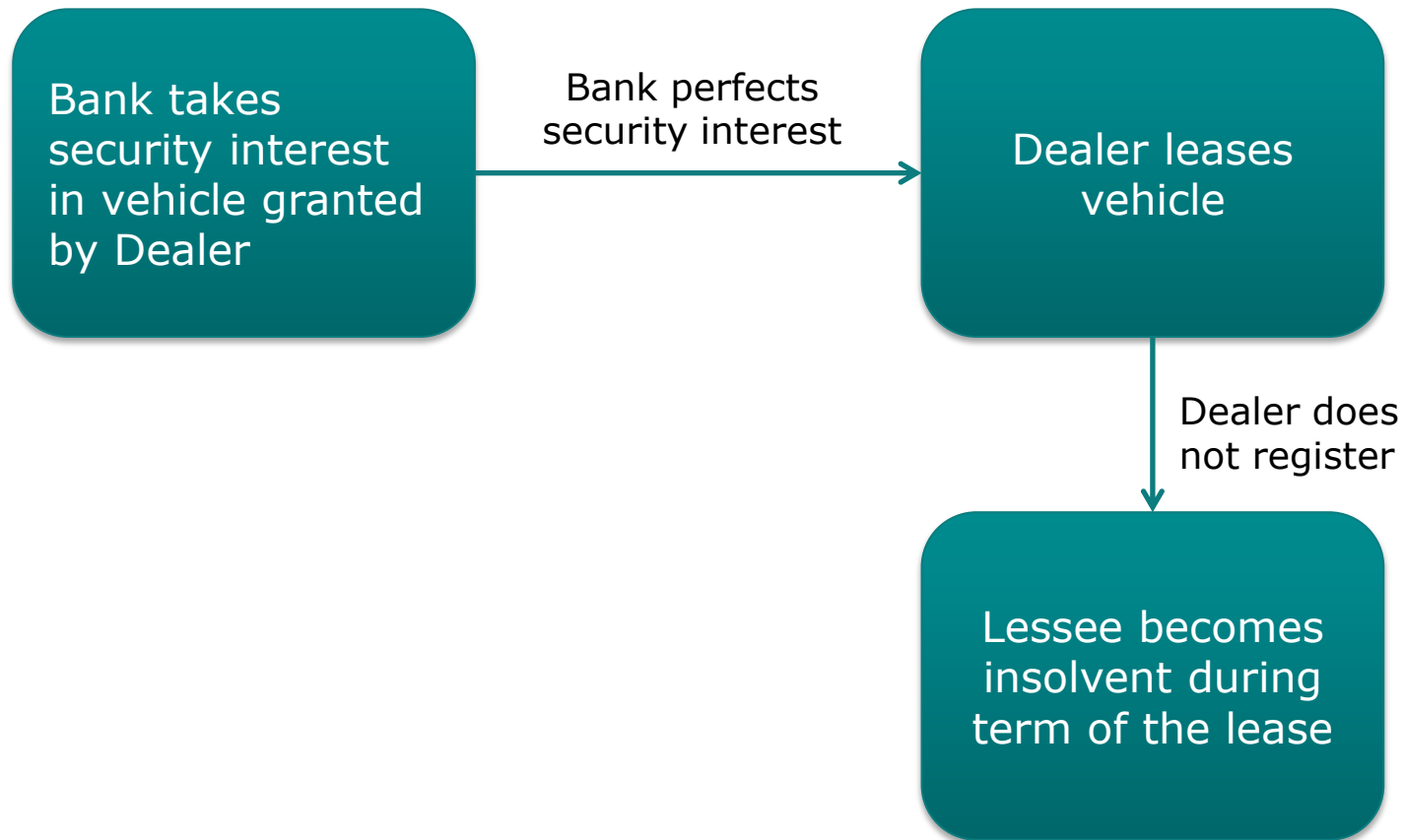
Scenario 2

- Unauthorised lease by the grantor

Scenario 3

- Unauthorised sale by the grantor with competing buyer-granted security interest

