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## Document (1)

1. [OPS SCREENING & CRUSHING EQUIPMENT PTY LTD v GOLD VALLEY IRON PTY LTD \(IN LIQ\) BC202011274](#)

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**OPS SCREENING & CRUSHING EQUIPMENT PTY LTD v GOLD VALLEY  
IRON PTY LTD (IN LIQ)  
BC202011274**

Unreported Judgments WA - 62 Paragraphs

Supreme Court of Western Australia — in Civil

Tottle J

CIV 1495 of 2020

10 September, 17 November 2020

OPS Screening v Crushing Equipment Pty Ltd v Gold Valley Iron Pty Ltd (in liq) [2020] WASC 412

## Headnotes

**PERSONAL PROPERTY** — **Personal Property Securities Act 2009 (Cth)** — **Meaning of security interest** — **Whether hire agreement created security interest under the PPSA** — **Turns on own facts.**

(CTH) Personal Property Securities Act 2009 ss 12(1), 12(3), 13, 20(1), 267

*Black Box Control Pty Ltd v Terravision Pty Ltd* [2016] WASC 219; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544; *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104; *Rabobank New Zealand Ltd v McAnulty* [2011] NZCA 212; *Re Arcabi Pty Ltd (recs & mngrs apptd) (in liq)* [2014] WASC 310; *White v Spiers Earthworks Pty Ltd* [2014] WASC 139; *Woodroffe v Box* [1954] HCA 22; (1954) 92 CLR 245, referred to

**Tottle J.**

### Introduction

[1] This action involves a contest about the ownership of mining equipment hired by the first defendant from the plaintiff. During the hire period the first defendant was placed in administration and later into liquidation. The first defendant claims that immediately before the administrator was appointed the plaintiff's interest in the mining equipment vested in it by reason of the operation of s 267 of the ***Personal Property Securities Act 2009*** (Cth)

....

(the PPSA).

[2] The outcome of the contest depends on whether the hire agreements involved the grant by the first defendant to the plaintiff of security interests in the equipment. Given that when the hire agreements were made the plaintiff was the owner of the equipment framing the issue in these terms may seem counter intuitive. So framed, however, the issue reflects the potential operation of the statutory provisions which contemplate that a lease of goods may provide for the *lessor* to be granted a security interest.

[3] Whether a lease creates a security interest will often depend on whether the lease is a finance lease under which the lessee ultimately acquires ownership of the goods (in which case a security interest will invariably be created) or an operating lease under which the lessee has a limited right to possession and use of the goods (in which case a security interest may be created).

[4] These reasons determine a preliminary issue formulated as follows: did each hire agreement create a security interest in the equipment the subject of the agreement pursuant to s 12(1) of the PPSA or alternatively s 12(3) of the PPSA, which the plaintiff was required to perfect by registration pursuant to s 20(1) of the PPSA?

[5] Save in the respects to which I refer later in these reasons there was no dispute about the facts.

[6] As I will explain I have concluded that the hire agreements did not create security interests in the equipment to which they related.

### **PPSA — s 267**

[7] If it applied, the operation of s 267 of the PPSA was not controversial. Relevantly for the purposes of this case, s 267(2) provides that the security interest held by the secured party vests in the grantor immediately before the appointment of an administrator to the grantor. In this case the plaintiff is the putative secured party and the first defendant the putative grantor.

[8] Section 267 applies if two conditions are met. The first is that one of the events specified in s 267(1) occurs. One such event is the appointment of an administrator. The second condition is that the relevant security interest is unperfected at the time the specified event occurs. In this case it is unnecessary to explore the distinction between perfected and unperfected security interests because it is accepted by the plaintiff that if it held a security interest in each item of equipment, each such security interest was unperfected.

[9] There is no dispute that an administrator was appointed to the first defendant on 20 February 2020 pursuant to s 436C of the Corporations Act 2001 (Cth) . The critical question is whether the plaintiff held a security interest. In large measure, the answer to that question turns on the provisions of the hire agreements to which I now turn.

### **The Hire Agreements**

[10] There were five written agreements between the parties under which the first defendant agreed to hire specified items of equipment. The material terms of the agreements were identical.

....

[11] Each agreement was entitled 'Monthly Plant and Equipment Dry Hire Agreement' and comprised a front page on which basic information was recorded in tabular form, a second page containing 'Hire Particulars', a third page recording 'Additional Hire Charges', two pages of 'Terms and Conditions of Hire' and finally two pages of 'Special Terms & Conditions of Hire'.

[12] The front page of each agreement contained five tables of information. One contained details of the quote provided by the plaintiff, one contained the 'Hirer Details' in which various details of the first defendant were set out. Another table contained 'Equipment Details' recording details of the equipment the subject of the agreement and the 'Plant Insurance Value'. Another table specified the 'Hire Rate'. Using the agreement in respect of a C-1540S Cone Crusher as an example, the form of the table relating to the hire rate was as follows:<sup>1</sup>

**Hire Rate:**

Minimum Ten Continuous Months Hire  
Period:

Monthly Hire Rate:	AU\$46,000.00	+ GST per month
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Monthly hire rate based on a maximum  
200 SMU hours per month. Hours in  
excess of 250 SMU hours per month will  
be charged at the below pro rata hourly  
hire rate.

