

PPSA Case Law Update

INSOL – OCTOBER 2011

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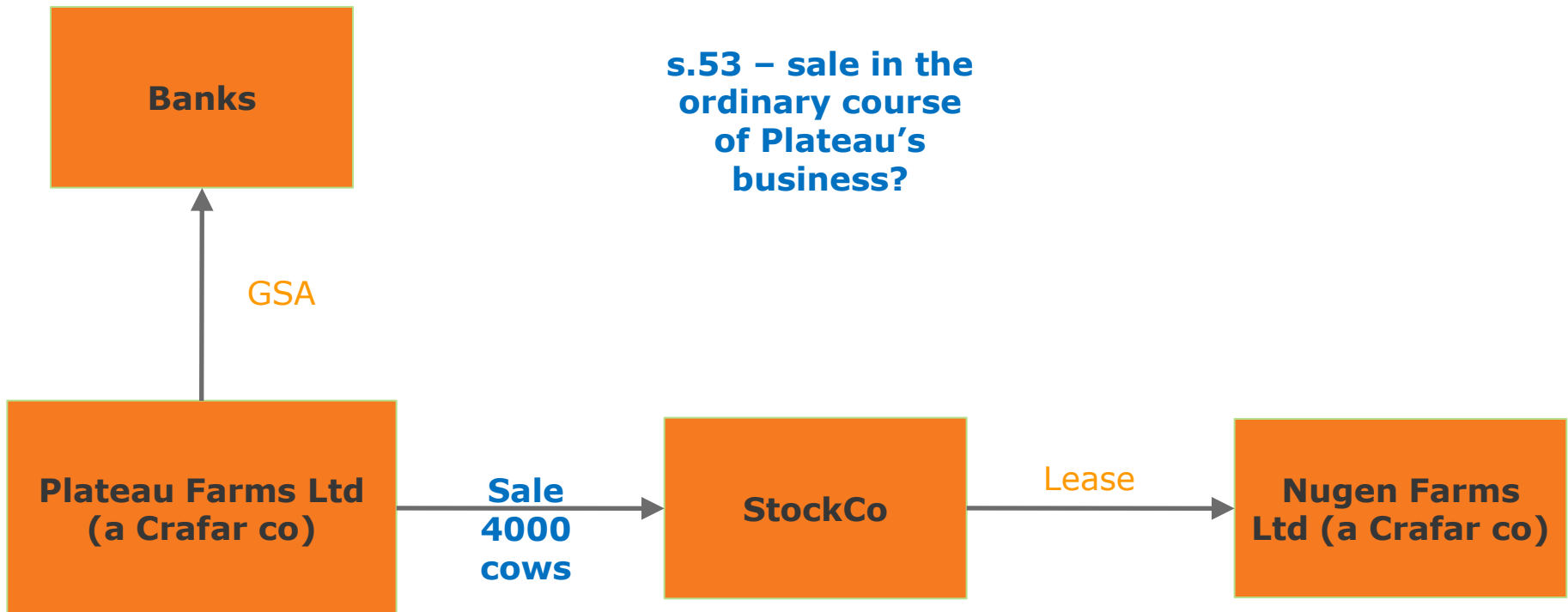
What have the Courts said in the last 12 months?

- Ordinary course of business
- Section 88 – loss of priority on transfer
- Identification of collateral
- Good faith – section 25
- Misleading registrations
- Bailments for a term of more than one year
- Accounts receivable

Other Judicial Commentary on PPSA

- Liens
 - Toll Logistics v McKay*
 - StockCo v Walker*
- Mortgages vs GSAs (s.23)
 - Marac v Greer* – Appeal pending
- Debtor initiated payments (s.95)
 - Stiassny & Ors v CIR*
- Date of perfection vs date of registration
 - Healy Holmberg v Grant* – Appeal pending

Sale in the Ordinary Course of Business – StockCo



Ordinary course of business

- Objective, factual enquiry at time of sale – “a straightforward deal in the mainstream”
- Plateau’s business included selling livestock, but not OCOB because:
 - Absence of direct economic benefit to Plateau and discounted price
 - Part of wider group transaction enabling Plateau to obtain cash and advance unsecured to another group member
 - Unusual process of negotiation
 - Sale of all year one heifers (first time ever)
 - Assets removed from charging group and not replaced with cash
- Bank’s security interest continued in the cows on sale to StockCo

Other cases

- *Nichibo v Lucich*

The fact that the buyer is an employee does not take the transaction out of the ordinary course if the price was that of a “normal commercial transaction”.

