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Fixtures Filing – Mysteries Solved (2017), 22 C.S.F.L.R.

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Most equipment lenders and mortgage lenders have heard the term “fixtures filing”, however many are unaware of the implications of filing a notice against land to protect an interest in personal property.

This article deals specifically with the Personal Property Security Act (Ontario) (the “PPSA”) and the relevant provisions of the Land Registration Reform Act (Ontario), however most provinces with personal property legislation have similar concepts.

Section 34 of the PPSA is the governing provision. It provides that a security interest that attaches before the goods become affixed to land will have priority over all existing interests in land. Therefore, if you have financed the goods and have filed your financing statement under the PPSA before the goods become affixed, you will have priority over the current owner of the land and any existing mortgagees. However, if the land is sold or remortgaged at any time in the future, you will lose that priority to the new interests in the land, UNLESS you register notice of your security interest against title to the land to which your goods have affixed. This is the “fixtures filing”. Under the Land Registration Reform Act (Ontario), this is referred to as a “Notice of Security Interest” and these terms are often used interchangeably. A fixtures filing must contain a complete description of the equipment which the equipment lender has financed and is claiming priority over.

As an aside, if the security interest attaches after the goods became affixed to the land, the lender will not have priority over the equipment and must seek waivers from the existing interests in the land wherein they consent to the security interest in the goods and specifically disclaim any interest in the fixture.

It must first be determined if the goods are really a fixture, necessitating a notice of security interest to protect the lender's priority. This is mostly a question of fact and deals with the degree of annexation and whether the goods are affixed for the enjoyment of the goods themselves or whether they are for the improvement of the property. By way of an example, if a tenant leases the property and wants to bolt down some heavy manufacturing equipment, which bolts can later be removed to allow the equipment to be moved, then this is likely not a fixture. An HVAC system, on the other hand, is installed for the improvement of the property and would be characterized as a fixture requiring the protection of the fixtures filing. The two previous examples are likely obvious, but there are many categories of equipment in between them that are worthy of consideration. If there is any doubt as to whether the goods will become a fixture, the obvious solution would be to file a notice of security interest.

A common misconception is that a fixtures filing gives the equipment lender an interest in the land, or a right to be paid out if and when the land is sold or remortgaged. This, however, is not the case. All that a fixtures filing entitles the secured equipment lender to do is to remove the collateral, provided that it reimburses any owner or mortgagee for the cost of repairing the premises caused by the removal (which for greater certainty, does not include the loss of value of the property without the fixture). Practically speaking therefore, a lender of the HVAC system is not likely going to remove the fixture as the cost to repair the premises after removal may exceed the value of the collateral. However, the threat of such removal to an owner or mortgagee may result in the equipment lender being brought to the table in any enforcement discussions.

It is important to note that a secured lender does not require any consent of the landowner or any mortgagee to file the notice of security interest. If the borrower has granted the lender a security interest in the goods (either by a security agreement or through an equipment lease) and the lender determines the goods will become affixed to the land, the lender is entitled to register its notice of security interest against the land, even if the borrower or lessee is not the owner of the land. A landlord may not be happy with the fixtures filing and the borrower may have violated the terms of its premises lease, however this does not impact the secured creditor and it cannot be forced to remove the notice from the land.

Often a fixtures filing will cause a landowner or a mortgagee a great deal of grief as they may be unsure of the implications of the filing on their interest in the land. Upon a sale or refinance of the real property, an equipment lender with a fixtures filing will often be asked to postpone or discharge their interest. An equipment lender should not agree to this unless it is being paid out in full, as they are then giving the other party priority over their collateral. Instead, the equipment lender should explain that it is not claiming an interest in land, only in the specified equipment. A form of estoppel could be negotiated to satisfy those with an interest in the land.

While often confusing, a fixtures filing is an ideal tool for an equipment lender to protect its priority over equipment it has financed.

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