IN THE COURT OF APPEAL OF NEW ZEALAND

CA220/2011
[2012] NZCA 45

BETWEEN	MARAC FINANCE LIMITED First Appellant
AND	KERRYN DOWNEY AND ALAN ISAAC Second Appellants
AND	MURRAY JOHN GREER First Respondent
AND	EQUITABLE PROPERTY HOLDINGS LIMITED Second Respondent

Hearing: 1 December 2011

Court: O'Regan P, Chambers and Stevens JJ

Counsel: M J Tingey and N F D Moffitt for Appellants
R B Stewart QC and M D Arthur for Respondents

Judgment: 1 March 2012 at 2.30 pm

JUDGMENT OF THE COURT

A The application by the respondents for leave to file further evidence is granted.

B The appeal is dismissed.

C The appellants must pay the respondents' costs for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Stevens J)

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A question of priorities

[1] Petherick Properties Ltd (in rec and in liq) (Petherick) owned two commercial properties in central Wellington: Morrison Kent House and Randstad House. The second respondent, Equitable Property Holdings Ltd (Equitable), held registered mortgages over both Morrison Kent House and Randstad House from December 2003. In July 2007, the first appellant, Marac Finance Ltd (Marac), entered into a loan facility with Petherick, which was secured by a general security deed (GSD). Shortly thereafter Marac perfected its security interest by registering a financing statement over all present and after-acquired personal property of Petherick on the Personal Property Securities Register (PPSR) established under the Personal Property Securities Act 1999 (PPSA). Equitable did likewise in March 2009 by registering financing statements in respect of all present and after-acquired property of Petherick.

[2] After Petherick defaulted on its loan obligations in July 2009, Marac appointed (on 13 October) the second appellants, Messrs Downey and Isaac, as receivers and managers under the terms of its GSD. The managers began collecting

rentals from the tenants of the Morrison Kent and Randstad properties. Within 10 days, Equitable appointed the first respondent, Mr Greer, as receiver of rental income that Petherick received as lessor of the two properties. Mr Isaac agreed to hand over to Mr Greer all the rental payments that he had collected since Mr Greer's appointment. Marac later claimed that, as first ranking security holder over Petherick's personal property (including rental), it should have received the rent obtained by Mr Greer. However, Associate Judge Doogue in the Auckland High Court declined Marac's application for summary judgment.[1] Marac now appeals that decision.

[3] There are two questions for determination. First, which secured creditor of Petherick has priority in respect of to the rental that was generated by the two properties? Marac held the first ranking security interest over all present and after acquired personal property of Petherick under the PPSA. However, Equitable held first ranking mortgages over Morrison Kent House and Randstad House. Marac argues that the rental is personal property and that the parties' claim to rental should be determined under the PPSA. It says that the exclusionary provisions in s 23 of the PPSA that relate to transfers of land do not apply to the rental from the two properties. Equitable says the PPSA does not apply: both the statutory wording and policy favour an interpretation whereby the exclusionary provisions in s 23 cover Equitable's interest, being a transfer of a right to payment that arises in connection with an interest in land, which includes a transfer of rental payments payable under a lease of land.

[4] The second question arises if Equitable's interest in the rentals falls outside the ambit of the PPSA. The point was not decided in the summary judgment application. It concerns the priority as between Marac and Equitable at common law. Marac says it has priority because it was first to appoint a receiver. It was thereby entitled to the rentals and that right was only lost if Equitable had a superior interest and went into possession. That latter step did not happen here. Equitable says that entry into possession is not required in order for Equitable to become entitled to the rental. By virtue of the terms of the two mortgages and the two assignments of rental, Equitable had the entitlement to rental. In such circumstances

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1 *Marac Finance Ltd v Greer* HC Auckland CIV-2010-404-4957, 17 March 2011.

the senior creditor is not required to enter into possession. The receiver appointed by the prior-ranking secured creditor will have the better right to rentals than a receiver appointed earlier in time by an inferior-ranking creditor, even though the former has not entered into possession.

Some more facts

The Equitable security interest

[5] On 19 December 2003, Equitable Life Insurance Company Ltd (part of the Equitable Group) registered a first ranking mortgage over the property at Morrison Kent House and a second ranking mortgage over the property at Randstad House.[2] On the same date, both mortgages were transferred to Equitable, then known as TEA Custodians (Equitable) Ltd. The mortgages had come about by way of refinancing and extension transactions relating to earlier mortgages over the Morrison Kent and Randstad titles which had been discharged.

[6] The two new memoranda of mortgage (which are in all material respects the same) provided that, by way of security, Petherick transferred to Equitable all its "rights, title, entitlements and interests … in and to the Assigned Property".[3] "Assigned Property" was defined in cl 1.3 as including earnings, and "Earnings" was defined in the same clause as:

> … all rent and other moneys whatsoever and whensoever payable to you or to which you are or become entitled to receive now and from time to time and at any time in the future under, pursuant to or in connection with each Lease, and includes the Monetary Rights under, pursuant to or in connection with each Lease.

[7] On 26 February 2009, Equitable Property Finance Ltd[4] entered into two loan agreements that refinanced earlier facilities it had provided to Petherick. As security for these refinancing agreements, Equitable entered into a general security agreement

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2 The second ranking mortgage over Randstad House later became a first ranking mortgage in 2007.

3 Clause 4.1(c).

4 Although different companies within the Equitable Group acted as lender, in each case the relationship was ultimately between Petherick and Trustees Executors Ltd (the Equitable Group's corporate trustee). The named lender acted as agent for Trustees Executors Ltd and Equitable held the mortgages as bare trustee for Trustees Executors Ltd.

(GSA) with Petherick. The GSA granted Equitable as the secured party a security interest in all of Petherick's present and after-acquired property, and all of Petherick's present and future rights in relation to personal property.

[8] On 4 March 2009 Equitable registered on the PPSR a financing statement in respect of all present and after-acquired personal property of Petherick. Equitable also registered on the PPSR on the same date a financing statement in respect of all rent and other amounts whatsoever payable from time to time under each agreement to lease in relation to all or any part of the land now or at any time in the future subject to all mortgages granted by Petherick in favour of Equitable.

The Marac loan

[9] On 9 July 2007 Petherick entered into a loan agreement with Marac, whereby Marac agreed to provide a loan facility of $3,000,000 to Petherick. On the same date, pursuant to the terms of the loan agreement, Petherick entered into a GSD in favour of Marac and ASB.[5] The GSD provided:

> In consideration of all Advances made by us, from time to time and to secure the payment of the Secured Indebtedness and compliance with the Secured Obligations, you charge and assign in our favour and grant to us a security interest in the Collateral …

[10] "Secured Indebtedness" was defined in cl 1.1 as "all your indebtedness to us, or any indebtedness that is incurred by us on your behalf". Clause 3.1, which set out the definition of "security", relevantly provided:

> **Security:** You grant to us a security interest in all your right, title and interest (present and future, legal and equitable) in, to, under or derived from all your present and hereafter acquired property ("the Collateral") whether situated in New Zealand or elsewhere, including without limitation:
>
> …
>
> (g) all book debts and other indebtedness owing and to become owing to you;
>
> …

[5] ASB's debt has since been paid in full.

