

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, R.S.N.L. 1990, c. J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and*
Insolvency Act, Chapter B-3 of the Revised
Statutes of Canada, 1985, as amended (the "BIA")

Affidavit

The Supplementary Affidavit of James A. Kirby, C.A., CIRP, Senior Vice-President of PricewaterhouseCoopers Inc. of St. John's, in the Province of Newfoundland and Labrador says as follows:


1. This Affidavit is in addition to my Affidavits dated 6 December 2002, 11 December 2002 and 13 December 2002, and all Affidavits are filed with respect to the Application of PricewaterhouseCoopers Inc. for Court approval of the Final Determinations allowed by the Applicant in their entirety and of the allowed portions of the Final Determinations allowed by the Applicant in part, in accordance with paragraph 16 of the Claims Plan.
2. Subsequent to the Trustee's issuing the Final Determination for Contract Funding Group Inc ("CFG") wherein the Trustee denied the claim due to a lack of evidence of value, this evidence was subsequently provided to the Trustee.

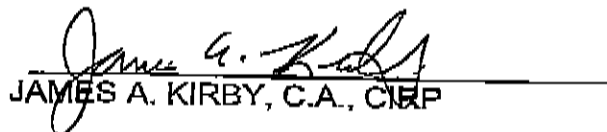
Jan-31-03 10:56am From-

T-781 P.003 F-875

3. On or about November 29, 2002, Justice Hall directed the Trustee to consider this information and prepare an amended Final Determination if appropriate.
4. The Trustee has considered this information and has amended the Final Determination to allow the claim of CFG. Attached as Exhibit "A" to this my Affidavit is a revised Final Determination for CFG wherein the addition evidence of value provided by CFG has been taken into consideration.
5. I have reviewed the Application for which this Affidavit is sworn and request that this Honourable Court consider and adjudicate on these matters at its earliest convenience.

SWORN TO at St. John's, in
the Province of Newfoundland
and Labrador, this 31st day
of January 2003, before me:


Ben'sler, NL


JAMES A. KIRBY, C.A., CFP

Jan-31-03 10:56am From-

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This is Exhibit A
 of James A. Kiley
 sworn or affirmed before me

SCHEDULE A FINAL DETERMINATION

(Issued in accordance with paragraph 14 of the Claims Plan)

Secured Party: **CONTRACT FUNDING GROUP INC. ("CFG")**

1. Introduction

PWC as Receiver continues to hold the Assets of HEL under the terms of the Receivership Order granted on March 13, 2002. The Claims Plan is intended to provide a mechanism by which Claimants assert Claims to these Assets.

Pursuant to paragraph 14 of the Claims Plan a Final Determination is to be made by the PWC as Trustee either allowing or disallowing a Claim as a valid secured claim under section 135(4) of the BIA. This is the Trustee's Final Determination in respect of CFG.

Capitalized terms used in this Final Determination shall have the meaning ascribed to them in the Claims Plan unless otherwise defined herein.

2. Summary Final Determination

CFG's claim is allowed as a valid secured claim. The Trustee claims no interest in the assets that are the subject of this claim.

3. Defined Terms

For ease of Reference in this Final Determination, the Trustee has applied the following definitions/ abbreviations:

"CSA"	-	Conditional Sales Act, R.S.N.L. 1990, c.C-28 (Rep.)
"HEL"	-	Hickman Equipment (1985) Ltd.
"JD"	-	John Deere
"LEMS"	-	Labrador Equipment and Mining Supplies Limited
"Old Registry"	-	Registry of Conditional Sales, Bills of Sale and Chattel Mortgages
"PMSI"	-	Purchase Money Security Interest
"PPSA" or "Act"	-	Personal Property Security Act, S.N.L. 1998, c.P - 7.1
"PPR"	-	Personal Property Registry
"Province"	-	Newfoundland and Labrador
"Regulations"	-	Personal Property Security Regulations (103/99)
"s/n"	-	serial number

4. The Assets

10 pieces of heavy equipment. Only one piece remained in the Inventory for HEL and was sold at the Trustee's auction (as described below).

