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# AllPAAP punctured: PMSI triumph over Kawasaki motorcycles — Allied Distribution Finance Pty Ltd v Samwise Holdings Pty Ltd

*Mark Wilks and James Lucek-Rowley CORRS CHAMBERS WESTGARTH*

This recent decision<sup>1</sup> of Blue J in the Supreme Court of South Australia involved a priority contest that turned on the construction of s 62 of the Personal Property Securities Act 2009 (Cth) (PPSA).

Section 62 provides for when purchase money security interests (PMSIs) will take priority over other security interests registered earlier in time. If the collateral is inventory, or its proceeds, the PMSI holder must perfect their interest by registration, *before* the grantor obtains possession, in order to obtain “super-priority”. This judgment provides clarity with respect to the meaning of when “a grantor obtains possession” for the purposes of s 62(2)(b)(i).

## Factual background

Samwise Pty Ltd t/as Bill’s Motorcycles (Bill’s Motorcycles) carried on a business as a motorcycle dealer selling and servicing Kawasaki motorcycles.

In 2012, Bill’s Motorcycles granted a security interest to its floorplan financier, Commercial Distribution Finance Pty Ltd (CDF). Floorplan finance is commonly used by motor vehicle dealerships to allow borrowing against specific inventory. The security interest to CDF was registered on the Personal Property Securities Register (PPSR).

Later that year, Bill’s Motorcycles granted a fixed and floating charge over its property in favour of its banker, the Australia and New Zealand Banking Group Ltd (ANZ). ANZ registered its security interest on the PPSR and obtained a guarantee from Bill’s Motorcycles’ parent company, Samwise Holdings Pty Ltd (Samwise).

In turn, Bill’s Motorcycles provided a guarantee in favour of Samwise and executed a general security agreement granting a security interest to secure any liability of Samwise under the ANZ facility. This interest, in all present and after-acquired property (AllPAAP), was registered by Samwise on the PPSR in June 2014.

## The Kawasaki agreement

In March 2016, Kawasaki entered into a distribution agreement with a new financier, Allied Distribution Finance Pty Ltd (ADF). The agreement contemplated

the financier entering into bailment agreements with Kawasaki dealers under which ADF would provide floorplan finance.

Under the proposed arrangements, when a dealer placed an order with Kawasaki to purchase motorcycles, the motorcycles would be sold by Kawasaki to ADF and then provided to dealers under a bailment agreement. On delivery of the motorcycles, dealers were required to pay ADF a bailment fee for displaying the goods. As with most financing transactions, the agreement was structured so that title to the motorcycles would remain with ADF until a dealer bought them to facilitate a sale.

## The bailment agreement between ADF and Bill’s Motorcycles

On 12 April 2016, a bailment agreement in terms described above was executed by Bill’s Motorcycles and, 2 days later, ADF registered the agreement on the PPSR as a PMSI over all motorcycles bailed to Bill’s Motorcycles from time to time.

As at 15 April 2016, Bill’s Motorcycles was the bailee of 40 new motorcycles then owned by CDF (the previous floorplan financier). These motorcycles had been in Bill’s Motorcycles’ possession for up to several months.

On 15 April 2016, Kawasaki purchased those motorcycles from CDF and sold them to the new financier (ADF), who then issued 40 bailed goods notices to Bill’s Motorcycles in respect of the recently purchased motorcycles.

On 16 June 2016, administrators were appointed to Bill’s Motorcycles and ADF sought a declaration that its security interest over the 40 motorcycles had priority over all other security interests.

It was common ground between the parties that:

- By 12 April 2016, the Samwise security interest had attached to the motorcycles.
- By 18 April 2016, the ADF security interest had attached to the motorcycles.

- Bill’s Motorcycles possessed the motorcycles such that both Samwise and ADF had enforceable interests in the motorcycles against third parties.
- The bailment of the motorcycles comprised a “personal property securities lease” — defined, at the relevant time,<sup>2</sup> as being:

... a lease or bailment of goods for more than one year (whether by original term, the accumulation of rights of renewal or actual uninterrupted consensual possession) or for an indefinite term for which the bailee provides value.<sup>3</sup>

No witnesses were cross-examined and there were no factual matters for his Honour to resolve.

### The issue in dispute

The priority issue turned on the construction of s 62(2)(b)(i) of the PPSA, the relevant parts of which are extracted below:

(2) The purchase money security interest has priority if:

...

(b) the purchase money security interest is perfected by registration at the time:

(i) for inventory that is goods — the grantor ... obtains possession of the inventory...

The question before the court was whether the reference to “grantor obtains possession of the inventory” is a reference to:

- the grantor simply obtaining possession of the inventory or
- the grantor obtaining possession of the inventory in question as grantor of a PMSI

Samwise’s primary contention was that ADF’s PMSI did not have priority over its AllPAAP as Bill’s Motorcycles had already obtained possession of the 40 motorcycles on bailment from CDF, well before ADF’s security interest was created, and thus the condition in s 62(2)(b)(i) was not satisfied.