(i) any of your rights in Personal Property arising by virtue of the PPSA;

(j) Proceeds derived directly or indirectly from the Collateral;

…

[11] If Petherick defaulted on paying the amounts secured by the GSD on the due date, Marac was entitled, under cl 8.1, to appoint one or more receivers.

[12] Marac perfected its security interest on 11 July 2007 by registering a financing statement over all present and after acquired personal property of Petherick on the PPSR. As noted earlier, this was some 20 months before Equitable registered its financing statements on the PPSR. On the same date, the Marac loan was advanced to Petherick. On 7 July 2009 Marac registered caveats against the Morrison Kent and Randstad titles.

Appointment of receivers

[13] Petherick failed to repay the loan it owed to Marac on the due date of 11 July 2009. By 11 October 2009 Petherick owed Marac a total of $3,069,464.02. Two days later, on 13 October 2009, Marac and ASB appointed Messrs Downey and Isaac as receivers and managers under the terms of the GSD. They commenced collecting rental from the two properties.

[14] On 22 October 2009, Equitable appointed Mr Greer as receiver of income over Morrison Kent House and Randstad House under the powers contained in the mortgages registered over the two properties. The day after his appointment, Mr Greer met with Mr Isaac to discuss their respective entitlements to the rental. Mr Isaac agreed that Mr Greer was entitled to all rent that fell due after Mr Greer's appointment. Thereupon Mr Isaac also agreed to pay over to Mr Greer any such rental that might be paid into his account.

[15] From the time of his appointment, Mr Greer received all rental income from the properties, in the capacity as Petherick's agent.[6] During this period, some tenants made further payments to the receiver appointed by Marac. Mr Isaac arranged for

[6] By virtue of the memorandum to the mortgages: cl 12.5.

those payments to be transferred to Mr Greer. Between November 2009 and February 2010, the Marac appointed receiver sent six payments totalling $101,000.44 to Mr Greer's property manager.

[16] Equitable later sold Morrison Kent House and Randstad House by mortgagee sale, the transfers being registered on 1 April 2010 and 24 August 2010 respectively. Mr Greer had received a total of $2,770,363.07 in rent from both properties, from which he deducted $85,365.92 in receivership costs. He paid $1,787,248.91 of the rental to Equitable. On 5 March 2010 Marac made a formal demand for the return of the rental.

Equitable's s 119 notice

[17] Because of its relevance to a new argument put forward by Marac during the appeal hearing, we deal briefly with the facts relating to the service by Equitable of a notice under s 119 of the Property Law Act (PLA) 2007 (the notice). Such facts are set out in an affidavit of Paul Stuart Gooby tendered during the hearing by counsel for Equitable. Counsel for Marac supported the admission of the affidavit. The evidence provided is uncontentious and is said, by Marac, to be important for the final determination of all issues arising on appeal. The evidence relates to a new argument (arising as part of the second issue to be determined on appeal) that was not pleaded or dealt with in the High Court. On this basis we grant leave for the further evidence to be filed.

[18] The evidence shows that the notice issued and served by Equitable (and dated 15 October 2009) required Petherick to remedy its default under the mortgage by 20 November 2009. As already noted, Mr Greer was appointed as receiver of rent by Equitable on 22 October 2009 and began to collect such rent nearly one month prior to the date upon which the notice was due to expire.

[19] We will consider the relevance of these facts, if any, to Marac's second argument when we discuss the priority question as between Equitable and Marac at common law.

First issue – effect of s 23 of the PPSA

The statutory framework

[20] The PPSA regulates security interests over personal property, including their priority. Under s 16, "personal property" is defined as including "chattel paper, documents of title, goods, intangibles, investment securities, money, and negotiable instruments". "Collateral" is defined in the same section as personal property that is subject to a security interest.

[21] "Security interest" is defined in s 17 of the PPSA. It provides:

> **17 Meaning of security interest**
>
> (1) In this Act, unless the context otherwise requires, the term **security interest**—
>
> > (a) means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
> >
> > > (i) the form of the transaction; and
> > >
> > > (ii) the identity of the person who has title to the collateral; and
> >
> > (b) includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
>
> (2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.
>
> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[22] Section 41 provides that a security interest is "perfected" once the security interest is attached, and either a financing statement has been registered on the PPSR in respect of the security interest, or the secured party (or another on their behalf) has

possession of the collateral. A security interest attaches to collateral when value is given by the secured party, and the debtor has rights in the collateral.

[23] Section 66 sets out the priority of security interests over personal property when the PPSA provides no other way of determining priority. The statutory rule is that a perfected security interest has priority over an unperfected security interest in the same collateral. In the case of perfected security interests in the same collateral (where perfection has been continuous) priority is to be determined by the order of whichever of the following occurs first in relation to a particular security interest: the registration of a financing statement; the secured party taking possession of the collateral; or the temporary perfection of the security interest in accordance with the PPSA.

[24] The PPSA does not apply to all personal property interests. Section 23 sets out when the Act does not apply. Relevantly, it provides:

> **23 When Act does not apply**
>
> This Act does not apply to—
>
> …
>
> (e) an interest created or provided for by any of the following transactions:
>
> (i) the creation or transfer of an interest in land:
>
> (ii) a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of or licence to occupy land, unless the right to payment is evidenced by an investment security:
>
> …

[25] The appeal revolves around s 23 and whether the above exceptions exclude from the scope of the PPSA security interests in the rental payable under a lease. The parties agreed that, if the exception in s 23(e) did not apply and the dispute had to be determined under the PPSA, then Marac's security interest would rank ahead of Equitable's because it was perfected under the PPSA before the Equitable security interest.

The High Court judgment

[26] The Associate Judge carefully analysed the nature of Equitable's interest in the rental under the mortgage agreements and considered whether this fell within the exclusionary provisions in s 23 of the PPSA. He noted that cl 4 of the memoranda of mortgage contained a transfer of a right to payment that arose in connection with an interest in land (that interest being the mortgage security),[7] which included a transfer of rental payments. So it squarely came within the wording of s 23(e)(ii). It was not necessary that the fruits of the performance of the contract which was secured by the mortgage should itself constitute an interest in land.[8] The Associate Judge concluded:

> [34] The form of security created over the secured property in this case is described as "an absolute transfer and assignment to us by way of security".[9] The interest created by the dealing between Equitable and the mortgagor in this case would therefore seem to be an interest "created or provided for by … a transfer of a right to payment" within the meaning of s 23(e)(ii).

