

<i>SUMMARY OF CURRENT DOCUMENT</i>	
Name of Issuing Party or Person:	John Deere Limited and John Deere Credit Inc.
Date of Document:	7 February 2003
Summary of Order/Relief Sought Or Statement of Purpose in filing:	Reply Memorandum of Fact and Law of John Deere Limited and John Deere Credit Inc. to the Interlocutory Application (Inter Partes) of various creditors in respect of the Security Interest claimed by GMAC
Court Sub-File Number:	7:05, 7:24, 7:25, 7:26, 7:27, 7:33, 7:33A, 7:34, 7:37, 7:38, 7:39, 7:42, 7:43, 7:45, 7:49, 7:50

2002 01T 0352
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF A Court ordered
 Receivership of Hickman Equipment (1985) Limited
 ("Hickman Equipment") pursuant to Rule 25
 of the *Rules of the Supreme Court, 1986*
 under the *Judicature Act*, RSNL 1990,
 c. J-4, as amended

AND IN THE MATTER OF
 the *Bankruptcy and Insolvency Act*,
 RSC 1985, c. B-3, as amended

MEMORANDUM OF FACT AND LAW OF
JOHN DEERE LIMITED AND JOHN DEERE CREDIT INC.
(collectively, "DEERE") IN RESPECT OF THE SECURITY INTEREST CLAIMED BY
GENERAL MOTORS ACCEPTANCE CORPORATION OF CANADA, LIMITED
("GMAC")

Michael F. Harrington, Q.C.
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 Solicitors for John Deere Limited and
 John Deere Credit Inc.
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 100 New Gower Street
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GENERAL MOTORS ACCEPTANCE CORPORATION OF CANADA, LIMITED
(“GMAC”)

1. GMAC has indicated that it relies on a Security Agreement (Leasing) dated 25 July 2000 between Hickman Equipment and GMAC (referred to herein as the “Security Agreement (Leasing)”) to claim a perfected security interest in all of the inventory of Hickman Equipment.

2. Deere submits that a plain reading of the Security Agreement (Leasing) does not support the broad interpretation espoused by GMAC, but rather confirms that the security interest which was granted by Hickman Equipment to GMAC is limited in collateral, namely, to Vehicles (as defined in the Security Agreement (Leasing)) which have been financed by GMAC.
3. Deere submits that the use of the word “vehicle” in the Security Agreement (Leasing) should be interpreted as meaning cars and trucks, and not heavy equipment, such as pavers, dozers, backhoes and excavators.

GMAC-Financed Vehicles and the Charging Provision

4. A security agreement is effective according to its terms. The Security Agreement (Leasing) must be read as a whole in order to ensure that it is properly interpreted in accordance with its terms. It is not sufficient to focus merely on one phrase or clause.

Reference: Bowater Newfoundland Limited v. Newfoundland and Labrador Hydro (1978), 15 Nfld. & P.E.I.R. 301 (Nfld. S.C., C.A.);

Canadian Deposit Insurance Corp. v. Canadian Commercial Banks (1991), 79 Alta. L.R. (2d) 294 (Alta. C.A.), further appeal dismissed at (1992), 13 C.B.R. (3d) 183 (S.C.C.);

Personal Property Security Act, S.N.L. 1998, c. P-7.1 (the “PPSA”) section 10.

5. As support for its claim that the Security Agreement (Leasing) creates a valid security interest in the heavy equipment inventory of Hickman Equipment, GMAC relies upon the definition of “Vehicle” which is contained in page 1, paragraph 1, which reads:

“In the course of business, we acquire new and used vehicles (including chassis) from manufacturers, distributors and others which we hold for lease, or which now or may be leased to the public, all of which are hereinafter referred to as “Vehicles”, which term shall include all vehicles of like kinds

or types now owned or hereafter acquired by us (including all accessories and attachments thereto) and all replacements and substitutions therefor and all additions and accessions thereto."

6. Deere submits that page 1, paragraph 1 cannot be read in isolation, but must be interpreted as it is modified by, and used in, the remainder of the paragraphs of the Security Agreement (Leasing).
7. Many of the other paragraphs of the Security Agreement (Leasing) make it clear that the security interest which is created by the terms of that document is limited to Vehicles which are financed by GMAC, and not Vehicles, or any other property of Hickman Equipment which is not financed by GMAC. For example, on page 1, paragraphs 2 and 3 read:

"We desire GMAC to furnish financing accommodation to us upon the security of Vehicles and proceeds thereof and hereby agree upon demand, to pay to GMAC the amount it advances or is obligated to advance in connection with *the financing by GMAC of Vehicles* with interest at the rate per annum designated by GMAC from time to time and then in force under the GMAC Wholesale Plan or otherwise as may be agreed upon.

