FEDERAL COURT OF AUSTRALIA

Registrar of Personal Property Securities v Brookfield [2024] FCA 29

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| File number(s): |  |
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| Judgment of: | **SARAH C DERRINGTON J** |
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| Date of judgment: | 30 January 2024 |
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| Catchwords: | **CORPORATIONS** – Securities – registration of purported security interest under *Personal Property Securities Act 2009* (Cth) – whether applicant applied to register financing statements – whether applicant was a secured party – whether belief on reasonable grounds applicant was or would become secured party in relation to collateral – whether debt under sale and purchase agreement created security interest in favour of applicant – imposition of pecuniary penalty |
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| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 29(2)(a)  *Australian Securities and Investments Commission Act 2001* (Cth)s 1(2)(g)  *Commonwealth Electoral Act 1918* (Cth)  *Competition and Consumer Act 2010* (Cth)Sch 2, s 2  *Corporations Act* *2001* (Cth)Ch 7, s 760A  *Crimes Act 2014* (Cth)ss 4AA  *Fair Work Act 2009* (Cth)s 546  *Regulatory Powers (Standard Provisions) Act 2014* (Cth) Pt 4, ss 80, 81, 82, 85, 93  *Personal Property Securities Act 2009* (Cth) Pt 5.6, 6.3, ss 3, 8, 10, 12, 151, 221, 271, 343  *Sale of Goods Act 1896* (Qld) s 41 |
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| Cases cited: | *Australian Building and Construction Commissioner v Pattinson* [2022] HCA 13; 274 CLR 450  *Australian Competition and Consumer Commission (ACCC) v Yazaki Corporation* [2018] FCAFC 73; 262 FCR 243  *Australian Competition and Consumer Commission v Google LLC (No 4)* [2022] FCA 942  *Australian Competition and Consumer Commission v Uber B.V.* [2022] FCA 1466  *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166  *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FLR 560  *Brookfield, in the matter of Real Estate Now Pty Ltd v Real Estate Now Pty Ltd* [2020] FCA 352  *Brookfield v Real Estate Now Pty Ltd and Anor* [2023] QDC 86  *Brookfield v Real Estate Now Pty Ltd* [2017] FCA 1083  *Brookfield v Real Estate Now Pty Ltd* [2019] FCA 993  *Brookfield v Real Estate Now Pty Ltd* [2021] QDC 95  *Brookfield v RealEstate Now Pty Ltd* [2021] QDC 226  *Brookfield v Realestate Now Pty Ltd* [2022] QDC 87  *Brookfield v Real Estate Now Pty Ltd* [2023] QCA 259  *Brookfield v State of Queensland* [2023] QSC 125  *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482  *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39  *Curo Capital Pty Ltd v Registrar of Personal Property Securities* [2020] FCA 1515  *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2014] VSCA 326; 49 VR 86  *Elderly Citizens Homes of SA Inc v Balnaves* (1998) 72 SASR 210  *Electoral Commissioner of Australian Electoral Commission v Wharton (No 3)* [2021] FCA 742  *George v Rockett* (1990) 170 CLR 104  *Gye v McIntyre* (unreported, Beaumont J, 26 May 1992)  *Hoobin v Samuels* (1971) 2 SASR 238  *Macquarie Leasing Pty Ltd v DEQMO Pty Ltd* [2014] NSWSC 1466  *Macquarie Leasing Pty Ltd v The Registrar of the Personal Property Securities Register* [2014] NSWSC 1677  *Makhoul v Barnes* (1995) 60 FCR 572  *National Australia Bank Ltd v Garrett* [2016] FCA 714; 340 ALR 532  *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40  *Real Estate Now Pty Ltd v Brookfield* [2018] FCCA 3072  *Rubis v Garrett as Trustee of the Andrew Garrett Family Trust* *Trading as Dynamic Commercial Workforce Solutions* *(No 2)* [2018] FCA 2011  *Sandhurst Golf Estates Pty Ltd v Coppersmith Pty Ltd* (2014) 285 FLR 267  *Trade Practices Commission v CSR Ltd* [1990] FCA 762  *Treasury Wine Estates Vintners Ltd v Garrett* [2016] FCA 715  *Warehouse Sales Pty Ltd (in liq) and Lewis and Templeton v LG Electronics Australia Pty Ltd* [2014] VSC 644; 291 FLR 407  *Whyked Pty Ltd v Yahoo Australia and New Zealand Pty Ltd* [2006] NSWSC 650 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Regulator and Consumer Protection |
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| Number of paragraphs: | 122 |
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| Date of hearing: | 18 December 2023 |
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| Counsel for the Applicant: | Ms C Schneider |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | The Respondent appeared in person |
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ORDERS

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|  | | QUD 202 of 2023 |
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| BETWEEN: | REGISTRAR OF PERSONAL PROPERTY SECURITIES  Applicant | |
| AND: | IAN WALTER BROOKFIELD  Respondent | |

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| order made by: | SARAH C DERRINGTON J |
| DATE OF ORDER: | 30 january 2024 |

THE COURT DECLARES THAT:

1. On 4 February 2020, the Respondent contravened s 151(1) of the *Personal Property Securities Act 2009* (Cth) by applying to register a financing statement that described collateral, in circumstances where the Respondent did not believe on reasonable grounds that the person described in the financing statement as the secured party (being the Respondent himself) was, or would become, a secured party in relation to the collateral.

2. In relation to the Personal Property Securities Register registration created on the application of the Respondent as described in Declaration 1 above (being PPSR registration 202002040022809 (**Registration 2809**)), on each day from 11 February to 20 February 2020, by operation of s 93 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), the Respondent contravened s 151(2) of the *Personal Property Securities Act 2009* (Cth) by failing to amend Registration 2809 to end its effect within five business days after the day of registration, in circumstances where:

(a) the Respondent was not a secured party in relation to the collateral described in the financing statement, since that financing statement was registered; and

(b) there were not, at any relevant time, reasonable grounds for the belief that the person described in the financing statement as the secured party (being the Respondent himself) was, or would become, a secured party in relation to the collateral.

3. On 25 May 2022, the Respondent contravened s 151(1) of the *Personal Property Securities Act 2009* (Cth) by applying to register a financing statement that described collateral, in circumstances where the Respondent did not believe on reasonable grounds that the person described in the financing statement as the secured party (being the Respondent himself) was, or would become, a secured party in relation to the collateral.

4. In relation to the Personal Property Securities Register registration created on the application of the Respondent as described in Declaration 3 above (being PPSR registration 202205250069183 (**Registration 9183**)), on each day from 23 June 2022 to 11 July 2022, by operation of s 93 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), the Respondent contravened s 151(2) of the *Personal Property Securities Act 2009* (Cth) by failing to amend Registration 9183 to end its effect within five business days after the day of registration, in circumstances where:

(a) the Respondent was not a secured party in relation to the collateral described in the financing statement, since that financing statement was registered; and

(b) there were not, at any relevant time, reasonable grounds for the belief that the person described in the financing statement as the secured party (being the Respondent himself) was, or would become, a secured party in relation to the collateral.

**THE COURT ORDERS THAT:**

5. Pursuant to s 82(3) of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth), the Respondent pay to the Commonwealth of Australia a pecuniary penalty in the amount of $30,000 in respect of the Respondent’s contraventions of ss 151(1) and (2) of the *Personal Property Securities Act 2009* (Cth).

6. The matter be listed for hearing on the question of costs on a date to be advised administratively.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

SARAH C DERRINGTON J

1 On 6 July 2015, **Blueprop** Pty Ltd, as Vendor, entered into a “Rent Roll Sale and Purchase **Agreement**” (the **Agreement**) with **Real Estate Now** Pty Ltd, as Purchaser, and Mr Mark Mergard, as Warrantor, for the sale of its **Rent Roll**, being a list of management agency agreements contained in Schedule 1 to the Agreement.

2 It is apparent from the terms of the Agreement that Mr Mergard was to take over the existing rent roll of approximately 62 properties and operate it using his licence as a real estate agent. Clause 4.1 provided that “[t]he profits, benefit, possession and the risks and obligations of the Rent Roll will remain with the Vendor until the Completion Date”. “Completion” was defined to mean “completion of the sale and purchase of the Rent Roll 60 days from date of commencement”. That date was 4 September 2015.

3 It is uncontroversial that the Rent Roll was transferred by Blueprop to Real Estate Now. For the purposes of these proceedings, the Registrar did not put in issue whether the purchase price of $100,650.00 was ever paid to Blueprop (but see *Brookfield v Real Estate Now Pty Ltd and Anor* **[2023] QDC 86**; affirmed on appeal, *Brookfield v Real Estate Now Pty Ltd* [2023] QCA 259 (***Brookfield* [2023] QCA**). On 31 October 2016, Blueprop purported to assign the debt arising under the Agreement to Mr Ian Brookfield (the **Assignment**).