[27] Accordingly the exclusion created by s 23(e)(ii) of the PPSA applied. The process of determining priorities of securities over land was not governed by the regime created by the PPSA. Rather, it had to be resolved by other means.

[28] The Associate Judge also considered the legislative intention behind s 23 of the PPSA and policy considerations. He explained that the registration of a mortgage pursuant to the Land Transfer Act 1952 (LTA) would provide notice to parties such as Marac of the extent of the secured property, so that it would be obvious that the rental to which the mortgagor was entitled was the subject of a security under the mortgage.[10] The Judge read the plain language of the s 23 as meaning that the process of determining priority of securities over land is not prescribed by the PPSA but must be resolved by other means. He stated:[11]

> There is no policy reason why the Act should be differently interpreted. A regime is already provided for the ranking of real estate mortgage securities under the Land Transfer Act.

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7 At [28], citing the definition of "estate or interest" in s 2 of the Land Transfer Act 1952.
8 At [30].
9 At cl 4.1(c) of the memoranda to the mortgages.
10 At [37].
11 At [38].

[29] The Associate Judge agreed with the submission by Equitable that it would produce inconvenience and uncertainty if the rules relating to the relative priorities of mortgages over land had to be sought in not one statute but two. He concluded that in the context of this case, the question of who had the prior claim to the rental payments under the leases was to be determined in the same way that any other contest as to priority between mortgages would be – under the LTA.[12]

[30] It followed that Marac's application for summary judgment was dismissed.

First issue – our evaluation

[31] We consider that the Associate Judge was correct on the question of whether the PPSA applied in this case – essentially for the reasons he gave. We will however deal with the detailed arguments advanced on appeal for Marac by Mr Tingey. The starting point is cl 4.1(c) of the memoranda of mortgage, which provides:

> The security created by this mortgage operates and takes effect as: … an absolute transfer and assignment to us by way of security of all your rights, title, entitlements and interests (present and future, legal and equitable) in and to the Assigned Property; …

[32] The question is whether this clause comes within the exclusionary ambit of s 23(e)(ii) of the PPSA dealing with an interest created or provided by "a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of or licence to occupy land". Mr Tingey invited us to read the provisions of s 23 narrowly and require that any "transfer" has to be an absolute one before the exclusionary effect can occur.[13]

[33] Elaborating, Mr Tingey submitted that s 23(e)(ii) does not apply as there is no "transfer" within the meaning of the provision where the mortgagee fails to take possession of the property but instead appoints a receiver, who acts as the mortgagor's agent, to collect rent. Under the LTA, a mortgagee no longer has a statutory right to collect rent; rather, the right to receive rent is a contractual one. Here, Equitable took an assignment of rent under both the memoranda of mortgage

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12 At [40].

13 The parties accepted that s 23(e)(i) did not apply because rental payable under a lease is not, itself, an interest in land.

and GSA of 2009. The fact that Equitable appointed Mr Greer as a receiver rather than proceeding under s 119 of the PLA 2007[14] shows that, when Equitable acted to collect the rent, it was not relying upon its mortgage. Rather, it was relying upon the GSA, a document which comes within the scope of the PPSA and is subordinate to Marac's security interest under the statutory priority rule in s 66(b)(i).

[34] Mr Tingey accepted that, if Equitable had in fact taken possession under s 137 of the PLA 2007, it would be likely to have priority to any rental collected over a PPSA-registered security interest. This is because there would have been a transfer of the rental income that satisfied s 23(e)(ii) – once the tenants were paying the rental to Equitable directly, the assignment would have been perfected. In other words s 23(e)(ii) only applies where there is a legal, not an equitable, assignment and where the assignment has been made absolute.

[35] Mr Tingey further argued that whether s 23 of the PPSA applied depended upon what contractual rights are relied upon by the creditor. Here the deed appointing Mr Greer as receiver shows clearly that Equitable was relying upon its right to the rent under the GSA rather than the memoranda of mortgage. Clause 1 of the deed of appointment states that the security holder appoints the receiver pursuant to powers granted by the mortgage and "at law", which refers to the deed of assignment of the leases which was undertaken during the 2009 refinancing. Mr Tingey submitted it was significant that the appointment of the receiver was not just an appointment under the mortgage, and could not have been because the notice given under the PLA 2007 had not expired.

[36] We do not accept these submissions. We are satisfied that Equitable's interest in the rental was excluded from the PPSA by the operation of s 23(e)(ii). For present purposes there is no distinction between the terms "transfer" and "assignment" used in the operative clause.

[37] Second, the assignment of the rent in cl 4.1(c) was an absolute assignment even though it was part of the security for the mortgage transactions. The

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[14] As the affidavit of Mr Gooby confirms, although Equitable issued and served a notice under s 119, it entered possession without waiting for the expiry of the notice.

memoranda of mortgage expressly described the assignment of rent as "absolute". Moreover the assignment was not conditional, a further factor pointing to its absolute character. We agree with the submission of Mr Stewart QC, for Equitable, that an absolute assignment can be a security if it allows for reassignment or redemption when the debt is repaid.[15] Here the memoranda of mortgage provided for reassignment of the rental upon repayment.[16]

[38] We do not accept that s 23(e)(ii) should be narrowly construed. There is no pressing policy reason for so doing. If effect is given to the plain meaning of the words, all elements of the provision, including the existence of a "transfer" are satisfied. We have no doubt that the right to payment of the rental arose "in connection with an interest in land".

[39] What then of the point that Equitable did not receive the rent directly but appointed a receiver? And did it matter that Equitable did not wait until the notice it had given Petherick under s 119 of the PLA 2007 had expired?

[40] To deal with these questions, it is necessary to consider further the terms of the mortgages. While cl 4.1(c) transferred absolutely the right to collect the rental to Equitable, Petherick still enjoyed a right to use the rent generated by the two properties. This was by virtue of the express licence relating to rentals (or "Earnings") found at cl 5.1 of the mortgage, which provides:

> **5.1 Dealings with Assigned Property:** Notwithstanding the assignment of the Assigned Property to us pursuant to clause 4.1(c), you may continue to receive the Earnings and to exercise the Monetary Rights and the Lease Rights:
>
> (a) so long as:
>
> (i) Earnings are applied for the purposes and in the priority order specified, required and permitted under clauses 5.2 and 5.3;
>
> (ii) you pay, perform and comply with your obligations to us under the Facility Terms;
>
> (iii) you observe and comply with your undertakings, and the restrictions and requirements, specified in this mortgage; and

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15 *Gibbston Valley Estate Ltd v Owen* (1999) 4 NZ ConvC 193,024 (CA) at [19] and *Re Universal Management Ltd* [1983] NZLR 462 (CA) at 470.