Pro Rata Hourly Rate:	AU\$230.00	+ GST per hour
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[13] The final table on the first page of the agreement was as follows:

**Outright Purchase Price Option:**

AU\$693,500.00 + GST

Ex Works — Bibra Lake, WA

....

**[14]** In each agreement the price specified in the 'Outright Purchase Price Option' table was the same as the figure specified as the 'Plant Insurance Value'.

**[15]** The 'Hire Particulars' included provisions referred to as 'Special Terms', 'Hire Period', 'Delivery Date', 'Commencement Date' and 'Anticipated Completion Date' all set out in tabular form along with other details that are not presently relevant. The relevant provisions are reproduced below.

#### **Hire Particulars:**

##### **Special Terms:**

1. Machine rental is subject to received and completed Hire Agreement, OPS Trading Terms Agreement; Special Terms & Conditions of Hire Agreement, as well as Customer purchase order and insurance CoC from a reputable insurer.

2. Hirer is granted to option to purchase the equipment, subject to receipt of an executed Special Terms & Conditions of Hire Agreement.

3. Two months base rental to be paid in advance, in order to secure units and commence dispatch preparations. Two months in advance to be maintained at all times during the hire. Hire invoices will be sent out minimum five business days prior to end of month for the base monthly hire rate. These invoices must be received in OPS' nominated bank account prior to COB AWST on the last business day of the calendar month.

Should funds not be received by this time, the equipment will be immediately disabled and demobilisation arrangements made.

OPS will retain the two months in advance as a security deposit up until the point of off hire, return of the equipment and completion of post hire repair estimation. The advance payment will be applied to the post hire repair invoice, with any difference being returned to the customer or to be paid by the customer within two business days of invoice issue.

Should the customer purchase the units at any stage during the hire, the advance payment will be applied as a deposit against the purchase buy out amount.

##### **Hire Period:**

Minimum ten (10) continuous months hire period with option to purchase at anytime. Should the hire fall short of ten (10) continuous months for any reason other than buyout of equipment, OPS will be entitled to charge the difference between the ten (10) months hire rates and its standard monthly contract hire rates.

##### **Delivery Date:**

Anticipated 20/12/2019 — To be confirmed by OPS

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Commencement Date:	As per delivery date
Anticipated Completion Date:	To be confirmed by customer — minimum period applies, as above

**[16]** Nothing turns on the provisions included under the heading 'Additional Hire Charges'.

**[17]** The 'Terms & Conditions of Hire' dealt with matters such as the payment of hire charges, the obligation on the Hirer to keep the equipment safe, the obligation on the Hirer to insure, the Hirer's responsibility for damage, the Hirer's responsibility for maintenance, and for the maintenance of service records and other practical matters relating to the hire of mining equipment. The terms included a term to the effect that the owner had the right to terminate the hire and recover the hired plant at any time 'in the event of non-payment of monies owing or plant misuse/abuse'. Further, there was a term to the effect that if the 'fixed hire period [was] concluded early, hire charges remain payable until agreed final hire date or until plant is rehired by the owner' but there was no other provision that dealt expressly with termination of the agreement.

**[18]** Clauses 12 and 13 of the 'Terms & Conditions of Hire' dealt with adjustments to the hire charges to be made in favour of the Hirer in certain circumstances. The clauses provided as follows:

12. Stand down time will only be granted by the owner, upon written or oral request by the Hirer, prior to the commencement of the proposed stand down period. Adjustment for hire charges will be considered on the merit of the request and will be at the owner's discretion. Stand down rates, if granted, will be charged at 50% of the current standard hire rate.

13. No hire charge shall be applied to the Hirer's account in instances of inclement weather or major machine maintenance/repairs. For hire charges to be waived, the Hirer must notify the Owner on each and every day the machine is to be stood down in these instances.

**[19]** In the 'Special Terms & Conditions of Hire' the plaintiff was designated 'the Owner' and the first defendant 'the Client'. The Special Conditions were preceded by a preamble that read as follows:

This document is in place to act as a binding agreement between the Owner and the Client, detailing the special conditions associated to Monthly Plant and Equipment Hire Agreement Number CENT0413A-2, as agreed.

**[20]** The Special Terms & Conditions of Hire were as follows:

John Bennett

....