4 The essential dispute between the **Registrar** of Personal Property Securities and Mr Brookfield is whether, by virtue of the Agreement, Blueprop held a “security interest” for the purposes of the *Personal Property Securities Act 2009* (Cth) (**PPSA**). All other issues in dispute are subsidiary to the resolution of that question.

5 By originating application filed on 15 May 2023, the Registrar seeks declarations of contraventions of the PPSA, pecuniary penalty orders, and costs. The Registrar alleges that Mr Brookfield has contravened ss 151(1) and (2) of the PPSA in respect of two registrations created by Mr Brookfield on the Personal Property Securities Register (**PPSR**), being PPSR registration 202002040022809 (**Registration 2809**) and PPSR registration 202205250069183 (**Registration 9183**), when he did not believe on reasonable grounds that he was, or would become, a secured party in relation to the relevant collateral described in the financing statements, and in failing to apply to amend their effect within five business days after the respective days on which they were registered.

6 Prior to these two registrations, between March 2016 and March 2019, Mr Brookfield had made applications to register seven financing statements in respect of a security interest allegedly granted by Real Estate Now, as grantor, to Mr Brookfield, as the secured party, in collateral described variously as “Commercial property” and/or “Consumer property” of Real Estate Now (together, the **Previous Registrations**) and further identified as:

(1) “Rent Roll as per contract signed by the seller on the 6th day of July 2015 consisting of 61 properties being purchased at $1,500 per property. Total value $100,650. In addition, the rent roll income @ $5,000 per month commencing July 2015 until such time as the purchaser has paid the purchase price in full” (**Registration 8230**);

(2) “Commercial property” or “Consumer property” of Real Estate Now (**Registrations 6866, 6897, 6023, 1157, 4349**); and

(3) “Commercial property” of Kamark Properties Pty Ltd (**Kamark Properties**) (**Registration 3127**), being a company of which Mr Mergard was a director.

7 Mr Brookfield was self-represented. He describes his occupation as “[c]orporate investigator”, which I understand to be a person who is licenced under relevant legislation to conduct investigations into corporations or firms to assess any number of issues that may affect that corporation or firm, including by conducting interviews, evaluating financial records, reviewing contracts and agreements, and gathering evidence. Although he is not qualified as a lawyer, I infer that he has some knowledge of the usual terms of commercial contracts, including those relevant to security interests. In the course of his submissions, Mr Brookfield said that he has had “30 years [of] coming in the Federal Court”. In relation to the dispute that has arisen out of the Agreement, he has represented himself in four matters in the District Court of Queensland, *Brookfield v Real Estate Now Pty Ltd* [2021] QDC 95; *Brookfield v RealEstate Now Pty Ltd* [2021] QDC 226; *Brookfield v Realestate Now Pty Ltd* **[2022] QDC 87**; *Brookfield v Real Estate Now Pty Ltd and Anor* **[2023] QDC 86**, and in the appeal from the latter decision in the Court of Appeal, *Brookfield* [2023] QCA; in the Federal Circuit Court, *Real Estate Now Pty Ltd v Brookfield* **[2018] FCCA** 3072; and in four matters, including this one, in the Federal Court, *Brookfield v Real Estate Now Pty Ltd* [2017] FCA 1083; *Brookfield v Real Estate Now Pty Ltd* **[2019] FCA** 993; and *Brookfield, in the matter of Real Estate Now Pty Ltd v Real Estate Now Pty Ltd* [2020] FCA 352.

8 Mr Brookfield’s interlocutory application filed on 2 November 2023 was dismissed by order 7 of the orders of this Court dated 3 November 2023. That application sought a stay of these proceedings pending the hearing of an application he filed in the Administrative Appeals Tribunal (**AAT**), belatedly, on 31 October 2023 seeking review of the Registrar’s decision to remove Registration 9183.

9 The Registrar relied on the affidavit of Mr Andrew Marshall filed 18 August 2023, as amended under oath during the hearing. Mr Marshall was cross-examined by Mr Brookfield. Nothing relevant emerged from cross-examination and I accept Mr Marshall’s evidence.

10 For the purposes of the hearing, Mr Brookfield relied only on his affidavit filed on 2 November 2023. He was not cross-examined.

11 The contraventions alleged by the Registrar raise two key issues for determination by this Court:

(1) Whether Mr Brookfield applied to register the financing statements in respect of Registration 2809 and Registration 9183; and

(2) Whether, at the time Mr Brookfield applied to register those financing statements, he believed on reasonable grounds that he was, or would become, a secured party in relation to the collateral described in each financing statement.

# THE RELEVANT LEGISLATIVE PROVISIONS

12 It is important in the circumstances of this case to remember that, from 2009, the PPSA made a fundamental change to the law relating to securities in and over personal property. It adopts what is referred to as a ‘functional approach’ to personal property law, meaning that the PPSA applies to transactions which have the effect of securing a payment or other obligation, regardless of the form of the transaction, the nature of the debtor, or the jurisdiction in which the personal property or the parties are located.

13 The legislative scheme created by the PPSA is described in some detail by Jackson J in ***Curo******Capital*** *Pty Ltd v Registrar of Personal Property Securities* [2020] FCA 1515. I gratefully adopt his Honour’s description of the features relevant to these proceedings.

[26] The PPSA creates a system of notice of security interests by registration, as distinct from a system whereby interests are created by registration. Its purpose is to provide persons searching the system with enough information to know whom to contact to find out more about a security interest: see *Auburn Shopping Village Pty Ltd v Nelmeer Hoteliers Pty Ltd* [2017] NSWSC 1230; (2017) 324 FLR 378 at [64] -[66] (Ward CJ in Eq), quoting *Re Lambert* (1994) 20 OR (3d) 108 at [32]-[33]. As I have already adverted to, registration of security interests, and the timing of registration, can be important matters such as competing priorities between different security interests.

[27] The Registrar has the functions given under the PPSA or any other Act: s 195(1). He (the present Registrar being male) has power to do all things necessary or convenient to be done for or in connection with the performance of his functions: s 195(2). He may conduct an investigation into any matter for the purpose of performing his functions: s 195A(1).

[28] One of the Registrar's key functions is the establishment and maintenance of the PPSR: s 147(1). With presently immaterial exceptions, he must ensure that the PPSR is operational at all times: s 147(4). An application to register an interest (by a 'financing statement') or to amend a registered interest (by a 'financing change statement') must be registered if it is in the approved form, any fee has been paid, the registration is not prohibited by the regulations and the Registrar is not satisfied that the application is frivolous, vexatious or offensive or contrary to the public interest or made in contravention of s 151: s 150(3). So there is no positive obligation on the Registrar to be satisfied of the accuracy of a registration before it is registered.

[29] It was common ground that the PPSR is in practice, a computer database which is searchable at all times by members of the public and which any person seeking to make or amend a registration can add to directly. There is no process by which new registrations are regularly checked or vetted by a human being before they are publicly available for search.

14 Section 151(1) of the PPSA is a civil penalty provision. It provides:

A person must not apply to register a financing statement, or a financing change statement, that describes collateral, unless the person **believes on reasonable grounds** that the person described in the statement as the secured party **is, or will become, a secured party** in relation to the collateral (otherwise than by virtue of the registration itself).

Civil penalty: 50 penalty units.

(Emphasis added.)

15 Section 151(2) is also a civil penalty provision. It provides:

If a financial statement, or a financing change statement, that describes collateral has been registered on the application of a person, the person must, within the period covered by subsection (3), apply to register a financing change statement to amend the registration to end its effect with respect to the collateral, if:

(a) **the person** described in the statement as the secured party **has never**, since the statement was registered, **been a secured party** in relation to the collateral (other than by virtue of the registration itself); **and**

(b) there are **no reasonable grounds** (or there are no longer any reasonable grounds) **for the belief** mentioned in subsection (1).

Civil penalty: 50 penalty units.

…

(Emphasis added.)

16 Section 151(3) prescribes the period for compliance to be “as soon as practicable, or 5 business days, whichever is earlier” after the day of registration or amendment, or the day on which there stopped being reasonable grounds for the belief.

17 The Registrar’s power to bring these proceedings, and this Court’s jurisdiction to make pecuniary penalty orders, in relation to ss 151(1) and (2), arises by operation of s 221 of the PPSA and ss 80-82 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (**Regulatory Powers Act**).

18 It is uncontentious that Mr Brookfield applied for both registrations and that he did not register a financing change statement to amend either registration within the prescribed period.

19 Consequently, and as the Registrar submitted, two questions arise for determination in deciding whether the declarations sought in relation to Mr Brookfield’s conduct should be made and whether any pecuniary penalties ought to be imposed.

20 The first question is whether, at the relevant times, Mr Brookfield believed on reasonable grounds that he was, or would become, a secured party in relation to the collateral. That first question must be answered at three relevant points in time: 4 February 2020, when the financing statement in respect of Registration 2809 was lodged; 25 May 2022, when the financing statement in respect of Registration 9183 was lodged; and within the period prescribed by s 151(3) of the PPSA. The answer to this question is relevant to the inquiry in respect of each of ss 151(1) and 151(2).