16 See cls 5.11 to 5.13.

(iv) no Default Event occurs or arises; and

(b) until and unless notice of assignment of the Assigned Property is given to the relevant Obligors in accordance with clause 5.7.

[41] The term "Earnings" is defined as:[17]

> … all rent and other moneys whatsoever and whensoever payable to you or to which you are or become entitled to receive now and from time to time and at any time in the future under, pursuant to or in connection with each Lease, and includes the Monetary Rights under, pursuant to or in connection with each Lease.

[42] The scope and terms of the express licence are spelled out in cl 5.1. Importantly the licence is conditional on no "Default Event" occurring.[18] The order of application of the Earnings is governed by cl 5.2 and the application of surplus Earnings dealt with in cl 5.3. The assignment remained valid notwithstanding the fact that the mortgagee gave the mortgagor a licence to collect the rent. Furthermore, once breach or a Default Event occured, the licence is revoked. Additionally, payment of the rent by the receiver to Equitable, following breach or the occurrence of a Default Event, does not affect the absolute assignment.

[43] Mr Stewart submitted that, where Petherick breached its contractual obligations under the mortgages, Equitable could enforce the assignment by revoking the licence. This could occur in one of three possible ways. First Equitable as mortgagee could go into possession of the property by complying with the requirements of the PLA 2007. Alternatively, Equitable could require the mortgagor to pay the rentals to it,[19] or it could appoint a receiver of income as agent of Equitable as mortgagor. This is in substance the same as asking the mortgagor to pay the rentals to the mortgagee. But Mr Stewart submitted it is incorrect to suggest that the mortgagee must enter into possession of the property in order to obtain the rent. Neither is it necessary to serve a s 119 notice (and wait until the notice period has expired) before proceeding.

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17 Clause 1.3.
18 Clause 5.1(a)(iv).
19 Under s 137 of the Property Law Act (PLA) 2007 such requirement does not involve going into possession of the mortgaged land.

[44] With respect to the licence to collect the rent enjoyed by Petherick, Mr Stewart submitted that this was revoked when Marac appointed its receivers. This constituted a "Default Event" under cl 11.1(i) of the mortgage meaning that, under cl 5.1(a)(iv), Petherick's right to receive the rent came to an end. Alternatively, the licence was revoked by the appointment of Mr Greer as Equitable's receiver or, at the very latest, when Mr Greer agreed with Marac's receivers that he would collect the rental from the date of his appointment. From the moment of default, Equitable was entitled to require Petherick or any agent of Petherick who was receiving the rental (including Marac's receiver) to account to Equitable for the rental.

[45] We agree with the analysis advanced by Mr Stewart. It matters not that Equitable did not receive the rent directly but appointed a receiver. The express licence by which Petherick retained its ability to collect the rent was brought to an end by operation of cl 5.1(a) of the mortgages. Equitable took steps to intervene to ensure that it received the rental that had been assigned to it by Petherick under the mortgages. It was not necessary that Equitable enter into possession. That was not a requirement of the mortgage or the law. It follows that the fact that Equitable did not wait until the expiry of the s 119 notice given to Petherick did not affect its rights to receive the rent following its assertion of its priority over Marac.

[46] In our evaluation of the exclusionary impact of s 23(e)(ii) we have relied upon the plain words of the provision and its application to the facts of the case. That s 23 has the effect of excluding the provisions of the mortgage from the PPSA is also consistent with the legislative policy behind s 23. A Law Commission report published in 1989 contained a draft of the proposed PPSA.[20] One of the categories of security interests excluded from the scope of the PPSA was "a transfer of a right to payment that arises in connection with an interest in land, including a transfer of rental payments payable under a lease of or licence to occupy land unless the right to payment is evidenced by a security" (s 4(5)(b)(ix) of the draft). This is near identical wording to s 23(e)(ii).

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[20] Law Commission *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989).

[47] In its commentary, the Law Commission stated that the exclusionary provisions in the draft legislation fell into two categories, the first of which was security interests adequately regulated elsewhere.[21] It gave as an example mortgages of land and transfer of mortgages, which were regulated by the PLA 1952. The other category of exclusionary provisions covered transactions relating to transfers which are seldom associated with commercial financing transactions. The Law Commission explained:[22]

> The only excluded transactions which arguably intersect with commercial financing are those anticipated by subsection (5)(b)(ix) insofar as it applies to a *transfer of rental payments or the transfer of a promissory note secured by a real property mortgage*. In the absence of the exclusion, those transfers would qualify as the transfer of an account, instrument or intangible and be subject to regulation under the statute. Under subsection (5)(b)(ix), the statute applies to such transfers only where evidenced by a security. This will be the case, for example, where rentals and mortgage payments are charged as security for debenture stock.
>
> (Emphasis added.)

[48] The Law Commission's focus was on excluding certain types of "transactions", rather than "interests". It considered that many of the transactions discussed were "adequately regulated elsewhere".[23] This is a clear indication of what the Commission saw as the scope of the proposed exclusion. Such comments from the Law Commission report also show that the proposed exceptions to the PPSA are not as narrow as counsel for Marac contended. The Law Commission envisaged that the exception would be for a transaction and that the parties would be able to determine whether the transaction was an exception or not at the time the transaction was entered into, so that they could decide whether to register the PPSA or not. The interpretation proposed by Marac would make it impossible for parties to do this, and they would only know whether the exception applied when they saw how the mortgagee enforced its rights. This makes Marac's submission completely impractical. We note that there is no other exception in s 23 where it is necessary to wait and see how the respective parties enforce their rights before deciding whether the exception applies or not. There is no reason to believe that this should be the case in relation to s 23(e).

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21 At 103.
22 At 103.
23 At 103.

[49] There are also Canadian authorities dealing with comparable PPSA legislation that counsel for Equitable referred to. None of these cases is directly on point but they do suggest that the mortgage transaction as a whole is to be kept outside of the PPSA regime. For example, in *Re Urman*,[24] the mortgage of a mortgagee's interest in land, which included the right to receive mortgage money, was held not to be personal property for the purposes of the PPSA as, relying on English authority:[25] "a mortgage debt is not to be separated from the land in which it is secured for the purpose of determining priority between competing assignees".[26] This was despite the court's acknowledgement that, in equity, the right to receive payments under a mortgage was personal property.[27]

[50] To sum up on the first issue, we reject the arguments for Marac that the absolute transfer by way of security of Petherick's interest in the rent was not excluded by s 23(e)(ii) of the PPSA. Such a proposition is supported neither by the plain words of the provision nor by policy. With respect to the latter, we consider that there is sense in giving the land mortgagee the better right to rents than the personal property mortgagee. The ability of a mortgagee to get the rent in the event of a default by the mortgagor is an important aspect of the funding of tenanted properties. If the land mortgagee does not have a first ranking PPSA security interest it will have to enter into a complex priority arrangement with the prior PPSA security interest holder. All that adds complexity to the transaction which, in turn, may lead to an increased cost of funds for the debtor.