1. 892E Excavator (FF892EX012642)
2. 892E Excavator (FF892EX012643)¹
3. 892E Excavator (FF892EX012455)
4. 310SE Backhoe Loader (T0310SE877721)
5. 301SE Backhoe Loader (T0310SE877726)
6. 160LC Excavator (P00160S041035)
7. 450LC Base Excavator (FF0450X090370)
8. 200LC Excavator (s/n FF0200X501668)
9. 608B Harvester (s/n 10BA1221)
10. 127B Harvester (s/n 01AB2086)

5. Assumptions

In preparing this Final Determination, the Trustee has made the following assumptions:

- i) the genuineness of all signatures, the authenticity of all original Documents and the conformity to authentic originals of all Documents that are copies, whether facsimile, photostatic, certified or otherwise;
- ii) that each party to any of the Documents that create obligations for that party, has duly authorized, executed and delivered such Documents to which it is a party;
- iii) with the exception of security interests created by the Documents, the Documents that create obligations for parties, constitute legal, valid and binding obligations of each party thereto, enforceable against each of them in accordance with their terms;
- iv) that insofar as any obligation under any of the Documents is to be performed in any jurisdiction outside the Province, its performance will not be illegal or unenforceable by virtue of the laws of that other jurisdiction; and

¹This piece of equipment was the only one remaining in the HEL inventory.

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- v) the accuracy and currency of the indices and filing systems maintained in relation to the public registries where we have searched or inquired or have caused searches or inquiries to be conducted.

6. Qualifications

Since there is no title registration system in the Province relating to personal property, any opinion respecting title is based solely upon the relevant Documentation.

For the purpose of determining the validity under prior law of security interests created and registered before the implementation of the PPSA and transitioned by registration in the PPR, the Trustee has only reviewed the security agreements and their registrations referenced in the PPR search report section entitled: "Pre-PPSA registration information continued by this registration", endorsements, if any, on the security agreements reviewed and the pre-PPSA legislation and the applicable common law relating to their registration.

Both the PPSA, and the *Conditional Sales Act* (the latter statute being part of the "prior law") provide that property in goods pass to a purchaser from a seller or trader where the sale is in the ordinary course of business of the seller or trader. In some instances HEL transferred equipment subject to a security interest to a purchaser without discharging the security interest. In some cases the purchaser granted a security interest to another lender, while in other cases the purchaser transferred the equipment to a third party who, in turn granted a security interest to a lender. Due to the lack of evidence concerning all transactions involving the Assets, we are unable to determine if sales by HEL were "in the ordinary course of business" such as to enable the purchaser to receive clear title to the equipment in order to allow a subsequent lender to obtain a valid security interest or a subsequent transferee to obtain clear title.

No opinion is expressed as to the rank or priority of any security interest created by the Documentation.

No opinion is expressed with regard to any collateral covered by the Documentation, but not referred to in this Final Determination.

Pursuant to the terms of the Court Order establishing the Claims Plan, this Final Determination determines the validity of security claimed and whether such security has been properly perfected. For the assistance of readers, the Trustee has sometimes provided comments concerning the priority of such security vis-à-vis other parties but such priority-related comments are made without prejudice to any position which may be taken at any future date by any other party in regards to priorities.

Notwithstanding the findings in this Final Determination concerning the validity of the Claim as secured or otherwise, PricewaterhouseCoopers Inc. is not precluded by such determination from challenging the Claim as being reviewable or fraudulent pursuant to the provisions of the BIA or any applicable provincial legislation.

Except where a specific claim to proceeds has been made and material provided in support of that claim, the Trustee expresses no opinion with respect to claims to proceeds or claims involving tracing. An outline of the proceeds claims processes and issues are set out in s.13.

7. Overview of Claim

CFG claims that it holds a perfected security interest in the 10 assets listed above arising from four (4) Lease Agreements entered into in 1998, 1999, 2000 and 2001. Specifically, in 1998, Cyber Lease leased assets (supplied by HEL) to HEL and LEMS as lessees. Again, in 1999, Cyber Lease leased assets (supplied by HEL) to HEL as lessee. These leases were assigned to CFG. As well, CFG leased assets on 2000 and 2001 (supplied by HEL) to HEL as lessee. CFG takes the position that it has satisfied all the requirements to attach and perfect a security interest, including registration of the security interests in the PPR.