21 The second question, which is relevant only to the inquiry in respect of s 151(2), is whether Mr Brookfield has ever been a secured partyin relation to the collateral.

22 It is convenient to deal first with the second question.

### Was Mr Brookfield a secured party?

23 The financing statement submitted on 4 February 2020, which led to Registration 2809, contained, inter alia, the following details:

Registration kind: Security interest

Registration start time: 04/02/2020 12:21:17 (Canberra Time)

Registration end time: 04/02/2045 23:59:59 (Canberra Time)

Registration last changed: 20/02/2020 12:21:17 (Canberra Time)

Subordinate Registration: Not stated

**Grantor Details:**

Organisation identifier: 153307432 Organisation identifier type: ACN

Organisation name: REAL ESTATE NOW PTY LTD (Verified)

**Collateral Details**

Collateral type: Commercial property

Collateral class: All present and after-acquired property - No exceptions

**Secured Party Details:**

Family name: Brookfield

Given names: Ian Walter

24 The date of “Registration last changed” was the date on which the registration was brought to an end by the Deputy Registrar.

25 On 11 February 2020, the Deputy Registrar notified Mr Brookfield that he was considering removing the registration because he had become concerned as to whether Mr Brookfield’s use of the PPSR might be without a genuine basis. He invited Mr Brookfield to provide any information which would support that the registration should remain on the PPSR.

26 On 19 February 2020, Mr Brookfield provided “supporting documents”, being the Agreement and the Deed of Assignment.

27 The Deputy Registrar caused the registration to be removed on 20 February 2020 and informed Mr Brookfield in writing of the terms of s 151(1). Mr Brookfield was also informed of his right to seek a review of the decision in the AAT.

28 In response to an enquiry from Mr Brookfield as to why he was not legally entitled to secure his asset against Real Estate Now, the Deputy Registrar wrote, on 2 March 2020:

Both on this occasion and on the 7 previous occasions that we removed your registrations, you provided a ‘Rent Roll Sale and Purchase Agreement’ **(Agreement)** as evidence of the security interest. After reviewing all evidence provided by you, including the Agreement, I have found no evidence of a security interest. The Agreement, regardless of whether it is countersigned or not, does not contain any evidence of a security interest being granted.

Please note, my decision only relates to whether or not you had provided evidence of a valid security interest (not whether or not a debt may be owed to you, or whether you may be the owner of the rent roll).

A security interest is an interest in personal property provided for by a transaction that, in substance, secures payment or performance of an obligation. It can also arise from consignments and certain long-term leases. A security interest is not established by a debt alone or by a disagreement on some issue. A security interest is created by a security agreement. And, a security agreement is an agreement or act, or writing evidencing such an agreement or act, in which a security interest in personal property is granted.

Without a security agreement, or the anticipation of one, registering a security interest on the PPSR is prohibited. Under s 151 of the PPS Act a person must not apply to make a registration that describes collateral unless they believe on reasonable grounds that the person described in the application as the secured party is or will become a secured party in relation to the collateral.

A breach of section 151 may result in a court ordered civil penalty of up to $10 500 for an individual and $52 500 for a body corporate.

…

You should consider this information carefully before considering whether to apply to register any further financing statements on the PPSR, as based on the evidence you have provided to date, you do not hold a registerable security interest.

29 Mr Brookfield responded by saying:

I have sought advice from liquidators and solicitors who have confirmed to me that when an asset is sold, that asset becomes encumbered until such time as it is paid for in full … what do I need to supply in order to take a security over my asset ??

30 Further correspondence between the Deputy Registrar and Mr Brookfield ensued. On 4 March 2020, the Deputy Registrar referred Mr Brookfield to s 12 of the PPSA. On 5 March 2020, Mr Brookfield responded:

Good morning Sir,

I respectfully confirm that I have already sought senior counsel advice on this matter and provided counsel with an identical set of documents as provided to your office. The advice is that more than one section of section 12 of the Personal Property Securities Act 2009 (Cth) is met and multiple sections of the act qualify for a security interest to be lodged against this entity.

The key points of the security are;

The Rent Roll is an asset

The Rent Roll is defined in law as property

The property is capable of being sold by the said company

The property is capable of being transferred by the said property [sic]

A debt is owed against that asset/property

The debt is owed by the said company (Realestate Now Pty Ltd)

An invoice was raised against the said company which remains unpaid

There was a pledge by the said company to pay for the property

The pledge was never fulfilled

…

31 Just over two years later, on 25 May 2022, Mr Brookfield submitted the financing statement, which led to Registration 9183, and which was in substantially similar terms to the financing statement in respect of Registration 2809 that had been removed previously by the Deputy Registrar. It contained, inter alia, the following details:

Registration kind: Security interest

Registration start time: 25/05/2022 17:24:40 (Canberra Time)

Registration end time: 25/05/2029 23:59:59(Canberra Time)

Registration last changed: 25/05/2022 17:24:40 (Canberra Time)

Subordinate Registration: Not stated

**Grantor Details:**

Organisation identifier: 153307432 Organisation identifier type: ACN

Organisation name: REAL ESTATE NOW PTY LTD (Verified)

**Collateral Details**

Collateral type: Commercial property

Collateral class: All present and after-acquired property - No exceptions

**Secured Party Details:**

Family name: Brookfield

Given names: Ian

32 Similar correspondence passed between Mr Brookfield and the Deputy Registrar as had occurred in relation to Registration 2809. This time, in response to the notice in respect of discretion to remove data dated 23 June 2022, on 7 July 2022, Mr Brookfield referred a Delegate of the Registrar to the Agreement, stating:

… I would like to advise that a security interest is granted by the vendor within the sales and purchase agreement as attached at page 3 of 23 under title Security Interest.

As a direct result of this inclusion within the sales and purchase agreement, I am legally and with consent under the contract able to register a security interest under PPSR …

33 Registration 9183 was removed on 11 July 2022 and Mr Brookfield was again advised of his rights with respect to the AAT. As mentioned earlier, Mr Brookfield eventually made an application to the AAT on 31 October 2023, after the trial of this matter had been listed, and well outside the time limit prescribed for an application for review:s 29(2)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth).

34 Before this Court, Mr Brookfield maintained his position that he holds a security interest in the Rent Roll and subsequent income from the Rent Roll. He contends that interest is equitable. He submitted:

… commonsense tells the average person in Australia who’s reasonable that this company has taken a rent roll, haven’t paid for it. Of course, the beneficiary of the payment of that business is entitled to be secured against that business until it’s paid for … that business is not freehold till they pay me in full and a reasonable person would view that I’m entitled to secure my financial interest against that business until they pay me.

35 In order for Mr Brookfield’s position to be accepted, he must first establish that Blueprop held a security interest in the Rent Roll. If it did not, the Assignment cannot assist Mr Brookfield.

36 To the extent that Mr Brookfield submits that Blueprop was *entitled* to secure its financial interest in the Rent Roll until it was paid in full, his submission can be accepted. Blueprop could have secured its financial interest in several ways. For example, the parties may have entered into a chattel mortgage or agreed to a floating charge over the assets of Real Estate Now. They did not. Alternatively, the Agreement might have contained an appropriately drafted retention of title clause. It did not.

37 In oral submissions, Mr Brookfield reiterated the assertion he had made to a Delegate of the Registrar on 7 July 2022 that a security interest was created by the Agreement because of the reference to a security interest on page 3 of that document. That reference is as follows:

**1. DEFINTITIONS AND INTERPRETATION**

1.1 Definitions

In this Agreement:

…

**“Security Interest”** means an interest or power:

(a) reserved in or over any interest in any asset included, without limitation, any retention of title: or

(b) created or otherwise arising in or over any interest in any asset under a bill of sale, mortgage, charge, lien, pledge, trust or power,

By way of security for the payment of debt or any other monetary obligation or performance of any other obligation and whether existing or agreed to be granted or created.

38 On the proper construction of the Agreement, this reference is clearly no more than a *definition* of a security interest, should one arise under the Agreement. It can in no way be construed as the *grant* of a security interest.

39 Further, cl 3.1 of the Agreement provided:

Subject to the terms and conditions of this Agreement and satisfaction or waiver of the Conditions Precedent the Vendor will sell and the Purchaser will buy the Rent Roll **free from any Security Interest** for the Purchase Price and calculated and adjusted in accordance with this Agreement.

(Emphasis added.)

40 Similarly, it is not possible to construe cl 3.1 as the grant of a security interest in favour of Blueprop. To the contrary, the clause expressly disavows the existence of any security interest in the Rent Roll.

41 Clause 3.5 provided that Blueprop was to remain in control of the Rent Roll, and would continue to manage it as a going concern until the Completion Date.

42 The passing of title and risk in the Rent Roll was tied to the Completion Date. Clause 4.1 provided:

The profits, benefit, possession and the risks and obligations of the Rent Roll will pass to the Purchaser on the Completion Date. The profits, benefit, possession and the risks and obligations of the Rent Roll will remain with the Vendor until the Completion Date.