## Special Conditions:

1. The Client will commence the hire of a 2019 Terex Finlay C-1540S Cone Crusher, with details confirmed as per Monthly Plant & Equipment Hire Agreement Number CENT0413A-2, at the agreed rates listed within the Hire Agreement. Any additional costs and charges associated with this hire will be as per the binding Monthly Plant & Equipment Hire Agreement and OPS Terms and Conditions of Hire Agreement.
2. The hire of this machine by the Client will be governed by the binding Monthly Plant & Equipment Hire Agreement and OPS Terms and Conditions of Hire Agreement, except where these Special Conditions of Hire are applied and take precedent.
3. The Client is agreed to have first right of refusal to purchase the 2019 Terex Finlay C-1540S Cone Crusher, machine serial number TRX1540SHOMK50180, for the purchase price of AU\$693,500.00 + GST (base unit pricing, exclusive of any required modifications, mobilisation, commissioning etc). Any resultant sale enactment will be governed as per OPS' standard Terms & Conditions of Sale;

- If the Client enacts the Sales Agreement by settling machine purchase funds within 30 days from commencement of hire, OPS agree to apply a rebate of 100% of the monthly hire rate for each month of hire which has been fully paid to and received by OPS, as a deposit against the final settlement amount for the machine purchase. No GST amount can be refunded or applied as a deposit.

- If the Client enacts the Sales Agreement by settling machine purchase funds within 31–60 days from commencement of hire, PS agree to apply a rebate of 85% of the monthly hire rate for each month of hire which has been fully paid to and received by OPS as a deposit against the final settlement amount for the machine purchase. No GST amount can be refunded or applied as a deposit.

- If the Client enacts the Sales Agreement by settling machine purchase funds within 61–90 days from commencement of hire, OPS agree to apply a rebate of 70% of the monthly hire rate for each month of hire which has been fully paid to and received by OPS as a deposit against the final settlement amount for the machine purchase. No GST amount can be refunded or applied as a deposit.

- If the Client enacts the Sales Agreement by settling machine purchase funds within 91–120 days from commencement of hire, OPS agree to apply a rebate of 65% of the monthly hire rate for each month of hire which has been fully paid to and received by OPS as a deposit against the final settlement amount for the machine purchase. No GST amount can be refunded or applied as a deposit.

- If the Client enacts the Sales Agreement by settling machine purchase funds within 121–300 days from commencement of hire, OPS agree to apply a rebate of 50% of the monthly hire rate for each month of hire which has been fully paid to and received by OPS as a deposit against the final settlement amount for the machine purchase. No GST amount can be refunded or applied as a deposit.

4. No transfer in ownership or title of the machine will take place until full settlement of machine purchase funds has been received (and confirmed as received) by OPS in our nominated bank account. As such, all usage of the unit up until this point will be subject to OPS Terms & Conditions of Hire and any alterations/modifications to the machine must be requested in writing to the Owner and subsequently approved in writing.
5. Rebate amounts are based on the base hire rate only, and exclude the amortised modifications. For clarity, this is the post three months hire rate.

....

**[21]** Clause 3 of the Special Terms & Conditions of Hire refer to 'OPS' standard Terms & Conditions of Sale' but there was no evidence that any such terms existed or, if they existed, what they were.

**In substance security interest or PPS lease (deemed security interest)**

**[22]** The issue of whether the plaintiff held a security interest in each item of equipment involves two subsidiary questions:

- (a) Did each hire agreement involve the grant by the first defendant to the the plaintiff of a security interest within the meaning of s 12(1) of the PPSA (an 'in substance security interest')?
- (b) Did each agreement constitute a PPS lease? If so, the plaintiff's interest in the equipment in its capacity as lessor is deemed to be a security interest under s 12(3) of the PPSA.

**The in substance security interest issue**

**The statutory provision**

**[23]** Security interest is defined in s 12 of the PPSA. Relevantly, s 12 provides:

12                                      **Meaning of                                      *security interest***

- (1) 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).

...

- (2) For example, a *security interest* includes an interest in personal property provided by any of the following transactions, if the transaction, in substance, secures payment or performance of an obligation.

- (a) a fixed charge;
- (b) a floating charge;
- (c) a chattel mortgage;
- (d) a conditional sale agreement (including an agreement to sell subject to retention of title);



....

- (e) a hire purchase agreement;
- (f) a pledge;
- (g) a trust receipt;
- (h) a consignment (whether or not a commercial assignment);
- (i) a lease of goods, (whether or not a PPS lease);
- (j) an assignment;
- (k) a transfer of title;
- (l) a flawed asset arrangement.

(3) A *security interest* also included the following interests, whether or not the transaction concerned, in substance, secures payment or performance of an obligation:

- (a) ...
- (b) ...
- (c) the interest of a lessor or bailor of goods under a PPS lease.

[24] I set out the definition of PPS lease later in these reasons.

### The authorities

[25] The parties identified two authorities that guide the analysis to be undertaken for determining whether the hire agreements created 'in substance' security interests.