[51] We are satisfied that, where the right to rental passes from the mortgagor to a mortgagee as a result of a mortgage agreement, that should be a transfer for the purposes of s 23(e)(ii). To do otherwise would be to dissect unnecessarily constituent parts of the mortgage and subject them to different statutory regimes. This result is not affected in this case by the fact that Equitable as mortgagor did not enter into possession.

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24 *Re Urman* (1983) 3 DLR (4th) 631 (ONCA).

25 *Taylor v London and County Banking Co* (1901) 2 Ch 231.

26 *Re Urman* at 636.

27 Counsel also cited two other Canadian authorities that consider the policy behind Canadian PPSA legislation: *United Dominions Investments Ltd v Morguard Trust Company* [1986] 1 WWR 78 (SKCA) and *Bank of Montreal v Enchant Resources Ltd* (1999) 182 DLR (4th) 640 (ABCA).

[52] For the sake of completeness, we refer briefly to a new argument that Equitable raised in the course of the appeal.[28] It was based on the notion of debtor initiated payments under s 95 of the PPSA. Equitable contended that, even if Marac were correct that the PPSA applies, Equitable would still gain priority to the rental as the payments to Equitable by its receiver Mr Greer had the effect of extinguishing Marac's security interest under s 95. Given our clear conclusions on the first ground, we see no need to deal with this further issue.[29]

[53] Accordingly Marac's first ground of appeal fails.

Second issue – if the PPSA does not apply

The parties' positions

[54] Given our conclusion that the PPSA does not apply, it is necessary to determine the priority of the respective security interests of Marac and Equitable under the relevant statutory provisions dealing with interests in land and at common law.[30] Mr Tingey on behalf of Marac submitted that the pre-PPSA position was that the right of a prior mortgagee to rentals where a receiver had been appointed depended on the date that the mortgagee had gone into possession or appointed a receiver. It was not based on priority of charges, as the English case of *Preston v Tunbridge Wells Opera House Ltd* showed.[31] The person who appointed a receiver first was entitled to the rentals and that right was only lost if the other party had a superior interest and went into possession.

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28 The point was not raised by Equitable in the High Court and was not mentioned in the memorandum supporting the judgment on additional grounds.

29 Equitable also sought to argue that it had changed its position in reliance on the action of Marac's receiver in conceding that Mr Greer had a better right to the rent and had not therefore taken steps to enter into possession, which would have secured its position on the argument raised by Marac. Again, given our findings on the effect of s 23, we advised the parties that we did not need to deal with this argument.

30 The Associate Judge did not deal with this issue (which counsel now agree is critical) as he noted that counsel were agreed that an answer to the substantive issue (presumably whether the PPSA applied or not) would resolve the issue of Marac's claim: at [41].

31 *Preston v Tunbridge Wells Opera House Ltd* [1903] 2 Ch 323 at 325.

[55] Mr Tingey also relied on two further English cases of *Re Metropolitan*[32] and *Re Belbridge*[33] to show that a receiver's right to the rental is not ousted by a superior creditor unless the superior creditor goes into possession. As noted, Equitable did not go into possession of the properties at any time before they were sold by mortgagee sale. Thus Mr Tingey submitted that Marac, having appointed a receiver first, has the right to the rentals as Equitable elected not to go into possession.

[56] Mr Stewart contended that Equitable is entitled to the rent as its mortgage ranked ahead of that of Marac. In particular, it is not necessary for the superior creditor to go into possession in order to oust the receiver of the lower ranking creditor. Entry into possession was not required either under the rights inherent in each mortgage, or under the express assignments. With respect to the express assignments of the rent, while the mortgagee enjoyed a licence to collect the rent, possession (as already discussed at [40]–[45] above) was not required to revoke that licence.

[57] With regard to the entitlement to rental inherent in each mortgage, Mr Stewart argued that under the common law, a mortgagee granted a licence to the mortgagor to receive rental from the land. It is only when a mortgagee revokes that licence by enforcing its security – by either taking possession or appointing a receiver – that it can enforce its right to rental. The cases relied upon by Mr Tingey, particularly *Preston* and *Re Belbridge*, in fact support the proposition that the first mortgagee has a better right to the rental from the moment it enforces its mortgage. In the present case, Petherick's ability to deal with rents was revoked by the appointment of Mr Greer. By that appointment, Petherick's "undisputed possession" of the land and its right to the rent came to an end.

The cases – more detail

[58] In *Preston v Tunbridge Wells Opera House Ltd* the second mortgagees applied to the court for the appointment of a receiver of rents. The application was successful, and the tenants of the land were ordered to pay their rent to the receiver.

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32 *Re Metropolitan Estates Ltd* [1912] 2 Ch 497.
33 *Re Belbridge Property Trust Ltd* [1941] 1 Ch 304.

The first mortgagee later applied to the Court for an order discharging the receiver or, alternatively, to be let into possession of unlet premises and receipt of the rents from those that were let. The issue before Farwell J was whether the first mortgagee was entitled to the rent from the time the receiver appointed by the second mortgagee was discharged, or from the earlier date of the service of his notice of motion. The Judge stated:[34]

> … in [*Thomas v Brigstocke*[35]] the Master of the Rolls (Sir John Leach) in giving judgment says that a mortgagee may be considered to be in possession "from the time of the discharge of the receiver, or perhaps from the time when his application was first made for that discharge." In my opinion the latter date mentioned by the Master of the Rolls is the correct one. It is due to the exigencies of the business of the Courts that an application cannot be heard the moment it is made, and I think the first mortgagee should not be made to suffer from the necessary delay arising from this cause.

[59] Later, the Judge said: "I am of the opinion that the first mortgagee, from the date of the service of his notice of motion, must be treated as having been in possession of the mortgaged property".[36] The first-ranking mortgagee was therefore entitled to the rents and profits which from that date came into the hands of the receiver.

[60] The focus of the case was thus on the time from which the first mortgagee's entitlement to rent arose. The Judge assumed, without full discussion, that entry into possession was necessary. There is no suggestion in the judgment that an application for possession was the only way to oust the court appointed receiver. The case was different from the present because the first mortgagee in *Preston* was not seeking to appoint a receiver or receiver of income. Rather, the first mortgagee was seeking possession of the mortgaged property including the unlet premises.[37] As there was already a court appointed receiver of income, the first mortgagee would have needed a court order displacing that receiver.