(Emphasis in original.)

43 Clause 4.2 provided for the payment of the Deposit less the Retention Sum on the Completion Date and for the delivery of the Rent Roll, various other records, bonds, documents and keys to the Purchaser.

44 The Agreement also provided for certain payments to be made to Blueprop after the Completion Date in respect of properties which were listed on the Rent Roll prior to the Completion Date and in respect of which Real Estate Now subsequently entered into a Managing Agency Agreement.

45 Pursuant to cl 6, the Retention Sum, being the balance of the Purchase Price, was due and owing by Real Estate Now within 14 days after the end of the Retention Period. “Retention Period” was contemplated in cl 1 to mean a certain number of days from the date of Completion, although this definition failed to specify the number of days. However, nothing turns on this. It is uncontroversial that title to the Rent Roll was conveyed to Real Estate Now, despite the absence of payment of the Purchase Price. Given the terms of the Agreement as a whole, and of cl 3.1 in particular, it is clear that the transfer of title was unencumbered.

46 Mr Brookfield did not provide any evidence of the source of the legal advice he said he relied upon in continuing to press for the registration of his alleged security interest. No inference can be drawn from this; such advice would likely be privileged. There is no doubt that, at common law, an interest such as that claimed by Mr Brookfield was recognised as giving rise to an equitable interest in personalty: see *Elderly Citizens Homes of SA Inc v Balnaves* (1998) 72 SASR 210, 221 per Debelle J:

It is well established that an unpaid seller of personal estate has a lien for the unpaid purchase money in the same way as an unpaid vendor of real estate has a lien for the unpaid purchase money, and that lien gives rise to an equitable interest in the personalty: see *Davies v Thomas* [1900] 2 Ch 462; *In Re Stucley* [1906] 1 Ch 67. The lien is not a mere personal equity but creates a charge upon and an interest in the property sold in the same manner as if that charge had been in writing: see *Rose v Watson* (at 683; 1192); *Re Stucley* (at 83).

47 Similarly, pursuant to s 41 of the *Sale of Goods Act 1896* (Qld), an unpaid seller, who retains possession of the goods, has a right to retain the goods, which is in the nature of a lien.

48 But as has already been observed, the PPSA swept away the prior law relating to securities over personal property. There is no doubt that remedial constructive trusts or remedial equitable charges that may be imposed by a court of equity are not within the regime created by the PPSA: *National Australia Bank Ltd v* ***Garrett***[2016] FCA 714; 340 ALR 532 at [28]; ***Sandhurst*** *Golf Estates Pty Ltd v Coppersmith Pty Ltd* (2014) 285 FLR 267 at [100] and [106]. Whether or not Mr Brookfield holds a security interest that is registrable under the PPSA can only be determined by reference to the PPSA and the subsequent jurisprudence.

49 Section 10 of the PPSA relevantly provides the following definition:

***secured party***:

(a) means a person who holds a security interest for the person’s own benefit or the benefit of another person (or both); and

(b) if the holders of the obligations issued, guaranteed or provided for under a security agreement are represented by a trustee as the holder of the security interest—includes the trustee; and

(c) in relation to a registration with respect to a security interest—includes a person registered as a secured party in the registration.

50 The definition of a security interest is provided for under s 12 of the PPSA:

(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).

Note: For the application of this Act to interests, see section 8.

(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 consignment);

(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 includes the following interests, whether or not the transaction concerned, in substance, secures payment or performance of an obligation:

(a) the interest of a transferee under a transfer of an account or chattel paper;

(b) the interest of a consignor who delivers goods to a consignee under a commercial consignment;

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

(3A) A person who owes payment or performance of an obligation to another person may take a security interest in the other person’s right to require the payment or the performance of the obligation.

(4) Without limiting subsection (3A):

(a) an account debtor, in relation to an account or chattel paper, may take a security interest in the account or chattel paper; and

(b) an ADI may take a security interest in an ADI account that is kept with the ADI.

(5) A ***security interest*** does not include:

(a) a licence; or

(b) an interest of a kind prescribed by the regulations for the purposes of this section.

(6) A security interest is not created only by an agreement or undertaking to do either of the following:

(a) to postpone or subordinate a person’s right to payment or performance of all or any part of a debtor’s obligation to another person’s right to payment or performance of all or any part of another of the debtor’s obligations;

(b) to postpone or subordinate all or any part of a secured party’s rights under a security agreement to all or any part of another secured party’s rights under another security agreement with the same grantor.

51 Section 8 of the PPSA sets out those interests to which the Act does **not** apply. Relevantly, it provides:

(1) This Act does not apply to any of the following interests (except as provided by subsection (2) or (3)):

…

(b) a lien, charge, or any other interest in personal property, that is created, arises or is provided for under a law of the Commonwealth (other than this Act), a State or a Territory, unless the person who owns the property in which the interest is granted agreed to the interest;

(c) a lien, charge, or any other interest in personal property, that is created, arises or is provided for by operation of the general law;

…

52 Mr Brookfield relied on s 12(1) of the PPSA to support his contention that Blueprop held a security interest. He reasoned, as best I could understand his submission, that because the Agreement obliged Real Estate Now to pay Blueprop for the Rent Roll, the Agreement was a transaction that secured the obligation to pay. He submitted that because he [Blueprop] was the only “beneficiary” of the transaction, even though he does not “have a title on the asset, [he] [has] a title on the money that’s owed from the sale of that asset. So to [him]”, that “secures a debt … as [clearly] as … can be”.

53 Mr Brookfield’s construction of s 12(1) cannot be accepted. A sale agreement that does no more than provide for personal property to pass to a buyer from a seller in return for payment is simply an agreement for purchase and sale. Four elements are required to satisfy s 12(1): *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2014] VSCA 326; 49 VR 86 per Santamaria JA at [107]:

(a) there must be an outstanding existing monetary or non-monetary obligation;

(b) there must have been an “in substance security” to support the performance of that obligation;

(c) the security must amount to an “interest” in personal property;

(d) the interest must arise out of a transaction.

54 Only the first element is present on the facts of this case.

55 There being no security interest, the Assignment, assuming it to be valid, cannot put Mr Brookfield in a better position than Blueprop.

56 In any event, there is a real question as to the validity of the Assignment. Clause 12.5 of the Agreement provided:

A party must not assign or permit a third party to obtain the benefit of its rights and interest under this Agreement except with the prior written consent of the other party.

57 It is uncontroversial that Real Estate Now’s consent to the Assignment was neither sought nor obtained by Blueprop.

58 The Registrar submitted that the breadth of the clause prohibited the assignment of, inter alia, the interests created by or arising under the Rent Roll, without the prior written consent of all parties, even though such interests were, prima facie, capable of being assigned: *Whyked Pty Ltd v Yahoo Australia and New Zealand Pty Ltd* [2006] NSWSC 650 at [14]-[21]; [2019] FCA at [40]-[42]; *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2006] FCAFC 40 at [32].

59 Mr Brookfield contended that the validity of the Assignment had been “accepted by the Federal Circuit of Australia” by reason of the decision of Judge Jarrett in [2018] FCCA. Those proceedings concerned an application for a sequestration order against Mr Brookfield’s estate on the basis of a debt said to be owing by Mr Brookfield to Real Estate Now. In refusing to make such an order, Judge Jarrett observed, at [11], that, “for the purposes of the *Property Law Act 1975* (Qld), there has been notice of the assignment given to the party liable under the contract of sale to make payments to Blue Prop Pty Ltd”. Judge Jarrett went on to accept, at [16], that, “on the material and what is unanswered on the material, in my view, is that there is a contractual debt to Blue Prop Pty Ltd which has been effectively assigned to the respondent debtor in this case”. What is clear from that decision is that Judge Jarrett was not taken to anything which might suggest that the assignment of rights under the Agreement was ineffective. There was no interrogation of the meaning of cl 12.5. In any event, as was observed by Derrington J in [2019] FCA at [18]-[20], relying on the authorities of *Gye v McIntyre* (unreported, Beaumont J, 26 May 1992) and *Makhoul v Barnes* (1995) 60 FCR 572, no issue estoppel arises from the dismissal of the sequestration order by Judge Jarrett. That is because the question he was called to determine was not whether Mr Brookfield *was* indebted to Real Estate Now in the amount claimed. Rather, the question was only whether he was satisfied *as at that time* a sufficient debt was owing and whether, on that basis, and in the exercise of the Court’s discretion, a sequestration order should be made. To the extent that Mr Brookfield submitted that Judge Jarrett’s decision determined the issue of the validity of the Assignment for all purposes, that submission must be rejected.

60 It is, however, unnecessary for me to reach a final conclusion as to the validity of the purported Assignment, given the conclusion I have reached in relation to the absence of the creation of a security interest by the Agreement. Blueprop never held a security interest in the Rent Roll.

