

SUMMARY OF CURRENT DOCUMENT	
Name of Issuing Party or Person:	Hall, J.
Date of Document:	2003 02 20
Summary of Order/Relief Sought or statement of purpose in filing:	Filing of Decision in an Application by General Motors Acceptance Corporation of Canada, Limited ("GMAC") for payment to GMAC of the proceeds from the sale by the Receiver of four Terex Trucks.
Court Sub-File Number:	7:21 (Decision filed in 9:02)

CITATION: *Hickman Re GMAC*, 2003NLSCTD19

DATE: 2003 02 20

DOCKET: 2002 01 T 0352

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION**

**IN THE MATTER OF the Receivership of
Hickman Equipment (1985) Limited**


**AND IN THE MATTER OF the
Application by General Motors Acceptance
Corporation of Canada, Limited
("GMAC") for payment to GMAC of the
proceeds from the sale by the Receiver of
four Terex Trucks.**

Heard January 23 and 24, 2003

DECISION OF HALL, J.

Background

[1] By an Order filed March 14, 2002 Hickman Equipment (1985) Limited ("Hickman Equipment") was adjudged to be insolvent and a receiving order was issued against it. Additionally, PricewaterhouseCoopers Inc. ("PWC") were appointed receiver and trustee in bankruptcy of the company.



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[2] Pursuant to an Order of the Court, PWC commenced and completed a liquidation of substantially all of the assets of Hickman Equipment, including four large Terex Trucks of which the applicant General Motors Acceptance Corporation of Canada, Limited ("GMAC") claimed to be the first secured creditor. The gross proceeds received by PWC from the sale of these four trucks was \$760,000. The amount claimed by GMAC as owing on these four trucks was \$977,961.60 as of March 11, 2002. Therefore, if GMAC were to be successful in its claim as the first secured creditor over these four trucks, there would be no equity remaining for subsequent creditors or the bankrupt estate.

[3] The present application came on by way of an interlocutory application *inter-partes* wherein GMAC claimed full entitlement to the proceeds based upon certain security, more particularly set out in its application. Other secured creditors of Hickman Equipment opposed to the application of GMAC were represented at the hearing of the application, namely CIT Financial Ltd. ("CIT"), Canadian Imperial Bank of Commerce ("CIBC"), John Deere Limited ("JDL"), John Deere Credit Inc. ("JDCI"), Hickman Leasing Limited ("HLL"), Group Holdings Limited, ABN - Amro Leasing Inc. ("ABN - AMRO"), Royal Bank of Canada ("RBC"), and Trimac Equipment Finance ("Trimac").

[4] The principal opposition to the GMAC application came from CIT which claimed that it was the first secured creditor with respect to these four trucks. The application proceeded on the basis that the only issue the Court would decide amongst these competing creditors was whether or not GMAC was in fact the first secured creditor with respect to the trucks. If it was determined by the Court that the GMAC security was invalid, faulty, or did not have a first secured creditor status over the four trucks, the issue as to final entitlement to the proceeds from the sale of the four trucks would be deferred to a further hearing during which the other creditors would be more fully heard with respect to the relative priorities of their claims.

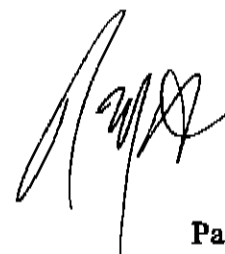
Summary of Relevant Registrations and Documentation

[5] The following is a summary of the relevant registrations in various public registries and the various documentation executed, as between Hickman Equipment, HLL, GMAC and CIT:



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- (a) *November 20, 1998* – Demand Debenture dated November 19, 1998 and registered at the Newfoundland Registry of Deeds (the “**Deeds Registry**”) on November 20, 1999 at Roll 1719, Frame 1910, wherein Hickman Equipment granted a Demand Debenture in favour of GMAC (the “**Debenture**”), which Debenture was transitioned under the Newfoundland **Personal Property Security Act** (the “**PPSA**”) on March 21, 2000. . .
- (b) *December 13, 1999* – (the first day on which the **PPSA** came into effect in Newfoundland), GMAC effected a **PPSA** registration over “All present and after acquired personal property of the Debtor (Hickman Equipment) and proceeds thereof.”... (the “**GMAC Global Registration**”)
- (c) *July 25, 2000* Hickman Equipment executed in favour of GMAC, (a “**Security Agreement (Leasing)**”) ...
- (d) *April and May, 2000* – CIT financed the acquisition by Hickman Equipment of several Terex Trucks. Included in the financing were the four Terex Trucks which are the subject matter of this Application (“**Terex Trucks**”)... At that time there was no registration of CIT’s security interest in the Terex Trucks.
- (e) *January 14, 2001* – Some time prior to January 14, 2001 HLL acquired the Terex Trucks from Hickman Equipment... By Lease Agreements dated January 14, 2001 a separate Lease Agreement for each of the Terex Trucks, for terms of 60 months each, was entered into between HLL as lessor and Hickman Equipment as lessee (“**Terex Truck Leases**”)...
- (f) *February 9, 2001* – By four Leasing Inventory Chattel Mortgages, each entered into on or about February 9, 2001, HLL granted Chattel Mortgages over the Terex Trucks to GMAC (“**Chattel Mortgages**”). Each of the Chattel Mortgages also contained an assignment, by way of security, of the Terex Truck Leases by HLL to GMAC...



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- (g) *February 13, 2001* – GMAC Leaseco Limited (*not GMAC*) filed PPSA registrations on February 13, 2001 against the Terex Trucks, and against the entity “Hickman Equipment” (“**Initial GMAC Terex Registrations**”)...
- (h) *November 20, 2001* – On November 9, 2001 Hickman Equipment entered into a General Security Agreement (Wholesale) and an Assignment of Lease Agreement (all lessees – all equipment) with CIT, both dated November 9, 2001... Notice of CIT’s security interest in “All of the debtor’s (Hickman Equipment) present and after acquired personal property” was registered under the PPSA Registry on November 20, 2001 under registration number 1365579...
- (i) *January 25, 2002* – HLL registered notice of its security interest against Hickman Equipment, describing assets which include the Terex Trucks. CIT assumes that these registrations relate to the Terex Truck Leases.
- (j) *January 29, 2002* – GMAC amended the Initial GMAC Terex Registrations on January 29, 2002... as follows:
- (i) GMAC Leaseco Limited was removed as the Secured Party and replaced with General Motors Acceptance Corporation of Canada, Limited.
 - (ii) “Hickman Equipment” was removed as the Enterprise Debtor and was replaced with “Hickman Equipment (1985) Limited, and with “Hickman Leasing Limited.”

Issues

[6] At the hearing of the matter, GMAC confirmed withdrawal of its reliance upon the Debenture as securing its first claim to the Terex Trucks. Additionally, GMAC acknowledged that the Initial GMAC Terex Registrations were invalid by reason of such registrations being seriously misleading and not being corrected until January 29, 2002, after the time of registration by CIT of its security interest in the Terex Trucks.


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The result was that GMAC was thrown back to relying upon its GMAC Global Registration over the assets of Hickman Equipment and proceeds thereof which was registered in the PPSA registry on December 13, 1999. CIT takes the position that this registration does not give GMAC priority over the Terex Trucks, because the GMAC Global Registration was not intended to provide to GMAC security over equipment pledged to it by a different grantor of security, by way of security only, and not by way of ownership, that different grantor of security being HLL. CIT takes the position that HLL had no prior security interest in the Terex Trucks since registration of notice of the Terex Truck Leases by HLL were not effected until January 25, 2002. It was the same Terex Truck Leases which were assigned by HLL to GMAC by way of security, and which assignment GMAC relies upon and states was "perfected" by registration on December 13, 1999 by the GMAC Global Registration.

Impact of Section 46(3) and Section 52(1)(A) of the PPSA

[7] Section 46(3) of the PPSA states:

46. (3) Where a secured party with a security interest that is not perfected by registration transfers the security interest, a financing statement may be registered in which the transferee is disclosed as the secured party. [Emphasis added.]