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34 At 325.

35 *Thomas v Brigstocke* (1827) 4 Russ 64 (Ch).

36 At 325.

37 No doubt this was why appointment of a receiver was insufficient for the first mortgagee's purposes.

[61] In *Re Metropolitan* the first mortgagee appointed a receiver (one Philips) but did not give immediate notice to tenants. The next day, the court, on the application of a debenture holder, appointed a further receiver, who gave immediate notice to the tenants and demanded payment of rents. A week later the first mortgagee gave the court-appointed receiver and tenants notice of Philips' appointment and instructed the tenants to pay rent to Philips. The first mortgagee applied to the court (on 27 February 1912) for a possession order and was successful, the order for possession being made on 1 March. The issue to be determined was from what date the first mortgagee was entitled to the rent.

[62] Swinfen Eady J stated:[38]

> It is well settled that until a mortgagee takes possession by himself or a receiver the mortgagor is in undisputed possession of the property and the rents. If a puisne incumbrancer enters into possession or receipt of the rents, the mortgagor's possession is displaced and the puisne incumbrancer can receive the rents without accounting to any prior incumbrancer until that prior incumbrancer intervenes. When he intervenes he displaces the puisne incumbrancer, but until that intervention the puisne incumbrancer is entitled to remain in possession of the rents. The law is clear and undisputed.

[63] The Judge decided, relying on *Thomas v Brigstocke* and *Preston*, that the holder of the first mortgages were entitled to the rents from 27 February, when the notice of motion was served.[39] On the question of timing, Swinfen Eady J observed:[40]

> It is clear, however, that, notwithstanding the order appointing Whitehill [the court-appointed receiver], the first mortgagees were not entitled to come in and displace him. It is true they could not do this vi et armis or without coming to the Court. But they had only to signify their desire of obtaining possession by an application to the Court, and this application they could make by serving a notice of motion on which an order for possession would be made.

[64] The Judge later commented that, if a prior mortgagee was apprehensive of his position, he should at once take proper steps to obtain possession for himself, as any mortgagee was entitled to intervene and take the rents unless a prior mortgagee had

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38 At 501.
39 At 502.
40 At 502.

already done so.[41] The Judge also quoted from *Thomas v Brigstocke*:[42] "A mortgagee is entitled only to such rents as accrue due to him when he is in possession of the mortgaged premises."

[65] *Re Metropolitan* is distinguishable from the present case in two respects. First the mortgagee's receiver, Philips, did not give notice to the tenants, whereas Mr Greer gave prompt notice of his appointment to the tenants. The other difference is that in *Re Metropolitan*, the first mortgagee was required to go to court to obtain an order to oust the second mortgagee's receiver, as this receiver had been court-appointed. Swinfen Eady J was explicit in stating that the first mortgagee needed to go to court to displace the second mortgagee's receiver. There is clear emphasis in the judgment upon need of the first mortgagee to apply for possession in order to effect displacement.

[66] The third English case is *Re Belbridge*. It concerned debenture holders who obtained a court order appointing a receiver. The first mortgagee sought leave of the Court (under wartime emergency legislation) to appoint a receiver. This was successful, and a receiver was appointed. The issue before the court was whether the debenture holders' receiver should account for rents as from the date on which the court summons under the emergency legislation was issued by the first mortgagee, or from the date of the present summons. Uthwatt J referred to the case of *Re Metropolitan* and stated:[43]

> The rule in that case was stated to be that the first mortgagee was to be entitled to an account as from the date when he served his application for possession, but that rule is based on a wider principle to which, in cases where the proceedings under the Courts (Emergency Powers) Act, 1939, are necessary, effect must be given by treating the whole of the proceedings by which the mortgagee obtains the leave of the Court under that Act as merely part of the machinery by which the mortgagee applies for possession. It follows that the rents must be accounted for from the date [of when the summons under the emergency legislation were first served].

[67] The case has the added complexity of dealing with wartime legislation preventing appointments of receivers without leave of the court. Given that a receiver had been appointed by the debenture holders, a later application by a prior-

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41 At 503.
42 *Thomas v Brigstocke* at 65.
43 At 306–307.

ranking mortgagee to appoint a receiver was necessary. And the mortgagee was required to seek leave to do so. But the case supports the proposition that from the moment that the mortgagee applied for leave to appoint a receiver and served its summons, it had the better rights to the rents. It was enough that the prior-ranking creditor appointed a receiver. Possession by the mortgagee was not required in order to usurp the earlier-appointed receiver.

[68] These three cases support two possible ratios. The first is a narrow one, appearing most strongly from *Re Metropolitan*, that the first mortgagee has to displace the receiver by actually going into possession. The second possible ratio is a broader one, drawn from across the three cases but most strongly from *Re Belbridge* and *Preston*. That is that it is sufficient for the first mortgagee to take some action, whether it would enter into possession or to appoint a receiver, to oust the second-ranking creditor's receiver. On balance we prefer the broader approach. Even if we are wrong to do so, each of the cases is, strictly speaking, distinguishable on the facts and not binding on this court.

[69] Three further cases need to be mentioned. Marac relied on *Southpac Custodians Ltd v Bank of New Zealand*[44] as authority for the proposition that a first mortgagee is only entitled to rents once they go into possession. However, that case differs significantly from the present appeal. In *Southpac*, the second mortgagee had appointed a receiver to collect rents. Later, the first mortgagee served notice of default to the mortgagor under the PLA 1952 and, when the notice expired, made a demand for the rent from the receiver. When the receiver's solicitors proved resistant, the first mortgagee commenced proceedings, claiming a declaration that it was entitled to rents as mortgagee in possession.

[70] One of the issues on appeal was whether the first mortgagee had a right to go into possession, given that it had no contractual right to do so. Any right to go into possession would come under s 106 of the LTA, which allowed the mortgagee to bring an action for possession. The Court held that s 106 allowed the first mortgagee an unqualified right to possession as a statutory incident of its mortgage,[45] and that,

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[44] *Southpac Custodians Ltd v Bank of New Zealand* [1993] 1 NZLR 663 (CA).
[45] At 669.

if a mortgagee did apply to the court for possession, the court did not have a discretion to refuse the order if the right had been made out.[46]

[71] *Southpac* was therefore concerned with the rights of the first mortgagee to go into possession under s 106 of the LTA, a provision which has since been repealed. It does not deal with the situation where the second-ranking creditor appoints a receiver, followed by the appointment of a receiver by the first mortgagee. The case is further distinguishable by the fact that the first mortgagee in *Southpac* had no contractual right to go into possession and collect the rent; any right it had was derived from statute. However, in the current appeal, the first mortgagee has a contractual right to the rent in a rents assignment clause, and is not relying upon any statutory right to the rent. *Southpac* is therefore of limited assistance.