Scenario 1



Additional facts

- Same facts as *David Morris Fine Cars Ltd v North Sky Trading* (1996 Alberta CA)
 - Term of lease is 46 months
- Dealer's lease deemed security interest = PPS lease
 - More than one year
 - Regularly engaged in the business of leasing goods
- Dealer fails to register a financing statement
- Lessee becomes insolvent during the term of the lease
- Alberta Court of Appeal:
 - Dealer's security interest **ineffective**
 - Bank's security interest **ineffective**

Reasoning

Dealer fails to perfect

- section 267
- Dealer's security interest vests in Lessee

Bank perfects against Dealer

- section 46
- Lessee takes free of Bank's interest
- ordinary course of the Dealer's business

Section 46
"complete answer"

- Bank's security interest not attached to Vehicle upon Lessee's insolvency
- Neither Bank nor Dealer can enforce

Not so simple... perhaps?

- *Perimeter Transportation Ltd (Re)* 2010 BC Court of Appeal
- Facts the same as *North Sky*:
 - GE Equipment Finance had perfected a security interest in Dealer's buses
 - Buses leased by Dealer for terms of 8 years
 - Dealer failed to perfect against Lessee
 - Lessee becomes insolvent
- BC Court of Appeal
 - Dealer's unperfected security interest **ineffective**
 - GE's security interest **effective** despite Dealer's unperfected security interest

Reversionary interest

- Court in *Perimeter*:
 - distinction between sales and leases under ordinary course of business rule
 - security interest not “cut off” in the case of a lease but only “abridged to the extent of the lessee’s interest”
- Cuming, Walsh and Wood:
 - *...in the context of a lease, this only means that the security interest cannot be asserted against the lessee. The security interest is not cut off; it remains effective with respect to the reversionary interest of the debtor-lessor.*

Ordinary course of business rule

Serves merely to protect lessee's limited possessory rights from security interests granted by the Dealer

Dealer's failure to perfect against Lessee, therefore, has no bearing on the operation of the rule