### White v Spiers Earthworks Pty Ltd

[26] In *White v Spiers Earthworks Pty Ltd*,<sup>2</sup> Le Miere J was required to decide essentially the same issue concerning the existence of an 'in substance' security interest as has arisen in the present case. In **White** the defendants had sold their earthmoving business to a company which entered voluntary administration. The sale was effected by two agreements one of which, relevantly, was an agreement pursuant to which the defendants agreed to hire to the purchasing company their vehicles and other equipment. The issue was whether the defendants' interest in the assets the subject of the hire agreement constituted a security interest for the purpose of the PPSA. Le Miere J observed that it might seem anomalous to say that the defendants' interest in the assets was to use the language in s 12(1) 'provided for' by the agreement when it owned the assets before entering into the agreement but his Honour observed that the relevant issue is whether or not the agreement 'in substance secures payment or performance of an obligation'. His Honour's analysis of this issue was as follows:

....

An interest in relation to goods provided for by a transaction that in substance secures payment or performance of an obligation is a security interest for the purposes of the PPSA, regardless of its form or who has title or ownership to the goods. The concept of being in substance security for payment or performance of an obligation refers to the economic or commercial substance of a transaction. To determine whether the Hire Agreement in substance secures payment or performance of an obligation it is necessary to consider the rights and obligations of the parties under the Hire Agreement.

There are a number of features of the Hire Agreement which indicate that the Hire Agreement is in substance a sale of the Hire Assets, with the defendants retaining title until the final payment to secure payment of the total purchase price. First, the total amount payable for the hire of the Hire Assets under the Hire Agreement is an amount equal to the agreed market value of the Hire Assets. Payment is to be made by monthly payments commencing 11 months after the commencement date. Each monthly payment is an amount calculated so that over the term of the agreement the total payments made by the Company equal the market value of the Hire Assets plus a monthly interest charge.

Secondly, the Hire Agreement gave the Company two options to purchase the Hire Assets. The first option was exercisable at any time during the term of the agreement. In essence, the Company could acquire the Hire Assets, or any of them, for \$1.00 provided that the total amounts paid by the Company under the agreement exceeded the market value of the purchased assets at the time of the exercise of the option. The second call option is exercisable by the Company one month prior to the end of the term of the agreement by payment of \$10,000 to the defendants. After paying \$10,000 the Company will have paid an amount equal to the market value of the Hire Assets plus a monthly interest charge.

Thirdly, the Hire Agreement was part of the transaction by which the Company purchased the business under the Business Purchase Agreement. It is a condition of the Business Purchase Agreement that on completion of the Business Purchase Agreement the defendants and the Company 'will execute the [Hire Agreement] in relation to the sale and purchase of the Hire Assets'. In substance, the Company purchased the Hire Assets by the payment of the purchase price by instalments over time, together with interest, and the defendants got security over the assets by way of it being a hire purchase agreement rather than a sale.

the interest of the defendants in the Hire Assets is a security interest for the purposes of the PPSA because their interest is in substance a security interest.

### **Re Arcabi Pty Ltd (Receivers & Managers Appointed) (in liq)**

**[27]** In *Re Arcabi Pty Ltd (recs & mngrs apptd) (in liq)*,<sup>3</sup> Master Sanderson was required to consider whether certain bailment arrangements gave rise to 'in substance' security interests. The master noted:

There are several factors accepted by overseas courts as indicia of when bailment arrangements secure payment or performance of an obligation. These include:

....

- (a) the bailment provides that the ownership of the goods will vest in the bailee on expiry of the bailment agreement;
- (b) the bailee has an obligation to purchase the goods or an option to purchase the goods or extend the term of the arrangement at a 'bargain' price such that it would be reasonable to expect the bailee to exercise the option;
- (c) the term of the arrangement is for a major part of the economic life of the goods; and
- (d) the minimum payments under the bailment amount to substantially all the capital cost of the goods.

### **An overview of the parties' submissions**

**[28]** It was common ground that each agreement involved a 'transaction' and 'personal property'. The controversy was limited to whether there was an interest that in substance secured payment or performance of an obligation.

**[29]** The first defendant emphasised the need to have regard to the substance rather than the form of the agreements and the fact that each agreement was styled 'Monthly Plant and Equipment Dry Hire Agreement' was not determinative of the nature of the substance of the transaction. The first defendant's contention that each agreement involved the grant of a security interest to the plaintiff rested on the proposition the agreements were in substance agreements for the sale of the equipment. In support of this submission the first defendant relied on the reasoning of Le Miere J in *White v Spiers Earthworks Pty Ltd*.<sup>4</sup>

**[30]** The first defendant relied on the 'Special Terms' set out under the Hire Particulars, which referred to the option to purchase the equipment, and emphasised that the option was expressed as being exercisable at any time. The first defendant contended that each agreement should be construed as providing both an option to purchase the equipment at any time as referred to in the Hire Particulars and 'in addition to and separate from the first defendant's option 'a 'first right of refusal' as set out in cl 3 of the 'Special Terms & Conditions of Hire', the latter being dependent on the plaintiff electing to sell the equipment.<sup>5</sup> Whilst the first defendant contended that the option and the 'first right of refusal' were separate 'rights' it contended that the rebate of hire charges provided for in Special Condition 3 of the 'Special Terms & Conditions of Hire' applied in the event that the option to purchase was exercised.<sup>6</sup>

**[31]** The first defendant also placed reliance on the provisions for the payment of two months base rental in advance, the payment of monthly hire charges, and the plaintiff's right to disable and demobilise the equipment in the event payments were not made on time. The first defendant argued that when these provisions, which 'secured the first defendant's use of the equipment during the hire period', were considered in conjunction with the option to purchase, it was apparent that in substance each agreement was an agreement for the sale of the equipment to which it related.

