

THE DEVIL IS IN THE DETAILS: A CASE COMMENT ON *ROYAL BANK V. RAMCO SALES INC.*

CLAYTON BANGSUND*

I. INTRODUCTION

In *Royal Bank v. Ramco Sales Inc.*,¹ Kent J. determined, among other issues, entitlement to surpluses realized on the sale of seized items.

II. FACTUAL BACKGROUND

The items in dispute included a Mack truck, a skid office, a double drop trailer and a Cadillac Escalade (collectively, the “Goods”). Each of the Goods appears to constitute a “serial number good” (as that term is defined in the *Personal Property Security Regulation* (the “Regulations”)), and although it is not entirely clear from the text of the decision, at least some of the Goods appear to have been acquired by Ramco as “equipment”² (as that term is defined in the *Personal Property Security Act* (the “PPSA”)).

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¹ 2010 ABQB 1.

² The decision is silent on the characterization of the Goods as “equipment” or “inventory”. In paragraph 1, Kent J. identified the Goods as “equipment”, but it is likely that she was using the term in the common vernacular sense, as opposed to the technical sense as set out in section 1(1)(p) of the PPSA. Because Ramco was in the business of sales, some of the Goods may have been inventory. However, the skid office, for example, appears to have been used by Ramco as an office space as opposed to a piece of inventory for sale in the ordinary course. To the extent the Goods were “equipment” within the meaning of the definition in section 1(1)(p) of the PPSA, the analysis should have varied as discussed herein.



The Goods, as well as additional property located away from Ramco's premises, were purchased with funds advanced by Canadian Western Bank ("CWB"). Royal Bank of Canada ("RBC"), Ramco's lead secured creditor holding a security interest in all present and after-acquired personal property, subsequently appointed Price Waterhouse Coopers ("PWC") as receiver and manager of Ramco. The parties agreed that CWB had a valid purchase money security interest in the Goods thereby entitling it to priority to the extent of the obligations owed in respect of such Goods. The sole priority issue, outlined below, was in relation to the surplus realized on the sale of the seized Goods.

III. ISSUE

Which party, CWB or RBC, was entitled to the surplus realized on the sale of the seized Goods after payment to CWB on account of its purchase money security interest?

IV. DECISION & ANALYSIS

The parties' respective positions respecting the priority issue are aptly summarized at paragraphs 3 and 4 of the decision:

The fourth and most difficult issue is what is to be done with any equity left after the sale of each piece of equipment. CWB takes the position that if there is equity from one piece of equipment that equity first is applied against the deficiency, if any, of any of the other three pieces of equipment and if the indebtedness with respect to those pieces of equipment is paid in full, then any equity that is left goes next to pay off the balance owing on the entire CWB loan. The receiver would only receive funds if the entire balance of the CWB loan is paid off and there are still funds available.

The Receiver and the Royal Bank take the position that each piece of equipment is discrete. If the sale of the equipment results in surplus funds, those surplus funds go



to the receiver. They cannot be applied to any deficit with respect to other pieces of equipment or the loan agreement itself.³

In conducting her analysis, Kent J. identified section 61 of the PPSA as the appropriate provision dealing with surpluses realized on the sale of seized collateral.⁴ Section 61(1) is reproduced below:

Where a security interest secures an indebtedness and the collateral has been dealt with under section 57 or has been disposed of in accordance with section 60 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested persons, be accounted for and paid in the following order to

(a) a person who has a subordinate security interest in the collateral

(i) who has, prior to the distribution of the proceeds, registered a financing statement according to the name of the debtor or according to the **serial number of the collateral in the case of goods of a kind prescribed by the regulations as serial number goods**, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person who has an interest in the collateral, if that person has given a written notice of that person's interest to the secured party prior to distribution of the proceeds, and

(c) the debtor or any other person who is known by the secured party to be the owner of the collateral

but the priority of the interest in the surplus of a person referred to in clause (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section. **(emphasis added)**

Kent J. then offered the following comments starting at paragraph 15:

The authors then consider the relationship between a PMSI and an after-acquired property clause in a prior security agreement. The priority given the PMSI with respect to discrete, individual pieces of property alleviates the situational monopoly that an after-acquired property clause in a prior security agreement creates.

³ *Ibid.*, at paras. 3-4.

⁴ *Ibid.*, at para. 10.



Without the PMSI priority, the prior agreement would handcuff the debtor to one creditor on whatever terms that creditor demanded.