GE did all it was required to do by perfecting against the Dealer's interest

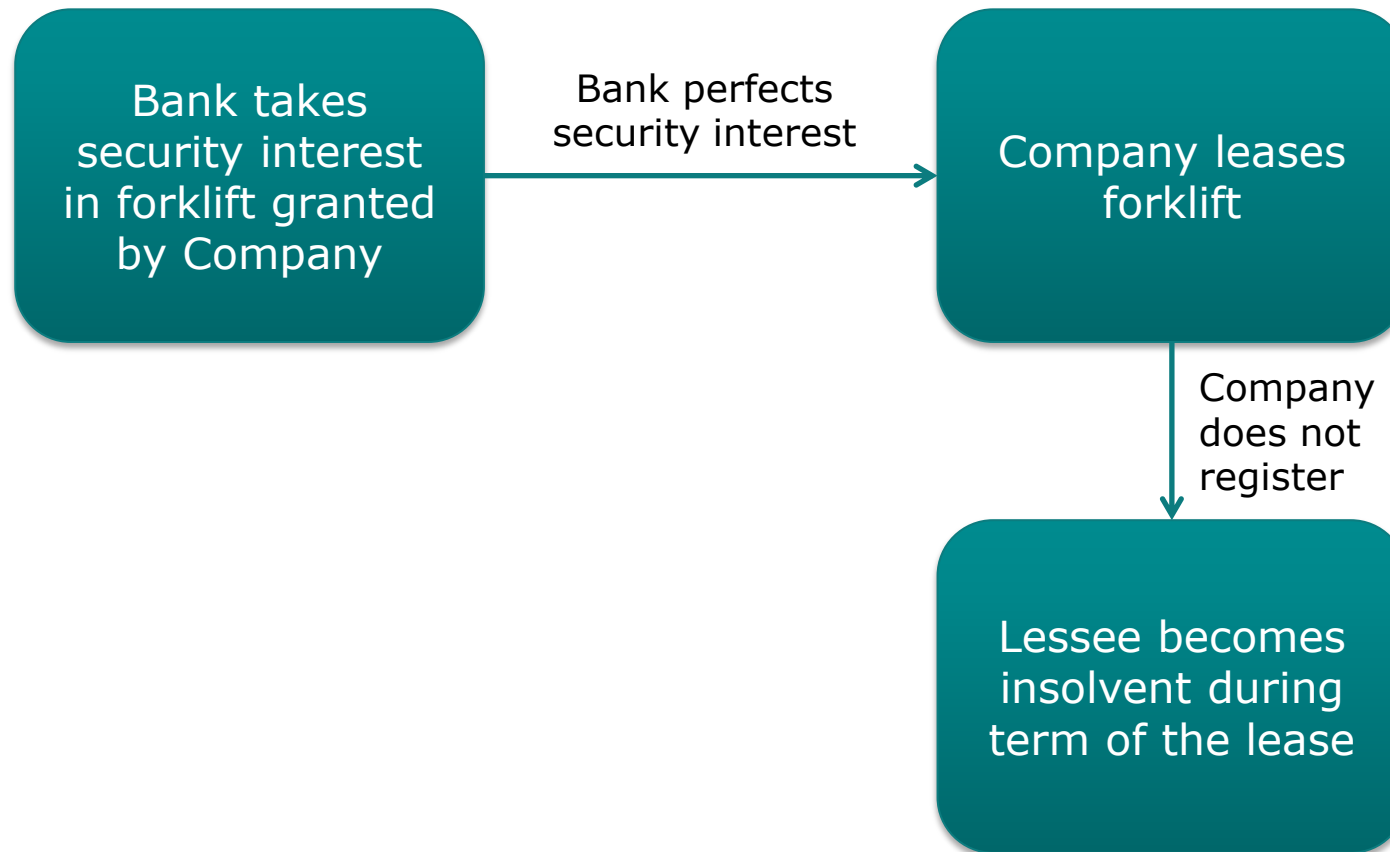
Insolvency rule

- BC Court of Appeal
 - “insolvency rule” has no application where the contest is between an insolvent lessee of goods and the holder of a perfected security interest
- Australia’s insolvency rule
 - Section 267 appears to apply only to unperfected security interests granted by the insolvent company or body corporate

Other issues

- What about finance leases and conditional sales?
- Double perfection recommended
 - But, does PPSA actually require double perfection?
 - apparently only if section 34 applies
 - but section 34 doesn't apply to ordinary course of business rule
- Policy
 - Notice to third parties
 - Priority rule v insolvency situation without competing creditors
- Serial numbered goods

Scenario 2



Additional facts

- Bank's security agreement **prohibits** Company from selling, leasing or otherwise dealing with the forklift
- Bank did not otherwise authorise the lease
- Company's lease is two year term
- Company did not register a financing statement
 - Regularly engaged in the business of leasing goods?
- Lessee becomes insolvent during the term of the lease

Application of the PPSA

Bank's security interest

- section 43
- section 32
- Bank's perfected security interest continues in forklift