### Were there reasonable grounds for Mr Brookfield’s belief that he was a secured party?

61 For there to be a contravention of s 151(1) of the PPSA, two matters must be established; first, that Mr Brookfield applied to register a financing statement which describes the collateral; and secondly, that Mr Brookfield did not believe on *reasonable grounds* that the person he described in the statement (being Mr Brookfield himself) was, or would become, a secured party in relation to the collateral. The former matter has been satisfied by way of affidavit evidence provided by Mr Brookfield.

62 It is not disputed that Mr Brookfield honestly believed that he was entitled to register the various interests he claims to have in the Rent Roll on the PPSR. The question is whether there were reasonable grounds for that belief at three relevant points in time: 4 February 2020, when the financing statement in respect of Registration 2809 was lodged; 25 May 2022, when the financing statement in respect of Registration 9183 was lodged; and within the period prescribed by s 151(3) of the PPSA.

63 A belief on *reasonable grounds* was described by the Court in *George v Rockett* (1990) 170 CLR 104, 112, in the following terms:

When a statute prescribes that there must be “reasonable grounds” for a state of mind — including suspicion and belief — it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. That was the point of Lord Atkin's famous, and now orthodox, dissent in *Liversidge v Anderson*.

(Citations omitted.)

64 In *Hoobin v Samuels* (1971) 2 SASR 238, albeit in the context of a provision of the road traffic legislation, which required a member of the police force to form a certain belief “on reasonable grounds” before subjecting a person to a breathalyser test, Walters J said, at 245:

I recognise that the expression “believes on reasonable grounds” must be given an objective and not a subjective construction. A reasonable ground for a belief “is just as much a positive fact capable of determination by a third party as is a broken ankle or a legal right.” The plain and natural meaning of the expression “believes on reasonable grounds”, in my view, “**imports the existence of a fact or a state of facts, and not the mere belief by the person challenged that the fact or state of facts existed**”. Thus a “reasonable [ground] for a belief when the subject of the legal dispute has always been treated as an objective fact to be proved by one or other party and to be determined by the appropriate tribunal” … **Nevertheless, a man’s belief is personal to himself, and the reasonable grounds become material in so far as they are an element in his mind which determines his belief**. When the reasonableness of the grounds is challenged, it is for the tribunal to **examine those grounds and to determine whether they are reasonable**”.

(Citations omitted. Emphasis added.)

65 It is therefore necessary to examine the grounds on which Mr Brookfield relied to assert the reasonableness of his belief and to determine whether those grounds are indeed reasonable and were reasonable at the relevant dates, being 4 February 2020, 25 May 2022 and thereafter, as soon as practicable, or within 5 business days, after there stopped being reasonable grounds for the belief (pursuant to s 151(3)), assuming that to have occurred. The grounds are said by Mr Brookfield to be at [9] of his affidavit:

a) A signed sale and purchase agreement

b) The Judgement of Jarrett J of the Federal Circuit Court

c) The judgement of Derrington J of the Federal Court of Australia.

66 It is to be recalled that the Agreement was dated 6 July 2015. The judgment of Judge Jarrett, [2018] FCCA, was delivered on 5 October 2018. The judgment of Derrington J, [2019] FCA, was delivered on 27 June 2019.

67 Mr Brookfield submitted that his belief was “based on a signed sale and purchase agreement that [he] believed [he]could rely on”. Mr Brookfield submitted that his belief that he could rely on the Agreement was reinforced by Judge Jarrett’s dismissal of the application for sequestration on the basis that “a Federal Circuit Court judge [had] looked at the contract and [said], ‘It’s signed by the parties, Mr Brookfield is owed money, I’m not going to bankrupt him because of that very reason’”.

68 Mr Brookfield next relied on the observations by Derrington J that the judgment of Judge Jarrett was not appealed, nor was “the learned judge … taken to any evidence to suggest that the contract of sale relied upon was not the relevant contract of sale or was not otherwise enforceable as between the parties to it”: [2019] FCA at [11] and [9]. Mr Brookfield submitted that these factors, together with the circumstance that Real Estate Now was represented by a member of Queen’s Counsel who did not adduce any evidence to contradict the Agreement, “[reinforces]” his belief that “[he is] owed money”. Further, Mr Brookfield submitted that Derrington J accepted the validity of the Assignment when his Honour said, at [9], “Judge Jarrett identified the contractual basis on which Mr Brookfield made his claim for debt including the rent roll sale agreement **and the assignment to him of the debts**” (emphasis added). Additionally, Mr Brookfield placed significant weight on the observations of Derrington J, which were made in the context of Real Estate Now’s submission that Mr Brookfield’s application to wind it up, being the third such application on the same substratum of facts, was an abuse of process. His Honour said, at [44]:

Whilst it can be accepted that the company has experienced inconvenience by Mr Brookfield’s attempts to wind it up, his application has not been heard on its merits before this occasion due to his lack of legal ability. The company submitted that Mr Brookfield ought to have known that, by reason of the company’s actions in defending the previous winding up application and in setting aside the last statutory demand, the debt was disputed on substantial grounds. It further submitted that to issue a third statutory demand is a clear abuse of process. Were the circumstances to have been only as identified above there may have been some force in the company’s submissions. **However, it must not be forgotten that in October 2018 the company did not seek to deny the existence of the debt in its application for a sequestration order against the estate of Mr Brookfield. That conduct would surely have given succour to Mr Brookfield’s belief that the company accepted that it was indebted to him as would have its failure to set aside the statutory demand**.

(Emphasis added.)

69 There can be little doubt, based on the totality of the matters relied upon by Mr Brookfield and described above, that he holds a reasonable belief that he is owed a debt by Real Estate Now. It is notable, however, that none of the various matters refers to the debt as being secured. No question relevant to the existence of a security interest was in issue before either Judge Jarrett or Derrington J.

70 By 4 February 2020 when Mr Brookfield lodged the financing statement which led to Registration 2809, Mr Brookfield had already been served with six Amendment Notices in relation to the Previous Registrations. In respect of each Amendment Notice, he had been informed of the reason for the Amendment Notice, being that no collateral described in the registration secured any obligation (including a payment) owed by a grantor to the secured party (Exhibit ATM-1, Tabs 22, 32, 38, and 49). In relation to Registration 8230, on 20 September 2016, Mr Brookfield was invited to appeal to the AAT (Exhibit ATM-1, Tab 30). He did not do so. Similar invitations were made on 26 April 2017, 21 February 2019, and 7 March 2019 in relation to Registrations 6866, 3127, and 1157, 6023 and 6897 respectively (Exhibit ATM-1 Tabs 36, 53 and 44).

71 Following Mr Brookfield’s registration of the financing statement in respect of Registration 4349, he was informed by the Deputy Registrar on 9 May 2019, inter alia, “that registering a financing statement on the PPSR in the absence of a valid security interest … may … constitute an offence” (Exhibit ATM-1, Tab 59). In response, on 14 May 2019, Mr Brookfield provided the Deputy Registrar with copies of the Agreement and the Assignment. Nevertheless, on 31 May 2019, Mr Brookfield was notified by the Deputy Registrar that Registration 4349 had been removed from the PPSR, and of the terms of s 151(1) of the PPSA (Exhibit ATM-1, Tab 60).

72 Accordingly, as at 4 February 2020, there was objective evidence that the Registrar or his Delegate did not consider that Mr Brookfield held a valid security interest to support a registration on the PPSR. The Deputy Registrar had explained his position, namely that no collateral had been identified against the alleged debt to be secured. Mr Brookfield had been invited on at least four occasions to challenge that conclusion before the AAT. He did not do so.

73 To the extent that Mr Brookfield believed that he held a security interest by reason of the Agreement and the Assignment, and sought to urge that position on the Deputy Registrar by providing copies of the documents on 14 May 2019, he was aware, at least by 31 May 2019, that in the opinion of the Deputy Registrar, neither document supported that belief. He was again invited to appeal that decision but did not do so.

74 Mr Brookfield was unable to point to any passage in the judgments of Judge Jarrett or Derrington J to support his belief that he held a registrable security interest under the PPSA. That is because, as I have already observed, the issue was not raised in either proceeding. At their highest, those two decisions support Mr Brookfield’s reasonable belief that, as at 4 February 2020, he was owed a debt by Real Estate Now; nothing more.

75 The clear correspondence from the Deputy Registrar to Mr Brookfield in respect of the Previous Registrations is objective evidence that Mr Brookfield’s belief that he held a security interest that was registrable on the PPSR was not reasonable.

76 By 25 May 2022, when Mr Brookfield submitted the financing statement which led to Registration 9183, nothing had changed in respect of the matters outlined above.

77 Absent any objective basis for Mr Brookfield’s belief that he was, or would become, a secured party in relation to the described collateral, his belief that he was entitled to apply the relevant financing statements was not reasonable. I therefore find that Mr Brookfield contravened s 151(1) of the PPSA in relation to Registration 2809 and Registration 9183.