The Proof of Claim dated 16 May 2002, and the documents attached thereto (more particularly described below) indicate a total claim of **\$1,619,421.90**. This is exclusively a secured claim. This relates to 4 Leases as follows:

- Lease No. 11-889-0 (securing 3 assets, #1 -3 above). Balance outstanding of **\$61,410.37**.
- Lease No. 11-89-2 (securing 4 assets, #4 - 7 above). Balance outstanding of **\$372,641.29**.
- Lease No. 11-174-0 (securing 1 asset # 8 above). Balance outstanding of **\$199,084.26**.
- Lease No. 11-89-3 (securing 2 assets, #9-10 above). Balance outstanding of **\$986,286.14**.

CFG has not set out any specific claim with respect to proceeds/tracing.

8. Documentation

In preparing this final determination, the Trustee has considered and relied upon only the following information provided to it from all sources:

- i. PPR search conducted in the name of the debtor on March 21, 2002.
- ii. Proof of Claim dated 16 May 2002.
- iii. Correspondence dated April 5, 2002, August 1, 2002 and October 25, 2002 from Mark Klar of Chaiton & Chaiton setting out the claim of CFG.
- iv. The 4 leases:

a. Lease # 11-889-0 (assets #1-3 above)

- Copy of lease
- Certificate of acceptance dated 9 June/98
- Option to purchase
- Correspondence dated June 11/98 from John Deere Credit to Cyberlease confirming that John Deere Credit Inc. holds no interest in the 3 assets.
- Correspondence dated May 6, 1998 between Cyber Lease and CIBC addressing priorities.
- Invoice from HEL to Cyberlease with respect to the 3 excavators
- CFG's account statement for the period June 1, 1998-June 30, 1998 showing payment of the sum of \$855,021.09 (the amount invoiced)
- Electronic correspondence from TD Bank to CFG dated November 20, 2002 confirming payment to HEL of \$855,021.09 on June 18, 1998.

b. Lease # 11-89-2 (assets #4-7 above)

- Copy of lease
- Certificate of acceptance dated 9 July/99
- Option to purchase
- HEL invoice to Cyberlease dated July 9, 1999 for the sale of the 4 assets
- TD Bank on-line account statement for CFG confirming payment to HEL for the invoiced amount.

c. Lease # 11-174-0 (asset #8 above)

- Copy of lease
- Delivery and Acceptance Certificate dated Feb.16/01
- Pre-Authorized Payment Authorization dated Feb.16/01
- Confirmation of Insurance for the asset
- Correspondence dated Feb 15/01 from CFG to CIBC setting out the priorities.
- Invoice from HEL dated May 31/01 to Marine Contractors Inc. for 3 Excavators (s/n FF0200X501636, FF0200X501668 and FF0200X501676.) Trade Ins were the following: CAT 320B Excavator, Serial # 06CR04707, CAT 320B Excavator, Serial # 06CR05244, and CAT 320B Excavator, Serial # 06CR05245.
- HEL invoice to Cyberlease dated February 15, 2001 for the sale of the asset
- TD Bank on-line account statement for CFG confirming payment to HEL for the invoiced amount.

d. Lease #11-89-3 (assets # 9-10 above)

- Copy of Lease
- Delivery and Acceptance Certificate dated Sept.14/00
- Pre-Authorized Payment Authorization dated Sept.14/00
- HEL invoice to Cyberlease dated September 14, 2000 for the sale of the 2 assets
- TD Bank on-line account statement for CFG confirming payment to HEL for the invoiced amount.

9. Classification of the Assets

The actual subjective use to which goods are applied by the debtor dictates whether they will be classed as inventory, equipment or consumer goods. In this regard, it is the opinion of the Trustee that all of the assets in the list above were held by HEL for sale or lease and as such, form part of the inventory (s. 2(x) of the PPSA).