Section 52.1(a) of the PPSA states:

52. (1) Where a security interest is perfected by registration and the debtor transfers all or part of the debtor's interest in the collateral with the prior consent of the secured party, the security interest in the transferred collateral is subordinate to

(a) an interest, other than a security interest in the transferred collateral, arising in the period from the expiry of the fifteenth day after the transfer to the time the secured party amends the registration to disclose the name of the transferee of the interest in the collateral as the new debtor or takes possession of the collateral; . . . [Emphasis added.]

[8] GMAC relies upon Section 46(3). HLL (as lessor) leased the Terex Trucks to Hickman Equipment as lessee for a term of 60 months. These are the "Terex Truck Leases" referred to in par. [5](e) hereof. HLL had not registered these leases in the Personal Property Security Act Registry ("PPR") and as they were leases for more than a year, registration was required in order to perfect this security. GMAC states this fact situation brings s. 46(3) of the PPSA into play.



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[9] On February 9, 2001, HLL granted to GMAC the "Chattel Mortgages" referred to in par. [5](f) hereof. These Chattel Mortgages provided as follows:

For the purpose of securing payment of the aforesaid indebtedness and all other indebtedness now or hereafter owing from lessor to secured party, and for good and valuable consideration, receipt whereof is hereby acknowledged, the lessor has bargained, sold and assigned and by these presents does grant, bargain, sell and assign unto the secured party, the goods, chattels and personal property described below (or on an attached schedule) including any attachments or accessories thereto (all of which are herein referred to as the "collateral") and all proceeds thereof.

To have and to hold all and singular the collateral unto the secured party forever. . . Provided always and these presents are upon this express condition, that if the lessor shall well and truly pay, or cause to be paid to the secured party in lawful money of Canada . . . the total principal balance hereinbefore set forth together with interest thereon at the rate designated herein and in the manner and at the times herein provided, then this mortgage and every manner and thing herein contained, shall cease, determine and be utterly void.

To further secure the payment of the said indebtedness the lessor hereby assigns to the secured party all its right, title and interest in and to the rents and other monies hereinafter becoming payable under and by virtue of the lease described below or which may become payable by reason of the leasing or rental of the collateral under any other lease or rental agreement, and in and to all proceeds of sale of the collateral

[10] The leases referred to in the above quoted sections of the Chattel Mortgages are, of course, the unregistered 60-month leases from HLL to Hickman Equipment described in par. [5](e) hereof.

[11] GMAC takes the position that, because HLL did not register the leases in the PSR, the security interest in the four Terex Trucks forming the collateral of the leases had not been perfected by HLL and that GMAC was, by reason of the Chattel Mortgages, a transferee of those leases. GMAC claims therefore that it, as the transferee of those leases, could register a financing statement wherein it is disclosed as the security party. GMAC claims that the financing statement which discloses it as the secured party, was the financing statement in relation to Hickman Equipment registered by GMAC on December 13, 1999, the first day in which the PPSA came into effect in Newfoundland, wherein GMAC effected a PPSA registration over "all



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present and after acquired personal property of the debtor (Hickman Equipment) and proceeds thereof . . . ,” this being the GMAC Global Registration referred to in par. [5](b) hereof.

[12] CIT disputes this position of GMAC. It firstly disputes GMAC’s contention that the security interest which is governed by Section 46(3) of the PPSA is the purported security interest of HLL held under the Terex Truck Leases which were not perfected by HLL. CIT takes the position that the security which the Courts should direct its attention to in determining whether or not a security interest was perfected or not is the security which GMAC was holding directly from HLL. CIT points out that GMAC purported to finance these vehicles in the hands of HLL, not in the hands of Hickman Equipment and that GMAC held the following security, which was perfected, from HLL namely:

- (a) An assignment of book debts granted on July 12, 1994 transitioned under the PPSA by virtue of Registration No. 168922;
- (b) An assignment of book debts registered under the Newfoundland Registry of Assignment of Book Debts on July 12, 1994, transitioned under the PPSA by virtue of Registration No. 180653; and
- (c) PPSA registration made on December 13, 1999 (the date the PPSA came into effect) over “all present and after acquired personal property of [HLL] and the proceeds thereof,” pursuant to PPSA Registration No. 1073.