[72] The final case relied on by Marac is *Leob Canada Inc v Caisse Populaire Alexandria Ltée*.[47] It concerned two competing security holders whose security interests included the inventory of a grocery store. An interim receiver had been appointed by the court to operate the store on 15 November 2002, pursuant to a motion brought by the plaintiff. On 27 February 2003 the defendant, a higher ranking secured party to the relevant inventory, appointed its own receiver and took possession of the inventory. The defendant argued that, when the plaintiff initiated court proceedings to appoint an interim receiver to continue to operate the grocery store, it became responsible to pay to the defendant the value of the inventory at that date.

[73] The Ontario Superior Court of Justice noted that, from the date the interim receiver was appointed, the defendant took no steps to realise upon its security in the inventory until late February of the following year and did not object to the ongoing sale of the inventory. R Smith J stated:[48]

> The interim receiver ensured that the continued operation of the grocery store would be carried on in the normal course of business. I … conclude that if a secured creditor takes no action to realize on its security in inventory and allows the business to continue to operate and as a result the inventory is

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46 At 669.

47 *Loeb Canada Inc v Caisse Populaire Alexandria Ltée* (2004) 7 PPSAC (3d) 194 (Ontario Superior Court of Justice).

48 At [92].

> reduced, when the store is operated in the normal course of business, the secured party cannot then insist on receiving the value of the inventory, which was present at some previous point in time.

[74] The defendant was therefore estopped from seeking the value of the inventory from a point other than when it took steps to realise its security.[49] This case can consequently be regarded as authority for the proposition that a higher ranking creditor is not entitled to the value of its security at a point prior to enforcing its security, at a time when the lower ranking secured party has taken steps to protect its security interest by appointing a receiver. However, *Loeb Canada* was concerned with security interests in a grocery store's inventory, rather than rental from real property subject to security interests. The receiver in the current case was therefore not continuing to operate a business and sell the items over which the security existed; rather, the receiver collected rent from the tenants who leased the premises, which is a distinguishing factor. Of course, under the PPSA legislation in New Zealand and Canada, inventory can be sold in the ordinary course of business and good title passes to a good faith purchaser for value. This situation is to be distinguished from rental from leased land.

[75] The Judge in *Loeb Canada* was also influenced by the decision of *Credit Suisse Canada*, in which the Court of Appeal for Ontario stated:[50]

> Where … the debtor is *entitled to* the collateral itself, subject to certain events occurring, and where the parties conduct themselves over the period of the loan transaction in a fashion which acknowledges the debtor's right to use the funds representing the collateral on its own account, circumstances of great commercial ambivalence would exist if the lender were able at the end of the day to undo what had been done.

[76] Such an approach is of limited applicability here, where Petherick's licence to receive the rental under cl 5.1 of the mortgage memoranda was contingent upon default not occurring, and upon certain other constraints. Once the express licence was revoked, Equitable could assert its right to the rental. Underlying Petherick's licence was the assignment of the rent to Equitable.

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49 At [96].

50 *Re Credit Suisse Canada v 113 Yonge Street Holdings Ltd* (1998) 41 OR (3d) 632 (ONCA) at 640.

[77] Peter Blanchard and Michael Gedye discuss *Loeb Canada* in their text on receivership law and note the Judge's suggestion[51] that the result may have been different if the first ranking secured creditor had objected to the ongoing sale of the inventory or had taken steps to appoint its own receiver.[52] The authors prefer the view that a receiver appointed under a subordinate security interest must repay prior ranking security interests before making payments to the appointing creditor.

[78] On the question of priority between chargeholders Mr Stewart referred us to the decision of the Saskatchewan Court of Appeal in *United Dominions Investment Ltd v Morguard Trust Company.*[53] It involved two competing security holders who had a right to rent. However, that decision is based on a statutory provision in s 22 of the Saskatchewan PPSA dealing with priorities between a security interest in rental payments and an interest in a lease providing for rental payments. The decision is of limited assistance to us as the New Zealand PPSA does not have a similar provision.

[79] However, in *United Dominions Investment Ltd*, the respondent ran an argument that the appellant had to go into possession before exercising its rights under its mortgage to the rental before it could have priority. Relevantly, the Court noted:[54]

> We reject this contention because the mortgage in question grants to the appellant Morguard the right, upon default, to collect the rents and profits "whether in or out of possession". We affirm the chambers judge's conclusion that Morguard as mortgagee acquired "an interest in the lease[s]" but reject his characterization of this interest as conditional within the context of the priority structure.

Second issue – our analysis

[80] We are satisfied that it was not necessary for Equitable to enter into possession in order to become entitled to the rental either under its rights as mortgagee under each mortgage or under the express assignments. We agree with

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51 See *Loeb Canada* at [96].

52 Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (Wellington, LexisNexis, 2008) at [3.21].

53 *United Dominions Investment Ltd v Morguard Trust Company* [1986] 1 WWR 78 (SKCA).

54 At 84.

Mr Stewart that the two rights are slightly different. Our analysis will deal with both situations.

Entitlement under the assignments

[81] There is no doubt that, if a mortgagee takes an assignment of rental from a mortgagor, the mortgagee can grant a licence to the mortgagor to collect rent from the tenants. But if the mortgagee wishes to receive rentals that a subordinate chargeholder's receiver is or has been collecting, the mortgagee must revoke the licence. We consider that possession is not a necessary requirement in order to revoke the licence. What is so required depends on the terms of the licence itself. Blanchard and Gedye refer to *Re Metropolitan* and state that, if a mortgage contains an assignment of rentals clause, possession may not be required before a first mortgagee is entitled to rent.[55]

[82] It is instructive to refer to the full text in order to place this observation in context. Dealing with priority of receivers, the authors state:[56]

> Sometimes, where there is more than one creditor holding a security interest over the debtor's assets, different receivers will be appointed in respect of the same assets by more than one secured creditor. Notwithstanding the order of appointment, it is the receiver appointed by the secured party of highest priority who is entitled to take possession of and manage the assets that are subject to the security interests. The other receivers must wait in the wings until the receivership instituted by the secured party with the highest priority is completed. A receiver already in possession under an appointment by a secured party with a lower ranking priority must give up possession and hand over the assets to the higher ranking secured party's appointee. However, whether the vacating receiver must also account to the newly appointed receiver for income and profits earned while the company was in the control of the vacating receiver will depend, in part, on the assets in issue and the terms of the respective security agreements.
>
> Although *Re Metropolitan Amalgamated Estates Ltd* confirmed that a first mortgagee is not entitled to rents prior to taking possession or commencing an action for possession, the position under a modern general security agreement is more complicated and requires a consideration of, among other things, the terms of the competing security agreements, the priority rules of the Personal Property Securities Act and the scope of a receiver's duty, if any, to pay secured creditors in the proper order of priority.