Note: Counsel for CFG maintains that these assets were used by HEL as equipment in accordance with s. 2 (p) of the PPSA. This is not accepted by the Trustee.

10. Application of the PPSA

As indicated by the documentation the secured transactions between CFG and HEL were in the form of equipment leases. These leases, which secured specific pieces of heavy equipment (broken down above), were all for a term of more than one year and were, in essence, financing leases as opposed to true leases. Section 4 of the PPSA confirms that such secured transactions are governed by the PPSA.

11. PRE-PPSA/ Transitioning Issues

The PPSA came into force in the Province on December 13, 1999. The transitioning provisions set out in Part VII of the Act (in particular s.75) create a means by which the new Act could apply to security transactions which pre-date it. In that regard, secured parties whose security pre-dates the PPSA (and the PPR registration system) were given a period of 2 years from the date of the coming into force of the Act (i.e. creditors had until December 13,2001) in which to perfect their pre-ppsa security interest in the PPR. In accordance with s.26 of the Regulations, secured creditors were required to register a financing statement that indicates, *inter alia*, under which prior registration law the security interest relates and also provides the prior registration number. If the provisions of the Act and Regulations were properly followed, the Act enables such secured parties to claim a date of perfection that extends back to the date of the pre-ppsa registration for purposes of priority. There are a number of conditions however. For example, defects in the pre-ppsa security could not be cured by the operation of the PPSA.

Transitioning issues are relevant for 2 of the 4 CFG Leases.

The dates for the 4 CFG leases are: June 1998 (#11-889-0), July 1999 (#11-89-2), September 2000 (#11-89-3) and February 2001 (#11-174-0). Transitioning issues are relevant for lease # 11-889-0 and # 11-89-2.

Lease #11-89-2

This transaction took place on 9 July 1999, prior to the coming into force of the PPSA. The Certificate of Acceptance executed 9 July 1999 indicates acceptance of the goods by HEL. Upon review of the lease, it is the opinion of the Trustee that it complies with the requirements of s. 5 of the CSA.

In accordance with the Regulations, CFG has registered a financing statement in the PPR (#80931) on Jan.31/00 which includes the following description:

General Description of Collateral: (1) 310SE Backhoe Loader S/N T0310SE877721; (1) 310SE Backhoe Loader S/N T0310SE677726; (1) 160LC Excavator S/N P00160X041035; (1) 450LC Base Excavator S/N FF0450X090370.

Pre-PPSA registration information continued by this registration.
733722 1999-07-15 Conditional Sales Act.

This registration indicates that prior to the PPR, this transaction was supported by a registration pursuant to the CSA on July 15, 1999, being registration # 733722. The Trustee has confirmed this registration with a search of the Old Registry. It is the opinion of the Trustee that the relevant date for purposes of perfection is the date of registration in the Old Registry.

Lease #11-889-0

This transaction took place on 5 June 1998, prior to the coming into force of the PPSA. The Certificate of Acceptance executed 9 June 1998 confirms acceptance of the goods by HEL. Upon review of the lease, it is the opinion of the Trustee that it complies with the requirements of s. 5 of the CSA.

In accordance with the Regulations, CFG has registered a financing statement in the PPR (#80913) on Jan.31/00 which includes the following description:

General Description of Collateral: (3) 892E Excavators, 32IN (800MM) Shoes, Standard Boom 4.00M (13' 1") ARM, Vandal Protection S/N FF892EX012642, S/N FF092EX012643, S/N FF892EX012455, DEERE ENG: RG6076A596348; RG6076A596350; RG6076A592086.

Pre-PPSA registration information continued by this registration.
697920 1998-06-11 Conditional Sales Act,
(Emphasis Added)

This registration indicates that prior to the PPR, this transaction was supported by a registration pursuant to the Conditional Sales Act on June 11, 1998, being

registration # 697920. The Trustee has confirmed this registration with a search of the Old Registry. It is the opinion of the Trustee that the relevant date for purposes of perfection is the date of registration in the Old Registry.