78 As to s 151(2) of the PPSA, there is no dispute between the parties that Mr Brookfield did not, within the earlier of five business days or as soon as practicable after the statement was registered, apply to register a financing change statement to amend the registrations and end their effect with respect to the collateral. The elements of s 151(2) of the PPSA are therefore satisfied, and I find that Mr Brookfield contravened s 151(2) in relation to Registration 2809 and Registration 9183.

# WHAT PENALTY SHOULD BE IMPOSED?

79 Despite approximately 12 years having elapsed since the commencement of the PPSA on 31 January 2012, this appears to be the first occasion on which the Registrar has commenced civil penalty proceedings pursuant to s 151 of the PPSA. The Registrar has a duty to maintain the integrity of the Register and to protect the public from obvious abuses based on his past knowledge and own experience of the manner in which a particular person (Mr Brookfield, in this case) has purported to use the PPSR (see ***Rubis*** *v Garrett as Trustee of the Andrew Garrett Family Trust* *Trading as Dynamic Commercial Workforce Solutions* *(No 2)* [2018] FCA 2011 at [4] per Rares J)). However, it has hitherto been more common for courts to be faced with applications for the removal of registrations under Part 5.6 of the PPSA. Examples include *Sandhurst*, *Garrett*, *Macquarie Leasing Pty Ltd v* ***DEQMO*** *Pty Ltd* [2014] NSWSC 1466, ***Macquarie Leasing*** *Pty Ltd v The Registrar of the Personal Property Securities Register* [2014] NSWSC 1677, ***Treasury*** *Wine Estates Vintners Ltd v Garrett* [2016] FCA 715, and *Rubis*. Nevertheless, observations have been made about whether the alleged secured party did or could have held a belief on reasonable grounds of the type identified in s 151(1) (*Garrett* at [50] per Beach J; *Macquarie Leasing* at [11] per Stevenson J). There is no obvious reason for the Registrar’s apparent reluctance to date to invoke the civil penalty provisions of the PPSA. This is, however, a clear case for the Registrar to do so.

### The statutory maximum penalty

80 Part 6.3 of the PPSA applies Part 4 of the Regulatory Powers Actto enable the Registrar to enforce civil penalty provisions, per s 221 of the PPSA.

81 Sections 151(1) and (2) of the PPSA each provide for a maximum civil penalty of 50 penalty units. Prior to 1 July 2020, being the relevant period with respect to the contraventions in relation to Registration 2809, the value of a penalty unit was $210, subject to indexation under s 4AA(3), per s 4AA(1) of the *Crimes Act 2014* (Cth). From 1 July 2020, the value of a penalty unit was increased to $222. This is the relevant value with respect to the contraventions in relation to Registration 9183.

82 Section 93(1) of the Regulatory Powers Act creates a continuing obligation to do an act or thing required to be done under a civil penalty provision, even if the period for so doing has expired. Section 93(2) provides that where a person contravenes a civil penalty provision requiring something to be done within or before a particular time, a separate contravention arises in respect of each day during which the contravention occurs, including the day that the relevant civil penalty order is made, or any later day.

83 The Registrar submits that there was one contravention of s 151(1) by Mr Brookfield with respect to each of Registration 2809 and 9183. Consequently, the Registrar submits the maximum penalty with respect to the contravention of s 151(1) by registering the finance statement that became Registration 2809 is $10,500 (50 x $210). Similarly, he submits the maximum with respect to the contravention of s 151(1) by registering the finance statement that became Registration 9183 is $11,100 (50 x $222).

84 As to the contraventions of s 151(2), the Registrar submits that Mr Brookfield contravened the provision with respect to Registration 2809 on 9 occasions, being each day between 11 February 2020, when the Deputy Registrar notified Mr Brookfield of the potential for the registration to be removed, and 20 February 2020, being the day on which the Deputy Registrar caused the registration to be removed. On that basis, the Registrar submits the maximum penalty for contraventions of s 151(2) in respect of Registration 2809 is $94,500 ((50 x $210) x 9).

85 With respect to Registration 9183, the Registrar submits that Mr Brookfield contravened s 151(2) on 40 occasions, being each day between 1 June 2022 and 11 July 2022, the latter being the day on which the Deputy Registrar caused the registration to be removed. The commencing date for the contraventions of 1 June 2022 appears to be an error. Mr Brookfield was in fact not notified until 23 June 2022 of the potential for the registration to be removed. For that reason, the number of contraventions established on the evidence is, in fact, 18. On that basis, the maximum penalty with respect to the contraventions of s 151(2) arising from Registration 9183 is $199,800 ((50 x $222) x 18).

86 The total maximum available penalty arising from all contraventions is therefore $315,900.

### The approach to determination of an appropriate penalty

87 Although the High Court has warned against using lists of factors, in particular the ‘French factors’ (*Trade Practices Commission v CSR Ltd* [1990] FCA 762 at [42]), as a “rigid catalogue of matters for attention” or a “legal checklist” (*Australian Building and Construction Commissioner v* ***Pattinson*** [2022] HCA 13; 274 CLR 450at [19], quoting *Australian Ophthalmic Supplies Pty Ltd v McAlary-Smith* (2008) 165 FLR 560 at [91]), there is a statutory mandate in the present context to take into account at least four matters, in addition to any others that may be relevant.

88 In considering the imposition of an appropriate penalty, s 82 of the Regulatory Powers Actrelevantly provides:

**82 Civil penalty orders**

…

(3) If the relevant court is satisfied that the person has contravened the civil penalty provision, the court may order the person to pay to the Commonwealth such pecuniary penalty for the contravention as the court determines to be appropriate.

…

(6) In determining the pecuniary penalty, the court must take into account all relevant matters, including:

(a) the nature and extent of the contravention; and

(b) the nature and extent of any loss or damage suffered because of the contravention; and

(c) the circumstances in which the contravention took place; and

(d) whether the person has previously been found by a court (including a court in a foreign country) to have engaged in any similar conduct.

89 Section 85 provides for the making of a single civil penalty order against a person for multiple contraventions of a civil penalty provisions if the proceedings are founded on the same facts, or if the contraventions form or are part of a series of contraventions of the same or a similar character. However, the penalty must not exceed the sum of the maximum penalties that could be ordered if a separate penalty were ordered in respect of each of the contraventions.

90 Although separate contraventions arising out of separate acts should ordinarily attract separate penalties where the relevant separate acts are inextricably interrelated, it may be appropriate for the Court to view those acts as a single course of conduct for the purposes of the determining the appropriate penalty: *Australian Competition and Consumer Commission (ACCC) v* ***Yazaki*** *Corporation* [2018] FCAFC 73; 262 FCR 243 at [234]; *Construction, Forestry, Mining and Energy Union v Cahill* [2010] FCAFC 39 at [41]. Nevertheless, “a judge is not obliged to apply the principle if the resulting penalty fails to reflect the seriousness of the contraventions” per *Yazaki* at [235].

91 Despite - or perhaps more properly - in addition to, the statutory mandate of s 82(6), the Court’s task remains evaluative in determining what is appropriate in the circumstances of the particular case. As the majority said in *Pattinson* in relation to the discretion conferred by s 546 of the *Fair Work Act 2009* (Cth), at [40]:

[It is] like any discretionary power conferred by statute on a court, to be exercised judicially, that is, fairly and reasonably having regard to the subject matter, scope and purpose of the legislation.

92 It is to the subject matter, scope and purpose of the civil penalty provisions within the PPSA that I now turn.

93 Civil penalties are imposed primarily - if not solely - for the purpose of deterrence: *Pattinson* at [15]. That purpose is “protective in promoting the public interest in compliance”: *Commonwealth v Director, Fair Work Building Industry Inspectorate* [2015] HCA 46; 258 CLR 482 at [55]. In the present context, the purpose of the civil penalty provisions within the PPSA might be characterised as being protective of the ‘primacy and predictability’ of the PPSR by deterring frivolous or vexatious registrations.

94 As was explained by Jackson J in *Curo Capital* in the paragraphs set out earlier in this judgment, the heart of the PPSA regime is the PPSR, and it is essential to understand the role of the PPSR within the regime. Section 3 of the PPSA provides an overview of the statute and stipulates, inter alia:

The Register of Personal Property Securities enables secured parties to give notice of actual or prospective security interests. Notice is given by the recording of data about secured parties, grantors and collateral. The register may be kept electronically, for example in a form that is interactive and accessible over the internet.

…

Chapter 5 provides for the establishment and maintenance of a register with respect to personal property securities and certain prescribed personal property (the Register of Personal Property Securities).

The Registrar of Personal Property Securities is responsible for maintaining the register. Chapter 5 also deals with how the register can be searched, and how certain non-registered data can be provided through the register (as a portal).

A search by reference to the details of an individual grantor must be made for an authorised purpose set out in the Act. A person who carries out an unauthorised search, or uses data from an unauthorised search, may be liable to pay compensation or a civil penalty (or both).