[13] CIT says that when you look at the transaction in this light, GMAC received from HLL a security interest which was perfected by registration and that the debtor, HLL, then transferred all of HLL’s interest in the collateral to Hickman Equipment. CIT says that this transaction obviously occurred with the prior consent of GMAC because GMAC referenced the existence of these leases when it took the four unperfected Chattel Mortgages on or about February 9, 2001. CIT takes the position that the HLL/GMAC security having been perfected, and GMAC not having registered a change statement to amend the registration to disclose the name of Hickman Equipment as the transferee of the interest in the collateral as a new debtor, then GMAC’s rights to this equipment, under the HLL/GMAC security, lapsed and was

superceded by the proper registration by CIT of its security interest at a later point in time.

[14] CIT takes the position that the indebtedness owing to GMAC for the financing of the Terex Trucks was owing from HLL, not Hickman Equipment. CIT argues that GMAC had an entitlement to receive monies from Hickman Equipment by virtue of the leases which were assigned to it by security exercisable in the event of the default by HLL. CIT, noting that GMAC has placed sole reliance upon the GMAC Global Registrations to argue its perfection of its security interest under either the Chattel Mortgages, or the assignment of the Terex Truck Leases, submits that GMAC intended to treat the Terex Truck financings as financing for HLL, separately and independent of its dealings of Hickman Equipment and that the Chattel Mortgages and the assignment of the Terex Truck Leases were not security interests intended to be secured by the much earlier GMAC Global Registration. CIT asserts that the GMAC Global Registration, therefore, does not have the effect of perfecting GMAC's security interest in the Terex Trucks. In such event, the previous registration in favour of CIT over the Terex Trucks would have priority over GMAC.

[15] GMAC's response to this position of CIT is that the GMAC Global Registration, wherein it stated that it claimed "all present and after acquired personal property of the debtor (Hickman Equipment) and proceeds thereof," was sufficient to perfect the unregistered security interest of HLL over the Terex Trucks by virtue of Section 46(3) of the PPSA.

[16] CIT argues that the GMAC Global Registration was not intended to provide security interest from Hickman Equipment to GMAC in personal property other than personal property financed by GMAC directly for Hickman Equipment. CIT claims that in order for the Global Registration to have protected security interests, such as arose under the assigned HLL Terex Truck Leases, it was necessary for such security interests to be in the contemplation of the parties that the prior Global Registration would have the effect of perfecting the subsequent security interest. CIT cited in support thereof **Adelaide Capital Corp. v. Integrated Transportation Finance Inc.** (1994) 16 O.R. (3d) 414 (Ontario Court General Division) where (at p. 17 of the Quicklaw version [1994] O.J. No. 103) Blair, J. states:

In a number of decisions, the Court has held that a single financing statement could serve to preserve priority for a subsequent loan made by the same lender to the same debtor, provided the subsequent loan was not a separate and distinct transaction but



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was linked to the former arrangement in a way that the two could be said to be 'one transaction or an on-going related transaction'.

[17] CIT states that an assignment by HLL of a security interest, which HLL held from Hickman Equipment, was not in any way linked to the arrangement by GMAC to take the security for equipment financed by it for Hickman Equipment, but rather was a separate and distinct transaction not within the contemplation of the GMAC Global Registration. In support thereof it references the fact that GMAC appeared to have intended to register its security interest in the Terex Trucks independently of any other security interest by virtue of the Initial GMAC Terex Registrations, all of which were erroneous and ineffective and conceded as such by GMAC.


[18] GMAC countered by arguing that the law in Ontario as stated in the **Adelaide Capital** case was subsequently changed by statutory amendment and not applicable in any event. In Secured Transactions and Personal Property in Canada, 2nd. ed., by Richard H. McLaren at p. 20-19 the author states the following with respect to the Ontario PPSA:

The case law under the prior Act developed the principle that where more than one security interest was created in more than one security agreement, it was possible to use a single financing statement so long as it was done in the prescribed form. However the documentation had to support the existence of one transaction or ongoing transaction . . .