12. Perfection

Section 20 of the PPSA holds that there are two required elements to a perfected security interest in collateral, regardless of the order of occurrence. There must be:

(i) **attachment** in accordance with section 13, which requires:

1. Value must be given. Value is defined in s. 2(tt) to include any consideration sufficient to support a simple contract. However, a secured party need not have actually advanced the loan funds or the purchase money credit in order to satisfy the value requirement of section 13. Value is given as soon as a secured party makes a binding commitment to extend the loan or purchase money credited to the debtor.²
2. The debtor must have rights in the collateral; and
3. There must be a security agreement that meets the requirements of s. 11.

(ii) a **perfection step** in accordance with section 25 (perfection by possession) or section 26 (perfection by registration of a financing statement in the PPR.

Is there attachment?

(i) Value given?

YES. The leases are in the nature of a sale-leaseback transaction whereby the assets were sold by Hickman to the secured party and then leased back to it. While the leases contain confirmation from HEL that the assets were received and accepted by them, and this is evidence of value for the lease portion of the transaction, it is also necessary to provide evidence of value for the sale. As indicated above, the Trustee has been provided with evidence of value with respect to each of the leases. This is the form of invoices and back statements confirming payment to HEL of the invoiced amount. It is the opinion of the Trustee that this is sufficient evidence of value for the purposes of attachment.

(ii) Rights in the collateral?

YES Any real right in the collateral that the debtor may have, including but not limited to, a right of possession is sufficient to meet the requirements of s. 13³. HEL held possession of the assets. Furthermore, s. 13 (3) of the Act confirms that a lessee under a

² C. Walsh, *An Introduction to the New Brunswick Personal Property Act*, (1995) at p.83.

³ Ibid. at 84.

lease for a term of more than one year has rights in the goods for purposes of attachment when s/he obtains possession of them under the lease.

Note: For the purposes of expressing a position with respect to HEL's rights in the collateral, the Trustee has not made any determination with respect to HEL's title in the collateral at issue nor with respect to the lawfulness of HEL's possession thereof.

(iii) Have the evidentiary requirements of s. 11 been met?

YES The evidentiary requirements of s. 11, required for attachment, are established by the 4 leases. Specifically, in accordance with s.11(1) (b), the 4 leases are in writing, they have been signed by HEL as the debtor and each provides an adequate description of the collateral that is secured.

Is there a perfection step?

a. Lease No. 11-889-0(assets # 1-3 above)

YES.

Registration # 80913 described above.

Registration #1581161 dated Feb.4/02 contains the following information

Description: All inventory, products or other personal property supplied to or purchased by the Debtors, or either one of them, from the Secured Parties, or either one of them, including three 892E Excavators, 32IN (800MM) Shoes, Standard Boom 4.00M (13' 1")ARM, Vandal Protection, S/N FF892EX012642, S/N FF092EX012643, S/N FF892EX012455, DEERE ENG; RG6076A596348; RG6076A592086, and includes all attachments replacements, substitutions, accessories, accessions and additions thereto, together with all personal property received directly or indirectly as proceeds therefrom.

b. Lease No. 11-89-2(assets # 4-7 above)

YES.

Registration #80931 described above

Registration #1581602 dated February 4/02 contains the following information

Description: All inventory, products or other personal property supplied to or purchased by the Debtor from the Secured Parties or either of them including one (1) 310SE Backhoe Loader – S/N T0310SE877721, one (1) 310SE Backhoe Loader – S/N T0310SE677726, one (1) 160LC Excavator – S/N P00160X041035, and one (1) 450LC Base Excavator – S/N FF0450X090370, and includes all attachments, replacements, substitutions, accessories, accessions and additions thereto, together with all personal property received directly or indirectly as proceeds therefrom.