In the alternative, it was argued that if Bill’s Motorcycles’ possession of the motorcycles was required to be as grantor, as opposed to simply being as bailee, it was a grantor from either June 2014 when it granted the security interest to Samwise or from 12 April 2016 when it executed the bailment agreement with ADF.

### The decision

The court disagreed and declared that the PMSI held by ADF entitled it to priority.

In reaching his conclusion, Blue J stepped through the essential provisions of the PPSA and, in particular, the necessary elements in a priority contest — the existence of a security interest, attachment to collateral, enforceability against third parties and registration.

His Honour further had reference to Pt 2.6 of the PPSA (which creates those rules to govern a priority dispute in the same collateral), noting the priority afforded to holders of a PMSI and, additionally, the significance of time when dealing with the priority of security interests at the same level.

### *Possession as grantor or simply possession*

With respect to the primary argument put forward by Samwise, his Honour observed that such an outcome would be an unlikely intention to attribute to the legislature notwithstanding the significance given to possession of property under the PPSA. In his reasoning, his Honour opined that:

- The text of s 62(2)(b)(i), considered in isolation, could be equally read as referring to the grantor obtaining possession of the inventory in question as grantor of the PMSI *or* to the grantor simply obtaining possession.
- The proper interpretation should be guided by the rationale of the scheme which affords priority to security holders who provide the means for the inventory to be acquired.
- The mere fact that the grantor had possession of the property in some other capacity was irrelevant.

Critical to his Honour’s decision was the fact that a PMSI cannot be registered until it is granted by the grantor. In his view, it would be a strange construction if, in a case in which the person who becomes the grantor happens to have pre-existing possession, the law requires the impossible — namely that the PMSI be registered before it has been granted and came into existence, and before the advance of consideration by the security interest holder.

### *Possession as grantor*

The alternative arguments advanced by Samwise were also dismissed by his Honour who confirmed that s 62(2) and (3):

- in referring to the grantor obtaining possession of the goods, refers to the grantor obtaining such possession as grantor of a PMSI and not simply at a time when that person has physical possession and happens to be the grantor of some other security interest
- in referring to the grantor obtaining possession of the inventory or other goods, refers to the grantor obtaining such possession as grantor of the PMSI in specific goods

This final point was a key finding of his Honour who, in reaching the above conclusion, rejected a submission by Samwise that if Bill’s Motorcycles’ possession was

required to be as grantor, it was a grantor in possession from the date it executed the bailment agreement. If the contrary view was reached, this would have been fatal to ADF's priority as the condition of registration before possession would not have been satisfied.

## Comment

This decision reinforces the priority position of PMSIs in the PPSA context and serves as a reminder of the evident purpose of the legislature in affording priority to PMSI holders. Those who advance moneys so property can be purchased should not lose priority over collateral which ultimately could not have been acquired absent the provision of funds. A consequence of his Honour's interpretation is that pre-existing security holders are, in effect, no worse off because, without the contribution of the PMSI holder, the grantor would never have acquired its interest in the property.

The ambiguity of the language in s 62 was picked up in several submissions received and considered by Bruce Whittaker for the purposes of his report on the *Review of the Personal Property Securities Act 2009*.<sup>4</sup> The report made extensive recommendations on how to improve the PPSA including, relevantly, that s 62 be amended to clarify that a reference to a grantor obtaining or having possession is a reference to the grantor obtaining or having that possession in its capacity as grantor.

Whilst the 394 recommendations of the report have not been implemented as yet, Blue J's decision is consistent with this proposed reform to s 62 and, furthermore, in line with Canadian case law which concerns similar provisions.

It is worth noting that the requirement to register a PMSI before the grantor obtains possession only applies where the collateral is inventory. Section 62(3)(b)(i)

provides that, in any other case, a PMSI holder will have up to 15 business days to register a financing statement in order to obtain super-priority status.



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## Footnotes

1. *Allied Distribution Finance Pty Ltd v Samwise Holdings Pty Ltd* [2017] SASC 163; BC201709984.
2. The definition was amended with effect on 20 May 2017 to increase the period from 1 year to 2 years and remove the reference to an indefinite term.
3. Above n 1, at [48].
4. Bruce Whittaker *Review of the Personal Property Securities Act 2009* Final Report (2015) [www.ag.gov.au/Consultations/Documents/PPSReview/ReviewofthePersonalPropertySecuritiesAct2009FinalReport.pdf](http://www.ag.gov.au/Consultations/Documents/PPSReview/ReviewofthePersonalPropertySecuritiesAct2009FinalReport.pdf).