**[32]** The plaintiff contended that each hire agreement created a 'true lease', that is, an operating lease and was not a disguised sale or financing arrangement whereby the first defendant acquired title to the equipment by paying hire charges. The plaintiff argued the 'Terms & Conditions of Hire' reflected the terms of an operating lease and there were no terms that supported construing the agreements as agreements for the sale of the equipment.

**[33]** The plaintiff contended that the references to 'Outright Purchase Price Option' and the express references to the option to purchase the equipment in Special Term 2 of the Hire Particulars and the subsequent reference to 'purchase buy out amount' and to a 'buy out of equipment' in the Hire Particulars involved the use of imprecise language which should be read as being subject to the 'Special Terms & Conditions of Hire' which limited the first defendant's rights to a 'right of first refusal' to purchase each item of equipment for a specified price (which in each

....

case was the same as the 'Outright Purchase Price') less a rebate of the hire charges paid.

**[34]** The plaintiff contended that the specific terms conferring a right of first refusal took precedence over the general references to the option to purchase. It argued that a right of first refusal was not capable of constituting a security interest granted by the plaintiff to the first defendant.

**[35]** The plaintiff identified a number of matters it contended demonstrated that the agreements were not agreements for the sale and purchase of the equipment. Those matters were as follows:

- (a) The minimum hire period was only 10 months while the useful economic life of the equipment was significantly greater than 10 months.
- (b) The total hire charges for the equipment over the minimum hire period of 10 months did not equate to the market value of the equipment (taking the first right of refusal purchase price as its market value). The total hire charges over 10 months would equate to between 66 to 76% of the relevant first right of refusal purchase price for the equipment.
- (c) There was no obligation on the first defendant to purchase the equipment.
- (d) In the event the first right of refusal was exercised the purchase price was calculated in such a way that it could not be described as a 'bargain price'.
- (e) In the event the first right of refusal was exercised at the end of the minimum hire period of 10 months the total the first defendant would have been required to pay for the hire and purchase of the equipment would equate to over 130% of the market value of the equipment.
- (f) In the event the first right refusal was activated and exercised after 12 months of hire, the total amount the first defendant would be required to pay for the hire and purchase of the equipment would equate to over 180% of the market value of the equipment.
- (g) There was no automatic right for the first defendant to end up with the title to the equipment at the end of the term of the hire agreement.

(I interpolate that the first defendant argued that the plaintiff's submissions as to the value of the equipment and its economic life were not supported by evidence.)

**[36]** The plaintiff drew attention to s 296 of the PPSA which provides that the onus of proving certain facts, including the fact that a security interest attaches to personal property, lies with the person asserting those facts.

### **Consideration**

**[37]** The essential question is: did each agreement provide for the grant by the first defendant to the plaintiff of an interest in the equipment to which it related that in substance secured payment or performance on an obligation by the first defendant? The answer depends on the construction of the terms of the agreements rather than by attaching a particular label to the agreements.

....

[38] The meaning of the terms of a commercial contract is to be determined by reference to the understanding of a reasonable business person considering the text, context and purpose of the contract. 'Context' means the entire text of the contract as well as any contract or document referred to in the text of the contract.<sup>7</sup> Absent a contrary intention, the court is entitled to approach the task of construction of the contract on the basis that the parties intended to produce a commercial result, one which makes commercial sense.<sup>8</sup> The applicable principles were stated more fully by the Court of Appeal in *Black Box Control Pty Ltd v Terravision Pty Ltd*<sup>9</sup> but, for present purposes, it is unnecessary to reproduce that statement.

[39] The proposition that each agreement conferred on the first defendant an option to purchase the equipment at any time was central to the first defendant's case that the hire agreements were, in substance, agreements for the purchase of the equipment (finance leases). As noted earlier, for its part the plaintiff contended that the references to the option to purchase should be understood as references to the first right of refusal referred to in cl 3 of the Special Terms & Conditions. The first defendant did not advance the converse contention, that is, that the first defendant did not argue that the reference to the 'first right of refusal' should be construed as a reference to the option. It contended that the hire agreements conferred both an option and a first right of refusal.