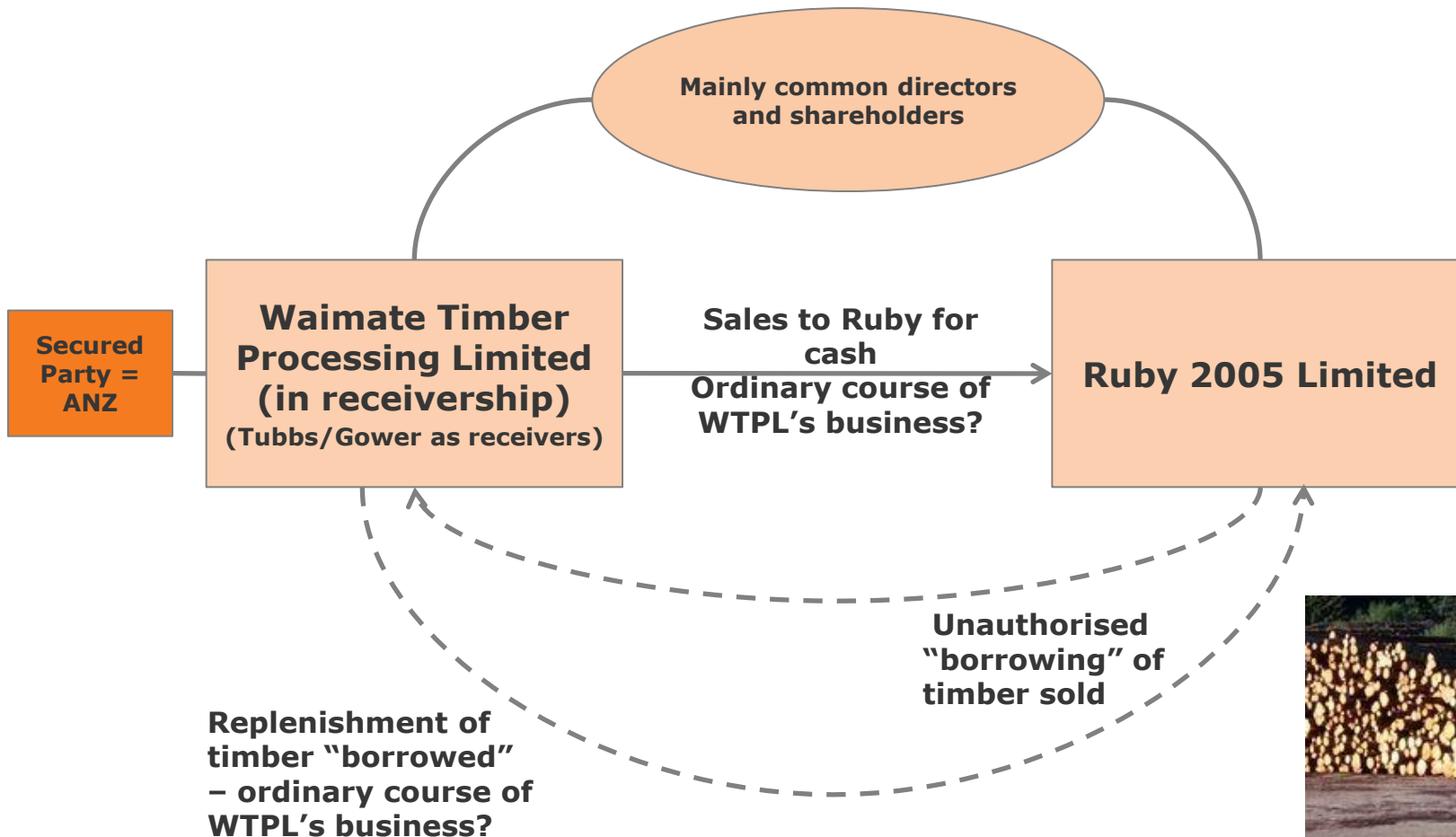
- *Tubbs v Ruby*

Three decisions, ultimate finding in favour of Ruby.