To secure collectively the payment of all amounts owing by us to GMAC including, without limitation, all amounts advanced by GMAC or which GMAC may be obligated to advance as aforesaid and all amounts owing by us to GMAC from time to time in connection with *the financing of Vehicles leased by us to the public* and interest due thereof and any ultimate balance thereof, we hereby grant, assign, transfer, set over, mortgage and charge in favour of and grant to GMAC a security interest in all *Vehicles so acquired* and in the proceeds thereof and in all leases relating thereto to the full extent provided or permitted by law. The word *proceeds* shall have the meaning ascribed to it under applicable personal property security laws." (emphasis added)

8. The phrases "furnish financing accommodation to us upon the security of Vehicles", "the financing by GMAC of Vehicles" and "the financing of Vehicles leased by us to the public" directly tie the financing by GMAC to the collateral in which a security interest is created, and clearly illustrate that the scope of the security interest granted

to GMAC in the Security Agreement (Leasing) is limited to Vehicles which are financed by GMAC.

9. Further, the charging provision states “**...we hereby grant to GMAC a security interest in all Vehicles *so acquired*...**” (emphasis added). The charging clause does not simply refer to “all Vehicles”. The charging provision is modified by the words “so acquired”. Some meaning must be given to the words “so acquired”. It is submitted that the words “so acquired” are limiting words, and modify the term “Vehicles”. Accordingly, the security interest which Hickman Equipment granted to GMAC by virtue of the Security Agreement (Leasing) is limited to collateral which were acquired by Hickman Equipment with financing by GMAC.

Reference: Bowater Newfoundland Limited v. Newfoundland and Labrador Hydro (1978), 15 Nfld. & P.E.I.R. 301 (Nfld. S.C., C.A.);

Canadian Deposit Insurance Corp. v. Canadian Commercial Banks (1991), 79 Alta. L.R. (2d) 294 (Alta. C.A.), further appeal dismissed at (1992), 13 C.B.R. (3d) 183 (S.C.C.);

Fridman, G.H.L., The Law of Contract in Canada, 3rd ed. (Toronto: Carswell, 1994) at 466 – 472;

Chitty on Contracts, Vol. 1, 27th ed. (London: Sweet & Maxwell, 1994) at 580 – 591.

10. Further, page 2, paragraph 1 states:

“We understand that we may lease the Vehicles in the ordinary course of business and all such Vehicles shall be held by us as inventory. We further agree that as each such Vehicle is sold, we will faithfully and promptly remit to you the amount you advanced or have become obligated to advance on our behalf pursuant to this agreement, with interest at the aforesaid rate per annum designated and in effect under the GMAC Wholesale Plan or as otherwise agreed and any other amounts which we may have become obligated to pay with respect to such Vehicle.” (emphasis added)

11. It is submitted that the reference in this paragraph to “*as each such Vehicle is sold, we will faithfully and promptly remit to you the amount you advanced or have become obligated to advance on our behalf pursuant to this agreement, ... and any other amounts which we may have become obligated to pay with respect to such Vehicle*” clearly illustrates that the collateral is limited to Vehicles which have been financed by GMAC. Amounts advanced by GMAC are to be remitted as each Vehicle is sold; there would not be any amount to be “*remit*” to GMAC on the sale of a non-GMAC financed vehicle, so it is implicit that the agreement relates to GMAC-financed Vehicles only.

12. Other paragraphs of the Security Agreement (Leasing) also demonstrate that the terms of the Security Agreement (Leasing) create a security interest only in Vehicles which are financed by GMAC. For example, page 1, paragraph 6, reads:

“We shall not mortgage, pledge or lend the Vehicles and shall not transfer or otherwise dispose of or encumber them except as in the next paragraph more particularly provided...”.

It is submitted that the use of these words further supports the interpretation that the security interest granted by Hickman Equipment to GMAC was not intended to be created in Vehicles which were financed by others, and subject to the mortgage, pledge or charge in favour of other creditors. The use of this language implies that the security interest granted by Hickman Equipment was intended to be limited to Vehicles financed by GMAC, and not others.

“Definition of Vehicles”

13. Deere submits that the word “*vehicles*”, used in the defined term “*Vehicles*” should not be construed so as to include heavy construction and forestry equipment.
14. Deere also submits that, in order for collateral to be included in the security interest created by the Security Agreement (Leasing), such collateral has to meet all of the

constituent elements of the term “Vehicles” as it is defined in page 1, paragraph 1 of the document.

15. As noted above, “Vehicles” is defined as follows:

“In the course of business, we acquire new and used vehicles (*including chassis*) from manufacturers, distributors and others *which we will hold for lease or which now or may be leased to the public*, all of which are hereinafter referred to as “Vehicles”, which term shall include all vehicles of like kinds or types now owned or hereafter acquired by us (including all accessories and attachments thereto) and all replacements and substitutions therefor and all additions and accessions thereto.” (emphasis added)

16. In everyday parlance, the word “vehicle” is usually used in connection with cars and trucks. This common usage of the term “vehicles” should be contrasted with the terminology that is typically used in the heavy construction equipment and forestry equipment industries where the goods involved are usually referred to generically as “equipment”, and sometimes as “units”, or “items”. Heavy equipment is very rarely, if ever, referred to as “vehicles”.