[40] The hire agreements are drafted in terms that lack precision and clarity. This makes it difficult to discern the parties' intentions. In particular:

- (a) Special Term 2 of the Hire Particulars records the grant of the option to purchase the equipment. The option was expressed to be 'subject to receipt of an executed Special Terms & Conditions of the Hire Agreement' which would suggest that the Special Terms & Conditions were of some relevance to the option to purchase. The Special Terms did not refer, however, to the option and the relevance of those terms to an option to purchase is not apparent. In oral submissions the first defendant's counsel noted that the option was expressed to be subject to 'receipt' of an executed copy of the Special Terms & Conditions rather than being subject to the terms themselves. In the context of hire agreements, notable for the imprecision with which their terms have been expressed, I am not persuaded that this distinction is to be accorded any significance.
- (b) The hire agreements were silent as to the price to be paid in the event that the option were to be exercised though it may be inferred that the price was that specified in the 'Outright Purchase Price Option' table. The only reference to an allowance against the option price for hire charges paid is the reference in the final paragraph of Special Term 2 of the Hire Particulars to the effect that the two months hire charges paid in advance were to 'be applied as a deposit against the purchase buy out amount'.
- (c) There is no textual foundation for construing the provision relating to the rebate of hire charges applicable on a sale following the exercise of the first right of refusal as being applicable also if the option to purchase was exercised. That said, assessed objectively, it would seem unlikely that the parties would have contemplated that the approach to rebating hire charges against the purchase price would differ markedly between a purchase pursuant to the exercise of an option and a purchase pursuant to the exercise of the first right of refusal.
- (d) Assuming for the purposes of discussion that the hire agreements are to be construed as conferring on the first defendant an option to purchase the equipment and that the purchase price was to be reduced by the rebate of hire charges in the amounts specified in cl 3 of the Special Terms & Conditions of Hire, the percentages of the hire charges rebated are not consistent with a transaction which in substance involves the payment of the capital cost of equipment by instalments in the form of hire charges. I return to this issue later in this section of the reasons but the short point is that because the percentage of the rebated hire charges reduced over time so did the financial incentive to buy the equipment.

....

[41] The difficulty in ascertaining the parties' intentions from the text of the hire agreements is compounded because, subject always to the terms of the bargain, from a commercial perspective, a first right of refusal and an option to purchase reflect conflicting commercial objectives on the part of an owner of property on the one hand and a potential purchaser of the property on the other.

[42] The term 'first right of refusal' is not a technical term but ordinarily it connotes (as it does in the hire agreements) a negative promise by the owner of property that it will not dispose of the property without first offering it to the party with the 'first right of refusal'.<sup>10</sup> A 'first right of refusal' does not confer an immediate right on the party to whom the first right of refusal is granted (though it might be thought of as a conditional option, the condition being a decision by the owners to sell). From the owner's perspective the grant of a first right of refusal reserves to it the decision as to whether to sell and the timing of any sale. These commercial benefits are undermined if the counterparty has an option to purchase 'at anytime'. Conversely, the benefit of an option to purchase 'at anytime' is undermined if by giving notice of an intention to sell the owner can force the counterparty to make a decision to purchase at a time otherwise than of its choosing. Further, the benefit of a first right of refusal is more limited than that conferred by an option because the first right of refusal only arises if the vendor decides to sell.

[43] Technically it may possible to construe the hire agreements as providing for both an option and a 'first right of refusal' on the basis that it would have been open to the first defendant to exercise the option until the plaintiff gave notice of an intention to sell the equipment thereby enlivening the first right of refusal. This would, however, be a strained construction. And, given the conflicting commercial objectives to which I have referred, it is not a construction that makes commercial sense on any view of the price to be paid on the exercise of the option. That is, whether the price is 'Outright Purchase Price Option' figure less the two months hire charges paid in advance or the Outright Purchase Price Option less the rebate of hire charges as set out in cl 3 of the Special Terms & Conditions of Hire.

[44] In my view, the difficulties to which I have referred are to be reconciled, effectively as submitted by the plaintiff, that is, by construing the references to the option to purchase as references to the first right of refusal in cl 3 of the Special Terms & Conditions of Hire with the result that the first defendant's only right to acquire the equipment arose by exercising the first right of refusal. This construction of the hire agreements:

- (a) reflects the parties' intention (as recorded in cl 2 of the Special Terms & Conditions of Hire) that the Special Conditions are to be accorded precedence over the other provisions of the hire agreements;
- (b) acknowledges the connection between the grant of the 'option' and the Special Conditions evidenced by the words 'subject to receipt of an executed Special Terms & Conditions of the Hire Agreement' in special term 2 of the Hire Particulars;
- (c) can be reconciled with the use of the term 'option to purchase' by reading it down as meaning an option exercisable if the owner decided to sell; and
- (d) avoids the commercially improbable result of the inclusion in the hire agreements of a first right of refusal and option to purchase at any time being provisions calculated to achieve conflicting commercial objectives.

[45] A consideration of the factors referred to by Master Sanderson in *Re Arcabi* does not support the conclusion that the hire agreements provided for a security interest which in substance secured payment or the performance of an obligation by the first defendant in that:

....

- (a) the hire agreements did not provide that ownership of the equipment would vest in the first defendant on the expiry of the hire period;
- (b) the first defendant was under no obligation to purchase the equipment, for the reasons already stated the hire agreements did not include an option to purchase the equipment but even if I had construed the agreements as including an option there is no evidentiary foundation for concluding that the option would have been exercisable at a 'bargain' price;
- (c) there was no evidentiary foundation for concluding that the minimum hire period of 10 months was a major part of the economic life of the equipment;
- (d) there was no evidentiary foundation for concluding that the minimum payments under the hire agreement, that is, 10 months hire charges, equalled substantially all the capital cost of the goods.