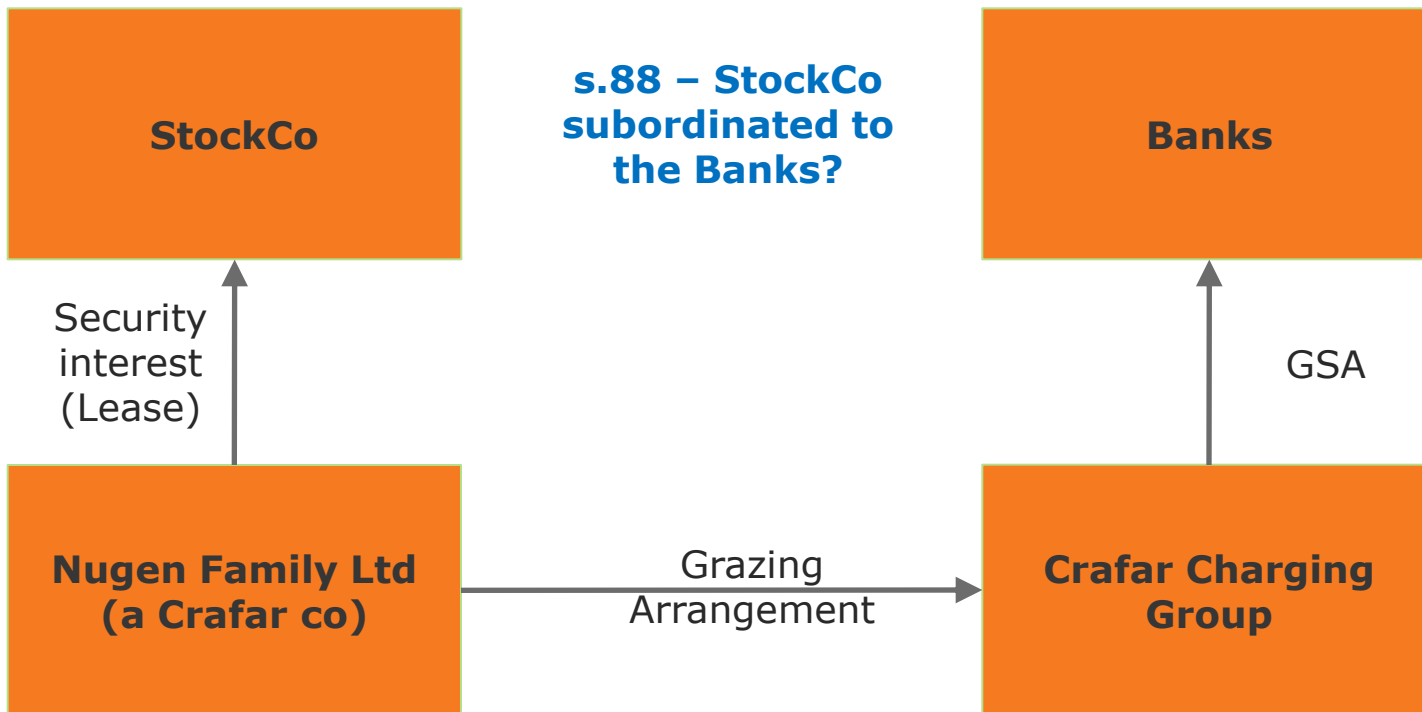
Transactions with a related party for cash flow purposes can therefore be in the ordinary course. Key was probably the longstanding nature of the practice and the existence of a cash benefit to company.