Reference: Affidavit of Douglas A. Dicker sworn to on the 7th day of February 2003;

Fridman, G.H.L., The Law of Contract in Canada, 3rd ed. (Toronto: Carswell, 1994) at 466 – 472;

Chitty on Contracts, Vol. 1, 27th ed. (London: Sweet & Maxwell, 1994) at 580 – 591.

17. Moreover, the dictionary definition of “vehicle” focuses on the transportation of people or goods. For example, the Shorter Oxford English Dictionary defines “vehicle” as follows:

“a means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, etc..”.

Unlike cars and trucks, heavy construction and forestry equipment such as pavers, dozers, backhoes, excavators, and so on, are not designed or used for conveying people or goods. It is therefore submitted that the meaning of the word “vehicles” as used in the Security Agreement (Leasing) should not be interpreted to encompass heavy construction and forestry equipment.

Reference: The Shorter Oxford English Dictionary, Vol 1, 3rd ed. (Oxford: Clarenden Press).

18. Further, the word “vehicle” is followed immediately by the phrase “(including chassis)”, which phrase must be interpreted as a modifier of the word “vehicle” and which informs the meaning of the term. A chassis is typically the frame on which the body of a car or truck is mounted. Chassis is defined in the Shorter Oxford English Dictionary as “**the base frame of a motor car**”. Sometimes a car or truck chassis is acquired separate from the body of the car or truck. For example, a truck chassis might be acquired (including a cab, engine, transmission and axle) and the customer could then add his own dump box, tow truck configuration, bread truck van, etc. However, in the heavy construction and forestry equipment industries, the units are supplied as complete goods. Even when there are separate attachments such as a boom, it is not perceived in those industries that there is a separate supply of any “chassis” or frame. This supports the conclusion that the word “vehicles” should not be unduly stretched beyond its normal everyday, common (and dictionary) meanings to encompass heavy construction and forestry equipment.

Reference: Affidavit of Douglas A. Dicker, sworn to on the 7th day of February 2003;

The Shorter Oxford English Dictionary, Vol 1, 3rd ed. (Oxford: Clarenden Press);

Fridman, G.H.L., The Law of Contract in Canada, 3rd ed. (Toronto: Carswell, 1994) at 466 – 472;

Chitty on Contracts, Vol. 1, 27th ed. (London: Sweet & Maxwell, 1994) at 580 – 591.

19. It is also submitted that the collateral which is the subject of the security interest created by the Security Agreement (Leasing) is limited to only those vehicles which Hickman Equipment held for lease or had out on lease. It does not cover vehicles held for any other purpose, including demonstration or sale.
20. Indeed, the very title of the document suggests that “leasing” is the key element in the arrangement.
21. Further, once a vehicle ceased to be in Hickman Equipment’s leasing portfolio – whether as a result of a sale thereof by Hickman Equipment or otherwise – such vehicle would *by definition* no longer be held for lease or leased and, therefore, would no longer be subject to GMAC’s security interest under the Security Agreement (Leasing).
22. Since GMAC purports to have a security interest, the onus is therefore on GMAC to provide evidence of which assets of Hickman Equipment fit into the category of vehicles which are the collateral contemplated in the Security Agreement (Leasing).

Conclusion

23. In conclusion, Deere submits that it is evident from a plain reading of the terms of the Security Agreement (Leasing) that the defined term “Vehicles” is not all-encompassing, and does not create a security interest in GMAC’s favour in all of the heavy equipment inventory which was held by Hickman Equipment.
24. A distinction must be drawn between the position which GMAC now claims and the reality of what the words in the Security Agreement (Leasing) actually say. The Security Agreement (Leasing) does create a security interest in certain assets which

were in the inventory of Hickman Equipment at the time of the bankruptcy and receivership, but the Security Agreement (Leasing) can only have effect in accordance with its terms.

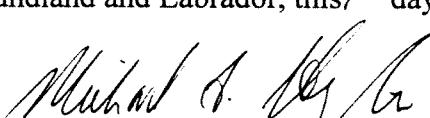
Reference: PPSA, section 10;

Bowater Newfoundland Limited v. Newfoundland and Labrador Hydro (1978), 15 Nfld. & P.E.I.R. 301 (Nfld. S.C., C.A.);

Canadian Deposit Insurance Corp. v. Canadian Commercial Banks (1991), 79 Alta. L.R. (2d) 294 (Alta. C.A.), further appeal dismissed at (1992), 13 C.B.R. (3d) 183 (S.C.C.);

25. It is submitted that the proper interpretation of the Security Agreement (Leasing) is that it creates a security interest only in vehicles in respect of which financing was provided to Hickman Equipment by GMAC, and only to the extent that such vehicles were held for lease or out on lease. Further, the word "vehicle" ought to be construed in accordance with the terms of the agreement and the every day meaning of the term "vehicle" to mean cars and trucks.

DATED AT St. John's, in the Province of Newfoundland and Labrador, this 7th day of February 2003.



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