**[46]** There are two further features of the hire agreements which provide support for the conclusion that they were not agreements for the sale and purchase of the equipment to which they related. Those features were as follows:

- (a) Clauses 12 and 13 of the Terms & Conditions of Hire provided for adjustment of the hire charges for 'stand down time'. While it must be acknowledged that whether any adjustment would be made lay in the discretion of the plaintiff, the inclusion of a provision that recognised the possibility of an adjustment for stand down time tends to suggest that the payment of the hire charges did not amount, in substance, to payment of the purchase price of the equipment.
- (b) The percentage of the hire charges paid over the hire period, which was to be rebated in the event of a purchase of the equipment, reduced over the hire period. For example, if the equipment was purchased in the first month of the hire period, 100% of the hire charges paid to that date would be rebated against the purchase price whereas if the equipment was purchased between four and 10 months (121 — 300 days) into the hire period the rebate would be 50% of the hire charges paid. If the hire agreements were in substance agreements for the purchase of the equipment, with the monthly hire charges effectively representing payment of the purchase price by instalments, one would expect the proportion of the hire charges rebated against the purchase price would increase rather than decrease over time to provide an incentive to the lessee to acquire the equipment. Further, the fact that percentage rebated in the event of a purchase between four and 10 months remained at 50% and did not vary depending on when in that period of six months the purchase was effected is not consistent with the hire agreements being agreements which financed the purchase of the equipment. If the agreements were finance agreements one would expect the percentage of the hire charges rebated against the purchase price to vary depending on the transaction date to reflect the time cost of money.

**[47]** Having concluded that the hire agreements were not in substance agreements for the purchase of the equipment it is impossible to identify any basis upon which it could be said that the agreements provided for the grant of security interests by the first defendant to the plaintiff. The hire agreements did not confer a proprietary interest on the first defendant as hirer from which it could grant a security interest in favour of the plaintiff as security for payment or performance of an obligation.

**[48]** There are, however, two points raised tangentially in the first defendant's submissions on which I should comment. The first of these was the significance, if any, of the payment of two months hire charges in advance

....

provided for by Special Term 2 of the Hire Particulars as a security deposit. Although the first defendant's counsel stressed the need to consider the advance payment in the context of the potential acquisition of the equipment, in my view, Special Term 2 might have created a security interest in the hire charges paid in advance but it did not create a security interest in equipment.

**[49]** The second point is whether the plaintiff's right to terminate the hire and recover the equipment at any time in the event of non-payment of monies owing or plant misuse/abuse was sufficient to amount in substance to the grant of a security interest by the first defendant to the plaintiff. In my view this provision is to be characterised as a limitation on the first defendant's contractual right to possession and use of the equipment rather than the grant of a security interest. The plaintiff's right to repossess in the event of non-payment of the hire charges was an incident of ownership of the equipment and not a right 'provided for' by the hire agreement.

### **PPS lease issue**

#### **The statutory provision**

**[50]** As noted earlier the interest of a lessor or bailor of goods under a PPS lease is deemed to be a security interest.

**[51]** A PPS lease is defined in s 13 of the PPSA. Relevantly, s 13 provides:

13

**Meaning of*****PPS lease***

(1) A *PPS lease* means a lease or bailment of goods:

- (a) for a term of more than 2 years; or
- (b) for a term of up to 2 years that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all terms might exceed 2 years; or
- (c) for a term of up to 2 years, or a lease for an indefinite term, in a case in which the lessee or bailee, with the consent of the lessor or bailor retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of more than 2 years after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for more than 2 years).

(2) However, a *PPS lease* does not include:

- (a) a lease by a lessor who is not regularly engaged in the business of leasing goods; or

...



(3) This section only applies to a bailment for which the bailee provides value.

### **Overview of the parties' submissions**

[52] There was no dispute that each hire agreement provided for a lease or bailment of the equipment to which it related. Nor was there any dispute that the plaintiff is regularly engaged in the business of leasing goods.

[53] The first defendant submitted that the agreements were 'indefinitely renewable on their terms and as such exceed or otherwise might exceed a 2 year term'. The first defendant supported its contention that the lease was for a term renewable at its option by reference to the 'Anticipated Completion Date' specified in the Hire Particulars being a date 'to be confirmed by customer'. For these reasons the first defendant contended that the agreements fell within the definition of PPS lease in s 13(1)(c) of the PPSA. The first defendant emphasised that for the purposes of s 13(1)(c) it was not necessary for the term of the lease to have in fact exceeded 2 years, it was sufficient if it might do so.