This analysis fits nicely with the overall intent of the *PPSA* to provide an ordered regime to facilitate commerce in a balanced way for a debtor and its creditors. I appreciate that it could be argued that the WCB (sic) can "demonstrate that [its] loan has been used by the debtor to acquire a specific and identifiable asset," to use the words of Jackson and Krenman, for all of the equipment, even that which has not been located. **However, to permit a PMSI creditor to use surplus funds from an identifiable, existing asset to pay off debt with respect to other identifiable, existing assets or any deficiency with respect to assets no longer available would upset the balance I spoke of. The PMSI creditor would usurp the priority of the prior secured creditor.**

In the result, any equity left after each piece of equipment is sold will be paid to the Receiver.⁵ (emphasis added)

Kent J. concluded that RBC was entitled to any surplus realized after sale of the Goods. While the general thrust of Justice Kent's reasoning is correct, her conclusion overlooked one significant – and determinative – issue, to wit, the nature of the Goods in dispute.

Because the Goods were serial number goods, it does not automatically follow that RBC, as a lead creditor with a registration against all present and after acquired property of Ramco, was entitled to the surplus realized after payment to CWB on account of its purchase money security interest. Rather, to correctly determine priority to the surplus, one must still consider section 61 of the *PPSA* in conjunction with the residual priority rules found in section 35.⁶ Relevant excerpts of section 35 are reproduced below:

⁵ *Ibid.*, at paras. 15-17.

⁶ While section 61(1) does not contain any specific language respecting "equipment" or "inventory", the provision must be construed in light of section 35 of the *PPSA* which contains the residual priority rules. For example, if a surplus is realized in respect of serial number goods acquired by the debtor as inventory, a secured party should not be deprived of the surplus because it has not registered against the serial number for such goods. Inventory need not be identified by serial number pursuant to the *PPSA* and its Regulations.



(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between perfected security interests in the same collateral is determined by the order of occurrence of the following:

(i) the registration of a financing statement, without regard to the date of attachment of the security interest,

(ii) possession of the collateral under section 24, without regard to the date of attachment of the security interest, or

(iii) perfection under section 5, 7, 26, 29 or 77,

whichever is earlier,

(4) A security interest in goods that are equipment and are of a kind prescribed by the regulations as serial number goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (9) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

Unless the Goods were held by Ramco as inventory, any surplus realized on the sale of the Goods should have been allocated to the party who first registered *against the serial number of the Goods*.⁷ Although not explicitly stated in the decision, it is probable that CWB was the first party to register against the serial number of each of the Goods because it was the party who financed their acquisition and would have first been aware of their serial numbers. Simply put, Justice Kent's closing remarks were too general in nature and didn't take into account the complexities that arise where serial number goods are involved.⁸

⁷ Although the issue was not specifically addressed in the decision, we must assume that CWB's security documentation provided that in addition to the Goods being purchase money security, they were also general security for all of Ramco's debts to CWB. If this were not the case, CWB would have no secured claim against any surpluses realized on the sale of the Goods.

⁸ See Ronald CC. Cuming & Roderick J. Wood, *Alberta Personal Property Security Act Handbook*, 4th ed. (Toronto: Carswell, 1998) at 331, where the authors discuss the priority regime for serial number goods:

When "serial number goods" are held by the debtor as equipment or inventory, the secured party has the option to describe the goods in general terms or specifically by serial number. If the secured party chooses to describe the equipment by serial number in the appropriate field on the financing statement, the maximum level of protection against competing interests is obtained. The security interest will have priority over the interest of a



V. CONCLUSION

Justice Kent's comments in paragraphs 16 and 17 are correct to the extent the Goods were not serial number goods, or alternatively, serial number goods acquired as inventory. However, if the Goods were serial number goods acquired by Ramco as equipment, Justice Kent's concluding statements (and potentially her disposition of the matter) were incorrect as they failed to consider the requirements set out under sections 35 and 61 of the PPSA. This is an example of how one seemingly small detail can drastically alter the outcome of a priority dispute. As the saying goes, the devil is in the details.

subsequent buyer of the goods who acquired her interest in a sale out of the ordinary course of the debtor's business. It will have priority over any subsequently perfected security interest in the goods and priority over a judgment creditor or trustee in bankruptcy of the debtor.

If the secured party chooses to describe the equipment only in general terms in the general collateral description field on the financing statement, his security interest has priority only with respect to judgment creditors and the trustee in bankruptcy of the debtor. He will not have priority over a buyer who acquired the equipment for value and without knowledge of the security interest (section 30(6) and (7)), and unless he has a purchase money security interest, **he will not have priority over other perfected security interests in the equipment (section 35(3)). (emphasis added)**