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55 At [3.21].

56 At [3.21] (footnotes omitted).

> ...
>
> Of course, all other assets that the vacating receiver has dealt with, and the proceeds of such assets, that are still on hand will be directly subject to an all-encompassing security interest of a prior secured party. The prior secured party will be entitled to all these assets in priority to the lower ranking secured party, including those assets that were derived from profits and income generated by the vacating receiver.
>
> When a receiver gives up possession to a prior ranking secured party's appointee, the receivership is not terminated but merely suspended in its operation until completion of the receivership that has priority.
>
> (Footnotes omitted.)

[83] As our earlier analysis shows, Petherick assigned the rental to Equitable which in turn granted a licence to Petherick to receive the rent. When default occurred, the licence was revoked, and to enforce its assignment Equitable intervened by appointing its own receiver.[57]

[84] We are satisfied that the view expressed by Blanchard and Gedye on the question of whether the mortgagee must take possession has merit. A prior security holder should not be forced to enter into possession to protect its prior right to rents when it has an express right to collect the rent. As Blanchard and Gedye suggest, weight must be attached to the wording of relevant security documents.[58] Clause 4.1(c) of the mortgage memoranda gave Equitable an absolute assignment of the rent, not one dependent upon possession.

[85] Policy reasons support this analysis. Receivership is a more conventional remedy, whereas entry into possession carries a range of liability risks. Also, if second ranking secured creditors can get an advantage by jumping in and appointing receivers, they will do so and trigger defaults where the first security holder may be able to help the debtor get through a difficult financial period. Moreover, first ranking security holders will have an incentive to sell the building in circumstances where the interests of all (including those of subsequent security holders) are enhanced. There may well be cases where it would be appropriate to wait for improved market conditions.

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[57] We have already discussed the way in which such revocation and intervention occurred at [44]-[45].

[58] At [3.21].

Entitlement under the mortgages

[86] At common law, as it developed in relation to the deeds system, a mortgagee granted a licence to a mortgagor to receive the rent from the land.[59] It is only when a mortgagee revokes the licence of the mortgagor by enforcing its security, either by taking possession or appointing a receiver, that it can enforce its right to rental.[60] The context to this approach in England is that a fundamental element of the real property rights created by a mortgage over land was the mortgagee's right to possession, and therefore to the rental collected from tenanted property.[61] This was because the mortgagee obtained the legal estate of the land.

[87] In New Zealand, the position is somewhat different. A mortgage creates a charge only over the mortgaged property. Because of this, a mortgagee's right to possession is regulated by contract and statute.[62] For mortgages entered into on or after 1 January 2008, there is an implied covenant (unless a contrary intention is expressed) that, if the mortgagor fails to pay any amounts secured by the mortgage on the due date, or fails to perform or observe any expressed or implied covenant of the mortgage, the mortgagee may enter into possession or appoint a receiver with the power to enter into possession of the mortgaged land as the agent of the mortgagor to collect rent.[63]

[88] For mortgages made prior to 1 January 2008, different statutory provisions apply regarding the right to possession. Under the PLA 2007, every registered mortgage over land under the LTA that came into operation before 1 January 2008 contains an implied power of the mortgagee, upon the mortgagor's default to enter into possession of the mortgaged land.[64] Before the PLA 2007 was enacted, s 106 of the LTA provided that the mortgagee, upon default, may enter into possession of the mortgaged land by receiving the rents and profits thereof. There is no power implied into mortgages that came into operation before 1 January 2008 to appoint a receiver

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59 See Charles Harpum, Stuart Bridge and Martin Dixon *Megarry & Wade – The Law of Real Property* (7th ed, London, Sweet & Maxwell, 2008) at [25-024]–[25-025].

60 See *Pope v Biggs* (1829) 9 B & C 245.

61 *The Law of Real Property* at [25-024].

62 See *Southpac Custodians Ltd v Bank of New Zealand* [1993] 1 NZLR 663 (CA) at 666.

63 PLA 2007, s 95(1) and sch 2, part 1, cl 12.

64 PLA 2007, s 95(3).

to collect rent, although the contractual terms of the contract could contain such a clause, as did the mortgage memoranda in this case.

[89] Also under the PLA 2007, if the mortgagee becomes entitled under a mortgage to enter into possession of mortgaged land, then it can do so through asserting management or control over the land by requiring a lessee or occupier of the land to pay to the mortgagee any rent or profits that would otherwise be payable to the current mortgagor.[65]

[90] This analysis of the statutory regime in New Zealand shows that both possession and receivership oust the mortgagor from the right to the rents. Despite differences between the different jurisdictions, for all practical purposes, a Torrens system mortgage provides rights equivalent to those enjoyed by a first mortgagee under the common law. Thus, by granting a first mortgage over its land, the mortgagor confers a proprietary right to the rentals as part of the bundle of rights available to the mortgagee in the event that the mortgagor defaults in making payments. It is an intrinsic part of the mortgagee's remedies.

[91] In the current case, we are satisfied that Petherick's ability to deal with rent was revoked by the appointment of Mr Greer as a receiver.[66] By virtue of such appointment, Petherick's right to possession of the land in relation to Equitable came to an end.[67]

[92] We therefore agree with Mr Stewart's submission that Equitable, as a first ranking mortgagee, has a better right to rental income from a mortgaged property than receivers appointed by a holder under a GSA from the moment that the mortgagee enforces its mortgage. We are satisfied that such enforcement can be by way of receivership or possession.

[93] We do not consider that such a conclusion is contrary to the *Preston* line of cases. In any event we prefer the broader ratio from such cases – that the mortgagee

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65 PLA 2007, s 137(1)(b).

66 Compare analysis at [44]–[45] above.

67 In *Re Metropolitan* the court referred to the licensee's right as being one to "undisputed possession" of the land: at [501].

must intervene in some way, either through taking possession or appointing a receiver – that would not preclude such a finding.

[94] Accordingly, for the reasons set out above, Marac's appeal cannot succeed. The fact that Marac appointed a receiver first does not, in the circumstances of this case, mean that it is entitled to the rentals because Equitable did not go into possession.

Quantum

[95] As a result of our conclusions, no issue of the quantum of the appellants' claim arises. We simply record that counsel for the parties provided us with a joint memorandum confirming that all issues of quantum and interest had been agreed.

Result and costs

[96] It follows that the appeal must be dismissed.

[97] The appellants must pay the respondents' costs for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.

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Chapman Tripp, Auckland for Appellants