Motor Vehicle	One (1) 450LC Base Excavator	FF0450X090370
Motor Vehicle	One (1) 160LC Excavator	P00160X041035
Motor Vehicle	One (1) 310SE Backhoe Loader	T0310SE677726
Motor Vehicle	One (1) 310SE Backhoe Loader	T0310SE877721

c. Lease No. 11-174-0(asset # 8 above)

YES

Registration #803940 dated February 16/01 contains the following information

Description: "One 200LC Excavator Unit #C001071 s/n FF0200X501668"

d. Lease No. 11-89-3(assets # 9-10 above)

YES

Registration #551721 dated September 20/00 contains the following information

Description: "1 Model 608B Harvester s/n10BA1221 Unit #C000760. 1 Model 1270B Harvester s/n 01AB2086 Unit #C000745"

What constitutes an appropriate description of collateral comes from ss.23-24 of the Regulations. In particular, in accordance with s.23(1)(e) of the Regulations, items of inventory must be described in accordance with s.24(1) and s.24(2). It is the opinion of the Trustee that the collateral descriptions in the above-noted financing statements satisfy these requirements.

13. Proceeds

Section 29(1) of the Act provides a secured party with an automatic and statutory interest in the proceeds from the disposition of a secured asset by the debtor. While this right is automatic as against the debtor, the entitlement to proceeds must be perfected, in order to protect the secured party's entitlement as against competing creditors.

The Trustee has not made any determination as to CFG's entitlement to proceeds with respect to other creditors as this is an issue of priority and not within the Trustee's mandate under the Claims Plan. However, the Trustee has outlined below the statutory requirements that must be met by a secured party in order to assert a claim to proceeds from the disposition of collateral as against other secured creditors.

The perfected status of a security interest in proceeds depends firstly on whether the security interest in the original collateral was perfected when the proceeds arose. If not, the secured party will have to perfect its security interest in the proceeds as original collateral either by registration or taking possession. If so, the question of whether the secured party must independently perfect its security interest in the proceeds depends on the method by which the security interest in the original collateral was perfected.⁴

Section 29(3) provides for 3 instances where perfection in proceeds is automatic and continuous. A security interest in proceeds is a continuously perfected security interest where the interest in the original collateral is perfected by a registration of a financing statement under Section 26 that:

⁴ Ibid. at p.140.

- (a) Includes a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind;
- (b) Includes a description of the original collateral, where the proceeds are of a kind that are within the description of the original collateral; or
- (c) Includes a description of the original collateral, where the proceeds consist of money, cheques or deposit accounts in a bank, credit union, or similar financial institutions.

If proceeds do not fall into one of these categories, s. 29(4) of the PPSA requires registration with respect to the proceeds collateral within fifteen days after such proceeds arise. Such registration would be in accordance with the same rules as the original collateral.⁵

As indicated above, collateral descriptions are governed by ss.23-24 of the Regulations. These rules extend to descriptions of collateral in the form of proceeds as well.

Note as well that the ability to assert a claim to proceeds is contingent upon two conditions. The debtor must have acquired rights in the proceeds and the proceeds themselves must be traceable (ref. s. s.2(ff)).

14. Additional Comments on Priorities

While it is not within the mandate of the Trustee or Trustee's counsel to determine priorities, we nevertheless offer the following comments, in order to provide assistance to any creditors who may also have a valid and perfected security interest in the assets and wish to determine, for their own benefit, their ranking with respect to same:

- The documents indicate that in all 4 leases the assets secured were supplied by HEL and then leased back to HEL by CFG. Although such sale and lease-back arrangements appear to entitle CFG to claim a PMSI, subsection 2(hh) of the PPSA specifically excludes "a transaction of sale by and lease back to the seller" from being a PMSI.
- If these leases were not sale/leaseback type transactions, there are instances whereby an Inventory financier such as CFG may be entitled to claim a super-priority status (ref. s. 35(2)). CFG has not provided evidentiary support for such an entitlement.
- As established by s. 36 of the PPSA, the relevant date for the determination of the priority of CFG's interest in the assets are:
 - Lease # 11-889-0: June 11, 1998
 - Lease # 11-89-2: July 15, 1999

⁵ Ibid. at 140.

- Lease # 11-174-0: February 16, 2001
- Lease # 11-89-3: September 20, 2000

15. Auction Results

One Excavator (FF892EX012643) was sold at the Trustee's auction on July 12, 2002, in Halifax, Nova Scotia. Net amount obtained (bid amount less LVG buyer's premium) was \$145,000.00.