At p. 20-20 the author continues:

However, amendments made to s. 45(4) of the Ontario Act in December 2000 make it clear that one financing statement can perfect one or more security interests whether or not the security interest or security agreements are part of a related or ongoing transaction. A properly registered financing statement alerts a searcher to the existence of a security agreement between the parties listed on the financing statement. It is then the searcher's responsibility to request further details of the security agreement related to the financing statement. If the collateral classification and parties to the security agreement are the same, one financing statement can perfect all security interests regardless of the date or nature of the security agreement.

[19] In effect GMAC argues that its Global Registration was effective notice to CIT and others and CIT was obliged to make inquiries of GMAC as to what security documents it held of Hickman Equipment as a debtor. Counsel for GMAC takes the position that the Newfoundland PPSA was modelled on the so-called "Western" model


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of PPSA and not the Ontario Act. He cited *Royal Bank v. Agricultural Credit Corp. of Saskatchewan* (1994), 7 P.P.S.A.C. (2d) 1 (Sask. C.A.) where the Saskatchewan Court of Appeal, in the absence of a similar provision to that in the prior Ontario Act, concluded that one financing statement can perfect multiple security interests arising from subsequent, unrelated transactions, between the same parties. The Court of Appeal cited the Act's underlying concept of providing a functional, practical and versatile notice-filing system that provides a broad warning to searchers as the basis for its conclusion.

[20] Counsel for GMAC also cited, in support, par. 43[3] of the commentary contained in the *Alberta Personal Property Security Handbook*, 4th ed. wherein it states:

Section 43(5) states a simple but important principle of the registry system. A single financing statement may relate to one or more than one security agreement between the same parties. In other words, the registration of a single financing statement can perfect security interests arising under a series of security agreements between the same parties.


The priority that a registration of a single financing statement gives under section 35(1) extends to all security interests in the described collateral arising under any security agreement thereafter entered into between the secured party and the debtor. The security agreements need not be linked in any way. [Emphasis added.]

[21] In a footnote to this commentary, the authors comment upon the *Adelaide Capital* case and state:

In *Adelaide Capital* . . . , the court held that the equivalent provision of the Ontario PPSA was not intended "to permit a financing statement to perfect a security interest created or provided for in *an earlier* security agreement between the parties." In other words, a financing statement could only perfect later security agreements, and not the reverse. The authors are of the view that there is no justification for reading this limitation into the provision.

[22] Catherine Walsh, in her book *An Introduction to the New Brunswick Personal Property Security Act*, at p. 209, deals as well with the issue of a single registration for multiple security agreements and states:

In the old document-filing system, any changes in the financing arrangement between the parties usually required a fresh registration, thereby threatening the priority position of the secured party. But in a notice-filing system, there is no reason


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why the same registration cannot operate to perfect security interests arising under a succession of security agreements. As long as the new arrangements involve the same debtor and cover collateral that falls within the registered collateral description, third party searchers are not misled. [Emphasis added.]

Accordingly, s. 43(6) confirms that a single registration may relate to one or more than one security agreement. So long as the registered collateral description is broad enough to cover all agreements, registration of a single financing statement is therefore effective to perfect a security interest arising under multiple agreements, regardless of whether the agreements are related to one another or represent separate and distinct transactions.

[23] I am satisfied that the registration of a single financing statement is all that is necessary in order to give effective notice to persons using the registry system of the existence of security documents between the same debtor and creditor and to put them on notice. However, I cannot fail to notice the repeated statement by the learned authors that such a single registration of a financing statement is effective where it relates to the same creditor and the same debtor. The difficulty is to reconcile the fact that Hickman Equipment, with respect to the four Terex Trucks, became a “debtor” of GMAC, not by reason of privity of contract, but by mere statutory definition under the PPSA. In other words, in order for a single registration of a financing statement to suffice, must there be some privity of contract between the debtor and the lender with respect to the equipment claimed to be secured? If there is no such privity, e.g., in the case of a transfer of collateral, is a financing change statement necessary to secure the lender’s position with respect to the transferred collateral?