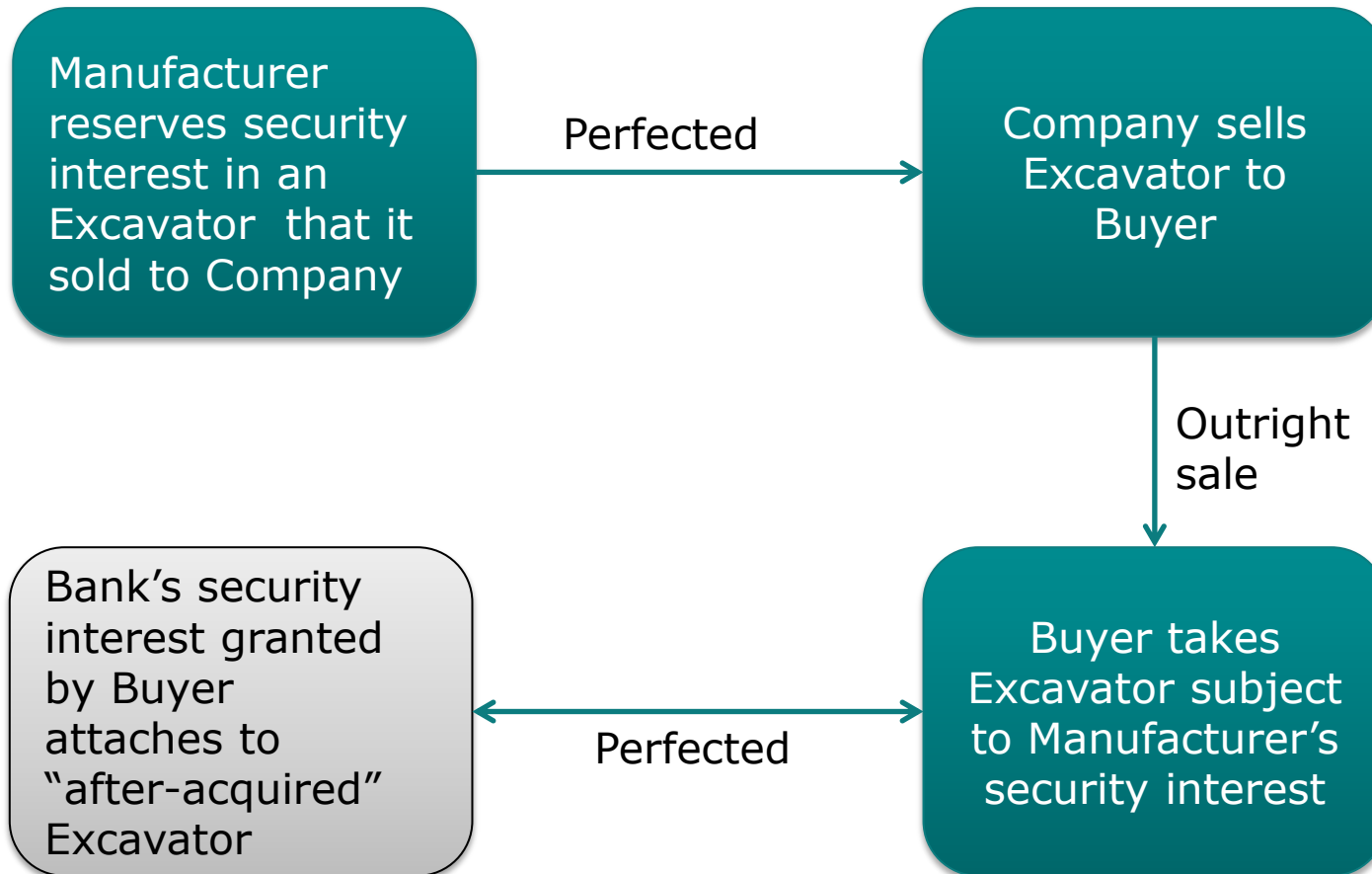
Company's interest

- PPSA applies if company regularly engaged in business of leasing goods
- But won't affect Bank's security interest

Section 267

- Bank's perfected security interest:
 - continues to be attached to forklift
 - doesn't vest in Lessee

Scenario 3



Additional Facts

- Manufacturer registered a financing statement against the Company on 31 March 2012
- Bank registered a financing statement against the Buyer on 15 February 2012
- Buyer becomes insolvent and administrator is appointed on 15 July 2012
- Manufacturer did not consent to, or know about, the sale of the Excavator to the Buyer

Manufacturer's security interest

- Section 79
 - transfer to Buyer effective despite prohibition in security agreement
- Sections 43 and 32
 - Buyer takes Excavator subject to Manufacturer's security interest
- Section 34
 - Manufacturer's security interest becomes temporarily perfected
 - (Section 52 – does not apply)
 - still temporarily perfected upon Buyer's insolvency
- Section 267
 - Manufacturer's perfected security interest does not vest

Bank's security interest

- Section 18
 - attaches to Excavator as after-acquired property of the Buyer
- Section 267
 - Bank's perfected security interest does not vest in Buyer
- Both Manufacturer and Bank have perfected security interests in the Excavator
- Priority dispute arises

Priority

- **Section 55**
 - “First to register” rule
 - Bank first to register
 - More specific rule required to balance interests of the parties
- **Sections 66-68**
 - Transferor-granted v transferee-granted
 - Manufacturer has priority if perfected before transfer and continuously perfected since transfer
 - Section 34 applies to determine continuous perfection
 - Turns on actual or constructive knowledge of transfer

Scope of sections 34, 66-68

- Do these sections apply if Company leased the Excavator?
 - Section 34 applies “if collateral is transferred”
 - Sections 66 to 68 apply if a “grantor transfers collateral”
- If not, should default priority rule apply?
 - “Double Debtor problem”
 - Default priority rule applies only if single grantor
 - Without specific rule, apply *nemo dat*

Questions?

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