Chapter 6 deals with the role of the courts in proceedings that relate to security interests in personal property… It also describes the Registrar’s role in judicial proceedings and applies Parts 4 and 6 of the Regulatory Powers Act to enable contraventions of civil penalty provisions to be enforced.

…

95 In *Warehouse Sales Pty Ltd (in liq) and Lewis and Templeton v LG Electronics Australia Pty Ltd* [2014] VSC 644; 291 FLR 407 at [37]-[38], a case concerned with whether various suppliers retained a security interest in goods sold subject to a typical retention of title clause, Sifris J observed:

The PPSA provides for a priority regime, not a title regime. Under s 273 of the PPSA ownership or title to personal property is not determinative and as a consequence a retention of title (“ROT”) financier’s ownership interest is replaced by a simple security interest. A ROT supplier must **protect that “security interest”** by taking possession of the personal property (eg a pledge under pre-PPSA law) **or by obtaining a signed security agreement that covers (describes the collateral) and perfecting that security interest by registration of a financing statement on the PPSR**. The consequences of non-perfection are that the security interest is ineffective against third parties, and on insolvency a security interest (title) vests in an administrator or liquidator. In other words, it is ineffective in the event of insolvency.

Because the ownership or title interest is merely a security interest, non-perfection also results in loss of priority because of PPSA s 55. A further consequence is that a transferee or buyer can take free of the security interest such as under s 43 because of non-registration and, also, under s 46 which provides that a buyer (transferee) takes free of a security interest given by the seller who sells personal property (mainly inventory) in the ordinary course of business of selling personal property of that kind. This is similar to but not the same as the idea of extinguishment under the old *Chattel Securities Act 1987* (Vic).

(Emphasis added.)

96 The significance of registering a security interest by means of a financing statement is thereby made plain. As a practical matter, a person is able to register a financing statement against another person without that person’s consent or knowledge. It is the financing statement that gives notice of an actual or potential security interest with respect to a particular grantor’s personal property. Priority is afforded to security interests that have been perfected by registration. Hence, as primacy is given to the PPSR, secured parties need to ensure that the PPSR contains an accurate and contemporaneous account of their security interests. Similarly, third-party searchers who consult the PPSR in good faith should expect, at base, that frivolous, vexatious or offensive registrations, or those contrary to the public interest, do not remain on the PPSR. There is an obvious vice in registering an overreaching financing statement, it being likely to deter other financiers from providing credit to a particular grantor. Consequently, as explained in the Replacement Explanatory Memorandum to the Personal Property Securities Bill 2009 (**EM**) at [5.17]:

A person would not be able to register a financing statement, or a financing change statement, in relation to a security interest unless the person believes on reasonable grounds that a security interest in the property is, or would be held by a person stated in the application as a secured party (clause 151(1) and (7)). **Where a person registers without such a belief they would be taken to have contravened an obligation owed to any person with an interest in the personal property** (clause 151(5)).

(Emphasis added.)

97 Further, in explaining the maximum penalty prescribed, the EM said, at [5.21]:

… The maximum penalty level is considered to be sufficient in light of the potential impact unauthorised registrations could have on those relying on the registrations as well as the ability of persons with an interest to the property to recover for any loss or damage resulting from these breaches.

98 That ability to “recover damages for any loss or damage” is prescribed in s 271 of the PPSA, which grants a right to recover damages for any loss or damage that was reasonably foreseeable as likely to result from a person’s failure to discharge any duty or obligation imposed on them by the PPSA. Section 151(5) provides expressly that, for the purposes of s 271, compliance with s 151(1) or (2) is taken to be an obligation imposed on the person who applied to register a financing statement or financing change statement, and that any person with an interest in the personal property described in the financing statement or financing change statement is taken to be a person to whom that obligation is owed. A contravention of s 151(1) or (2) is taken to be a failure to discharge that obligation.

99 These overlapping provisions make pellucid that the deterrence of frivolous and vexatious applications is the primary purpose of the civil penalty provisions under the PPSA.

100 The need for adequate deterrence in the context of the PPSA regime was discussed by Nicholas Mirzai in “Pollution on the PPSR – and what to do about it” (2015) 33 *Company & Securities Law Journal* 30. At that time, the regime was barely three years old. The learned author said, at 39:

… there is a present and growing concern that the Australia PPSR is quickly becoming polluted with unjustifiable interests which are, in certain circumstances, either non-existent, expired or not otherwise connected to a PPSA security interest. This is contrary to the transparency and efficacy that the PPSA and the PPSR were designed to provide.

101 The Commonwealth Attorney-General commissioned a review of the PPSA as required by s 343. In his *Review of the Personal Property Securities Act 2009 – Final Report* (27 February 2015) (**Whittaker Review**), Bruce Whittaker considered the purpose of s 151(1), particularly in the context of submissions calling for its repeal. The deterrent value of the civil penalty provisions was pivotal to his ultimate recommendation that s 151 be retained (**Recommendation 128**). I interpolate that, on 22 September 2023, the Attorney-General announced the Government’s response to the Whittaker Review and accepted Recommendation 128. Whittaker’s consideration of s 151(1) is set out at [6.10.4.2.1] in the Whittaker Review:

Should we repeal s 151(1)?

A number of submissions argued that s 151(1) should be repealed. They said that there is no need for it, and that it erodes the value of a secured party’s ability to make an advance registration.

I am not convinced that there is no need for the section. While it has been suggested that the experience in Canada and New Zealand is that the risk of frivolous or vexatious registrations is low, **there have been a number of Canadian cases in which a person made an unnecessary registration against another party as a means of applying commercial pressure**. I have also been advised informally that **vexatious registrations are not unknown in New Zealand**.

**It is also instructive to note that vexatious filings seem to be an unfortunate fact of life in the United States**. There, it appears that it is not at all uncommon for a person to register a financing statement against another person for reasons that are entirely unrelated to a financing transaction. Article 9 responds to these so-called “bogus” or “harassment” filings by allowing the debtor (ie grantor) to file an information statement that states that the financing statement should not have been filed, or is overly broad. That information statement becomes part of the financing statement (and so would presumably be revealed by a search), but does not alter the legal effect of the financing statement as filed.

**There have also already been a number of reported decisions under the Act in relation to what appear to have been groundless filings** [*Sandhurst* and *DEQMO*], and I am **aware of some anecdotal evidence that suggests that these are not isolated examples**.

A further reason for retaining 151(1) is that it may also be able to be employed as a tool to deal with concerns that were expressed in submissions regarding the making of overly-broad registrations …

(References omitted. Emphasis added.)

102 Thus, it can be seen that in some respects, the civil penalty provisions within the PPSA are analogous to those contained in the consumer protection context in the *Competition and Consumer Act 2010* (Cth) (**CCA**), the object of which under s 2 is “to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection”, and in the consumer protection provisions within Ch 7 of the *Corporations Act 2001* (Cth). Section 760A of the latter Act provides that the main object of the chapter is, inter alia, to promote “confident and informed decision making by consumers of financial products …” (s 760A(a)), “the provision of suitable financial products to consumers of financial products …” (s 760A(aa)), and “fairness, honesty and professionalism by those who provide financial services …” (s 760A(b)). In other respects, the civil penalty provisions within the PPSA resemble those within the suite of financial services legislation where enhancement of “compliance” is often at the forefront. For example, the objects of the *Australian Securities and Investments Commission Act 2001* (Cth) require the Australian Securities and Investments Commission to, inter alia, “take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it” (s 1(2)(g)).

***Assessment of the appropriate penalty***

103 The Registrar submits that it is appropriate to view Mr Brookfield’s contraventions of ss 151(1) and (2) as arising from two courses of conduct: the first in relation to that surrounding Registration 2809; and the second in relation to the conduct surrounding Registration 9183. That is appropriate, not least because of the effluxion of two years between the two courses of conduct.

104 The effect of treating the contraventions of ss 151(1) and (2) separately in respect of each registration takes into account that the initial applications for each, and the failure to bring them to an end within the time period specified by s 151(3), are “substantially contemporaneous and connected” (*Electoral Commissioner of Australian Electoral Commission v* ***Wharton (No 3)*** [2021] FCA 742 at [33]) and mitigates the risk of imposing a penalty which might be inappropriate or oppressive in the circumstances.

105 The Registrar submits that a penalty of $5,000 is appropriate with respect to the contraventions related to Registration 2809 and $10,000 with respect to the contraventions related to Registration 9183. His submission is that a total penalty of $15,000 is appropriate for both contraventions.

106 Turning then to the factors required to be considered by s 82(6) of the Regulatory Powers Act. *First*, the nature and extent of the contraventions. The nature of the contraventions must be considered in the context of the PPSA scheme in which they occurred. As has been explained, the scheme permits registration of a financing statement over another’s personal property without their knowledge or consent. It is a scheme that is premised on the assumption that those who use the PPSR hold a reasonable belief that they are entitled to register a financing statement. The consequences of misusing the PPSR may be grave both for the person over whose property the security interest is registered and for third parties in assessing their potential rights and interests in relation to the property. The nature of the contraventions was, therefore, serious.