[24] Under s. 2(m) of the PPSA, a “debtor” includes a lessee under a lease for a term of more than one year. A “security interest” is defined in s. 2(pp) to include the interest of a lessor under a lease for a term of more than one year. It is only by the application of the following logic that it could be said that Hickman Equipment becomes a “debtor” of GMAC with respect to the four Terex Trucks, i.e.:

- (a) HLL transfers the debt owing to it by Hickman Equipment under the Terex Truck leases to GMAC;
- (b) a lease for more than a year is a security interest;
- (c) that security interest is transferred by HLL to GMAC; and

- (d) Hickman Equipment as a lessee under the lease for more than one year therefore becomes a "debtor" of the person who holds the security interest in the leases, i.e., purportedly GMAC.

[25] However, I am not satisfied that this is what the learned authors intend when they refer to the requirement that new arrangements under a single registration of the financing statements involve the same debtor and creditor/secured party. When the authors talk about the security documents not needing to be linked in any way, they are talking about them not being linked to the initial lending between the parties which gave rise to the registration of the single financing statement. They are not referring to a situation where a third party, by the transfer of collateral, could be argued to have created a debtor-creditor relationship between others. In other words, the authors are endorsing one registration sufficing to secure a multiplicity of contracts creating security interests where there is privity of contract between the same debtor and lender. Where the same creditor happens to become a creditor of the same debtor by the independent act of a third party transferring collateral, a single registration of a financing statement cannot have been intended to override the specific requirements of the PPSA requiring the filing of a financing change statement.

[26] In my view, in order for the single financing statement registration by GMAC with respect to Hickman Equipment, made on the 13th of December, 1999, to have been effective with respect to these four pieces of equipment, it would have been necessary either that:

1. Hickman Equipment create a direct privity of contract between itself and GMAC by contractually assuming responsibility for the lease payments directly to GMAC and not to Hickman Leasing; or
2. That GMAC bring itself within the appropriate provisions of the PPSA dealing with transfers of collateral or security interests by complying with the requirements of s. 52(1)(a) through the filing of a financing change statement showing Hickman Equipment as a debtor.

[27] I am not satisfied that s. 46(3) is intended to cover the situation which pertains in this case. The relationship which existed between HLL and Hickman Equipment under the Terex Truck leases does qualify as a security interest. However, I am not satisfied that s. 46(3) is intended to cover an assignment of such a security interest

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without the complete transfer of the contract creating the security interest. A mere assignment of such a contract not absolutely, but by way of security only, would not suffice. I am, therefore, of the view that the proper section to be applied to this transaction is s. 52(1)(a). I am of the view that GMAC had a perfected security interest over the assets of HLL. Because GMAC was aware of the transfer by HLL to Hickman Equipment of the collateral covered by the leases between HLL and Hickman Equipment. GMAC impliedly consented to the transfer of the HLL security interests in this collateral to Hickman Equipment and it ought to have registered a financing change statement to disclose Hickman Equipment as the new debtor. Having failed to do so, and its interest in this collateral not intended to be covered by its Global Registration, I must deny the application of GMAC and find that it is not a secured creditor with respect to the four Terex Trucks.

[28] As indicated earlier in this Judgment, issues outstanding between the remaining secured creditors, and the relative priorities of their security interests in relation to the four trucks in question, are deferred to a later hearing between the interested parties in relation thereto.

[29] Creditors other than CIT took no active part in this hearing and maintained little other than a watching brief in relation thereto. I therefore award costs only to CIT on this application.


Justice

Thomas Kendell, Q.C., for GMAC

Gregory Dickie for CIT Finance Ltd.

Maureen Ryan for John Deere Limited, John Deere Credit Limited

Geoffrey Spencer for Canadian Imperial Bank of Commerce.

Brian Winsor for ABN-AMRO and Royal Bank of Canada and Trimac Equipment

Griffith Roberts for Hickman Leasing Limited and Group Holdings Limited

Anna Locke for PricewaterhouseCoopers Inc.