[54] Alternatively, the first defendant submitted that the agreements provided for a term of up to 2 years, or for an indefinite term in which it 'retains' uninterrupted possession for a period of more than 2 years. The first defendant contended that the use of the present tense '-retains-' is indicative of a legislative intention that the security interest arises under s 13(1)(d) where the agreement provides for the lessee or bailee to retain possession for an indefinite term even though the lessee has not been in possession for more than 2 years.

[55] The plaintiff began its submissions by referring to the policy reason for including PPS leases as deemed security interests. Put shortly, the policy reflected a utilitarian approach aimed at resolving the uncertainty about whether certain leases of goods created security interests. In this respect the plaintiff referred also to the decision of the New Zealand Court of Appeal in *Rabobank New Zealand Ltd v McNulty*,<sup>11</sup> in which the Court of Appeal referred to the reasons for including equivalent deeming provisions under New Zealand's Personal Property Securities Act 1999 (NZ) (which deems leases for more than one year to be security interests).

[56] The plaintiff contended that the first defendant's argument that the agreements were for 'terms' renewable at its option such that they could have exceeded 2 years is contrary to the express terms of the agreements which provide for a minimum hire period of 10 months and make no mention of discrete terms that had the capacity to exceed 2 years.

[57] The plaintiff contended that at best, from the first defendant's perspective, the agreements provided for indefinite periods of hire. It contended that the construction of s 13(1)(d) proposed by the first defendant would render the distinction between s 13(1)(a) and s 13(1)(d) and the words 'but not until the lessee's or bailee's possession extends for more than 2 years', redundant. Thus, the plaintiff contends, that even if the agreements are construed as being for an indefinite term they would not attract the operation of s 13(1)(d) because the first defendant's period of possession had not in fact extended for more than 2 years.

### **Consideration**

....

[58] In the hire agreements the hire period was expressed as 'a minimum 10 months continuous hire'. This does not equate to a term of '10 months' or to 10 terms of one month. In other words, the hire agreements did not specify a term. Nor did the hire agreements include a provision conferring a right on the first defendant to renewal of any term. For these reasons, in my view the hire agreements did not constitute PPS leases within the meaning of s 13(1)(c) of the PPSA.

[59] I consider that the hire agreements were leases for an indefinite period and that s 13(1)(d) is the definition that must be considered. Section 13(1)(d) is clear in its terms. For a lease or bailment for an indefinite term to constitute a PPS lease the lessee or bailee must retain uninterrupted or substantially uninterrupted possession of the leased or bailed property for more than 2 years. It is not sufficient that lease or bailment may extend for more than 2 years, it must actually do so.

[60] Accordingly in my view the hire agreements did not constitute PPS leases.

### Conclusion

[61] It follows from the reasons I have given that s 267 of the PPSA has no application in the circumstances of this case.

[62] I will hear the parties as to the orders to be made and costs.

## Order

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Preliminary question decided.

### Original Action

Counsel for the plaintiff: *J M Healy*

Counsel for the first, second and third defendant: *J E Scovell*

Solicitors for the plaintiff: *Trinix Lawyers*

Solicitors for the first, second and third defendant: *Lavan*

### Counterclaim

Counsel for the plaintiff by counterclaim: *J E Scovell*

Counsel for the defendant by counterclaim: *J M Healy*

Solicitors for the plaintiff by counterclaim: *Lavan*

Solicitors for the defendant by counterclaim: *Trinix Lawyers*

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<sup>1</sup> The extracts from the agreement are reproduced with the spelling and grammatical errors contained in the agreement.

## OPS SCREENING &amp; CRUSHING EQUIPMENT PTY LTD v GOLD VALLEY IRON PTY LTD (IN LIQ)

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- 2 [\[2014\] WASC 139](#) . *White v Spiers Earthworks Pty Ltd*
- 3 [\[2014\] WASC 310](#) [20]. *Re Arcabi Pty Ltd (recs & mngrs apptd) (in liq)*
- 4 [\[2014\] WASC 139](#) . *White v Spiers Earthworks Pty Ltd*
- 5 First defendant's outline of submissions 4 September 2020 [23].
- 6 First defendant's outline of submissions 4 September 2020 [20.4].
- 7 *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* [\[2014\] HCA 7](#); (2014) 251 CLR 640 [35] (French CJ, Hayne, Crennan & Kiefel JJ); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [\[2015\] HCA 37](#); (2015) 256 CLR 104 [46] (French CJ, Nettle & Gordon JJ).
- 8 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [\[2017\] HCA 12](#); (2017) 261 CLR 544 [17] (Kiefel, Bell & Gordon JJ); *Electricity Generation Corporation v Woodside Energy Ltd* [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting* [51].
- 9 [\[2016\] WASCA 219](#) *Black Box Control Pty Ltd v Terravision Pty Ltd* [42] (Newnes & Murphy JJA & Beech J).
- 10 *Woodroffe v Box Kitto JJ*, 257–258. [1954] HCA 22; (1954) 92 CLR 245 (Fullagar &
- 11 *Rabobank New Zealand Ltd v McAnulty* (O'Regan P, Chambers & Harrison JJ). [2011] NZCA 212

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