

Personal Property Securities Act 2009 - Issues for Property Owners Negotiating Construction Contracts

A recent New Zealand High Court case, *McCloy v Maruka Institute of Technology* [2013] NZHC 936 has provided some guidance in relation to issues not yet judicially decided in Australia. The findings are not surprising. However, they are important, as they suggest which way the Australian courts will go and concern issues relevant to owners corporations engaging contractors to carry out remedial and other works.

The case concerned a common factual situation, involving:

- A property owner engaging a contractor to carry out remedial works on an apartment complex.
- The contract providing for what are commonly known as "take out" or "step in" rights, i.e. the owner's right to take over and complete the work in the event of the contractor's default, using the contractor's equipment and materials for that purpose.
- The contractor going into external administration, in this case receivership.
- A dispute arising between the owner as to its take-out rights and the receiver appointed by the contractor's bank as to registered security interests held by the contractor's bank over the contractor's assets.

The Court found that:

- The owner's take-out rights were a security interest under the legislation, which could be defeated by a higher ranking competing interest.
- The bank's interest prevailed, because the owner's interest had not been perfected by registration or possession by the time the bank's interests had been registered.
- Seizure or repossession did not amount to possession for the purpose of perfecting a security interest, strongly suggesting that one should register a security interest in order to perfect it.

The practical implications of this for an owner's corporation and its advisers are as follows:

- An owners corporation proposing to enter into a contract with a contractor for remedial or other works, which incorporates "take out" rights, should consider this issue. This will usually be the case, as the Standards Australia AS4000, AS4902, AS4905 and AS4906 general conditions of contract all contain such provisions, as do many of the other standard industry contracts. It is also a very important practical consideration; as such rights can greatly

reduce the cost of having works completed by another contractor, if the initial contractor goes into external administration.

- An Owners Corporation should in these circumstances consider registering its interest under the contract in the Personal Property Securities Register ("PPRS"). This is a simple matter involving completion of a "financing statement" online and the fees are negligible.
- Before contracting with the contractor, the owner's corporation should first carry out a search of the PPSR in relation to the contractor in order to determine whether there are any prior registered interests pertaining to the contractor's assets, which would typically have been registered by the contractor's bank. If so, those interests would prevail over the owners corporations and the owners corporation may wish to explore a tripartite arrangement providing for the owner's interest to prevail over the bank's. That may or may not be acceptable to the contractor and/or its bank, but it would at least let the owner's corporation know whether its take-out rights under the contract are meaningful, before committing to the contract.

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