107 The extent of the contraventions that are the subject of the orders sought might, at first blush, seem reasonably confined. Penalty orders are sought only in relation to two registrations. Those contraventions must be assessed, however, in light of the Previous Registrations that were in substantially the same terms, all of which had been removed by the Registrar or his Delegate for the same reasons, of which Mr Brookfield had been notified. As between the two registrations in respect of which civil penalty orders are sought, Registration 2809 was created by Mr Brookfield after he had been informed by the Deputy Registrar that applying to register a security interest without a reasonably held belief as to its validity may breach s 151 and result in civil penalties being ordered. Nevertheless, Mr Brookfield persisted, not merely in the face of his inability to point to anything that had changed in relation to the underlying transaction on which all previous applications to register had been based, but also despite express judicial observations about the validity of the Assignment. Similarly, Registration 9183 was a repeat attempt by Mr Brookfield to register a security interest on precisely the same basis as the Previous Registrations, notwithstanding repeated explanations by the Registrar or his Delegate that the Agreement did not create a security interest in personal property.

108 I am cognisant of the fact that Mr Brookfield is not legally trained. However, his occupation and previous experience with litigation leads me to the impression that, whilst not being dishonest, he was nonetheless being deliberately obtuse about whether merely continuing to apply to register a security interest would improve his position vis à vis his dispute with Mr Mergard and/or Real Estate Now.

109 The *second* factor to consider is the nature and extent of any loss or damage suffered. Similar language is used in relation to the assessment of the mandatory considerations relating to the imposition of a civil penalty under s 224(2) of Sch 2 of the CCA (*The Australian Consumer Law*). As is well accepted, the words “loss” and “damage” in this context should not be given a narrow meaning limited to financial harm: *Australian Competition and Consumer Commission v Google LLC (No 4)* [2022] FCA 942 at [39]-[40]; *Australian Competition and Consumer Commission v Volkswagen Aktiengesellschaft* [2019] FCA 2166 at [235]; *Australian Competition and Consumer Commission v Uber B.V.* [2022] FCA 1466 at [15]. In considering s 82(6) in the context of arriving at an appropriate penalty for a breach of the *Commonwealth Electoral Act 1918* (Cth), Logan J said, in *Wharton (No 3)* at [34]:

Obviously enough, there is no loss or damage suffered by reason of the contravention in a monetary sense, but there is a loss which society suffers, having regard to the purposes, which I have mentioned. And that is a loss in relation to Mr Wharton’s candidacy of transparency.

110 In the present case, there is no evidence that any loss or damage was suffered by any person. Nonetheless, there was no doubt a considerable administrative burden placed on the Registrar and his staff, as is evidenced by the extensive correspondence exhibited to Mr Marshall’s affidavit. This is ultimately a cost to the taxpayer. Importantly, however, Mr Brookfield’s conduct also had the effect of undermining the integrity of the PPSR. That is a cost to the public at large to which I have had regard.

111 The *third* factor to be considered are the circumstances in which the contraventions took place. The circumstances involve a long history of acrimonious litigation in several courts, underpinned by “enmity and animosity” ([2019] FCA at [1]) between Mr Brookfield, on the one hand, and Mr Mergard on the other, the sole director of Real Estate Now. In essence, the underlying dispute between Mr Brookfield and Mr Mergard is whether Mr Brookfield is owed a debt arising from the Agreement. That dispute was resolved by the Court of Appeal of the Supreme Court of Queensland on Friday 15 December 2023, two days prior to the trial of this matter on Monday 18 December 2023 (*Brookfield* [2023] QCA). Neither party referred me to this decision. Neither the finding of the trial judge, nor the judgment of the Court of Appeal, is directly relevant to the issues in these proceedings, except perhaps on the question of costs, to which I will return. I refer to it at this point only to give colour to the totality of the circumstances in which Mr Brookfield’s contraventions occurred. The Court of Appeal upheld the decision of the trial judge dismissing Mr Brookfield’s claim for damages for breach of contract, and misleading and deceptive conduct, arising from the Agreement. The trial judge found that the Agreement was not, in fact, the relevant contract governing the sale of the Rent Roll by Blueprop to Real Estate Now, accepting the evidence of Mr Mergard that, despite his signature apparently appearing on the document, he never in fact signed the Agreement. Rather, the relevant contract was entered into on 1 September 2015 and was “duly performed until it was terminated by Real Estate Now for breach” (*Brookfield* [2023] QCA at [6]).

112 *Brookfield* [2023] QCA was the culmination of multiple skirmishes as to solvency and winding up, some initiated by Mr Brookfield against Real Estate Now, in the Federal Court (QUD 951 of 2016, QUD 913 of 2018, and QUD 790 of 2019) and the District Court of Queensland (868/21). Another was initiated by Real Estate Now against the estate of Mr Brookfield in the Federal Circuit Court (BRG 552 of 2018). There have been other disputes involving the State of Queensland, arising out of complaints by Mr Mergard against Mr Brookfield that resulted in charges of stalking and harassment using a carriage service, in the Supreme Court of Queensland (BS15087 of 2021).

113 It is tolerably clear that the circumstances of the underlying dispute between Mr Brookfield and Mr Mergard, over a period of some seven years up to the date of Registration 9183, were a significant motivation for Mr Brookfield’s continuing attempts to register a security interest, despite him holding no reasonable belief as to the legitimacy of that conduct.

114 It is uncontroversial that Mr Brookfield has not previously been found by the Court to have engaged in previous contravention of the PPSA, which is the *fourth* factor to be considered.

115 The Registrar submits that Mr Brookfield’s lack of cooperation in the proceedings is a matter that should be taken into account in relation to penalty. In my view, that matter, to the extent that I agree with the Registrar’s submissions, is a matter more properly to be taken into account when considering the question of costs.

116 I take into account that the contraventions of s 151(2) in relation to Registration 2809 and Registration 9183 are limited to 9 and 18 occasions respectively only because the Deputy Registrar caused those registrations to be removed. Mr Brookfield did not take steps to remove either of the registrations of his own volition.

117 In my view, the significance of the PPSR to the personal property securities regime overall – namely, its role in the protection of consumer interests coupled with its importance within the financial services sector – requires that a penalty for serious contraventions be significant enough to pose a real deterrent to those who may seek to use the PPSR for inappropriate purposes.

118 Taking into account all the circumstances, my assessment is that a penalty of $10,000 is appropriate in respect of the contraventions relating to Registration 2809, and $20,000 in respect of the contravention relating to Registration 9183. The higher proportion of the maximum penalty available in respect of Registration 9183 reflects the circumstances that Mr Brookfield was repeating the same conduct as with respect to Registration 2809 in circumstances where there had been no change whatsoever to the grounds on which (and since) Registration 2809 had been removed. The total penalty is therefore assessed at $30,000 which represents slightly less than 10% of the maximum penalty available.

# DISPOSITION

119 For these reasons, it is appropriate to make the declarations sought by the Registrar and order that pursuant to s 82(3) of the Regulatory Powers Act, Mr Brookfield pay to the Commonwealth of Australia a pecuniary penalty in the amount of $30,000 in respect of his contraventions of ss 151(1) and (2) of the PPSA.

120 The Registrar sought to be heard on the question of costs after the reasons for my decision had been published. With respect to costs, I observe that the originating application for this matter was filed on 15 May 2023. Some four days later, on 19 May 2023, the judgment in [2023] QDC 86 was delivered. After a trial spanning 23-24 January 2023 and 30 March 2023, Judge Burnett held that the Agreement on which Mr Brookfield relied to support Registrations 2809 and 9183, and on which he relied on these proceedings to resist the Registrar’s application, was not the operative agreement relating to the sale of the Rent Roll. The learned judge found that a different agreement, referred to as the ‘Mergard Agreement’, governed the parties’ conduct and that, when lawfully terminated on 15 April 2016, Blueprop was owed $29,120 by Real Estate Now. Further, that debt was offset by the damages claimed by Real Estate Now for Mr Brookfield’s breach of contract (on behalf of Blueprop), which were assessed in the equivalent sum.

121 Mr Brookfield did not bring the judgment in [2023] QDC 86 to the attention of this Court and indeed, as late as 18 October 2023, filed a defence, supported by his affidavit exhibiting the Agreement, notwithstanding that it had been judicially determined not to exist. In circumstances where there had been three case management hearings prior to trial, on 14 July 2023, 29 September 2023, and 3 November 2023 (albeit that Mr Brookfield did not appear at the latter), and where Mr Brookfield had filed two interlocutory applications, an explanation is called for as to why the judgment was not brought to the Court’s attention shortly after its delivery in May 2023.

122 The question of costs will be listed for hearing at a date convenient to the parties.

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| I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Sarah C Derrington. |

Associate:

Dated: 30 January 2024