A questionable outcome?

Tubbs v Ruby



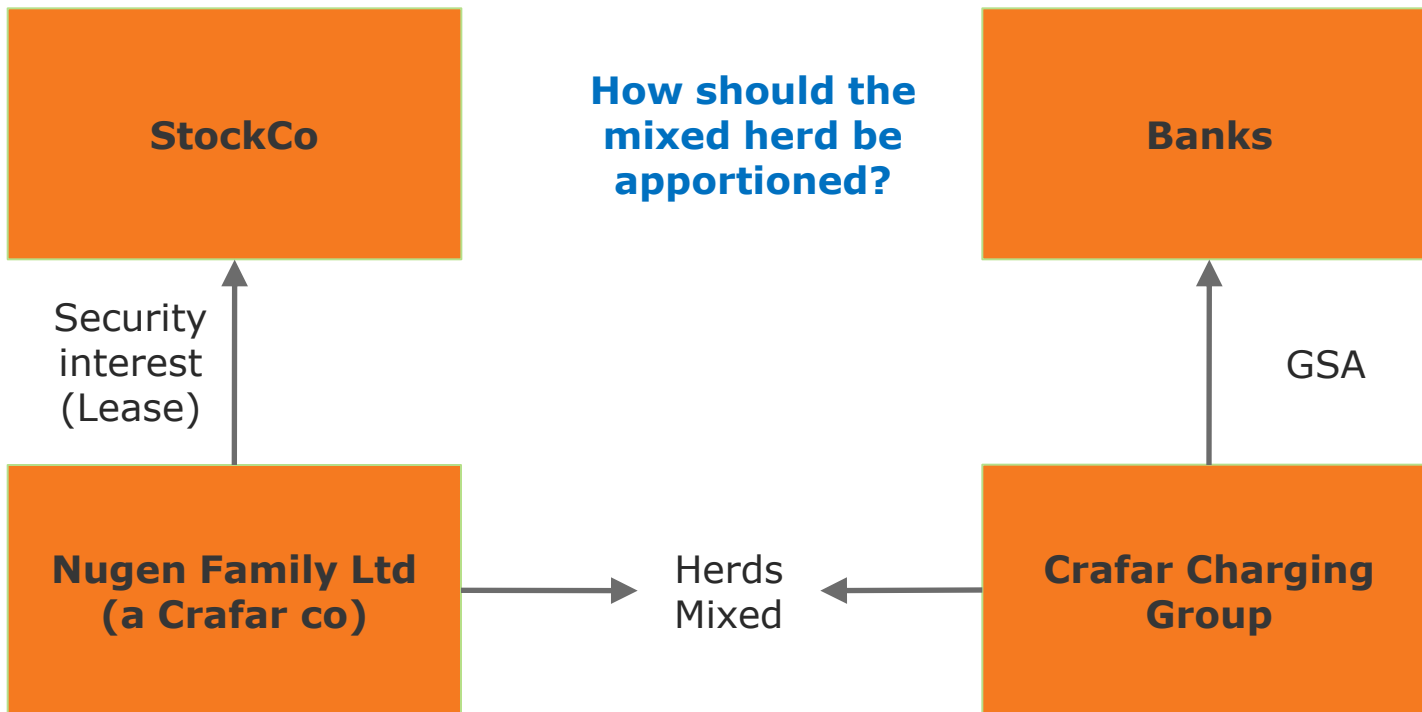
Loss of Priority on Transfer – StockCo



Loss of Priority on Transfer - StockCo

- Section 88: SP must register financing change statement within 15 working days of knowledge of transfer
- Grazing arrangement was a transfer (lease >1 year; s87)
- StockCo had knowledge (communication to person with responsibility)
- Advances – net or gross?
- Good faith – s25

Identification of collateral – Stock Co



Good faith and commercial practice

“All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharge in good faith and in accordance with reasonable standards of commercial practice.”

Section 25 Personal Property Securities Act 1999

- *Compass Capital Ltd v New Zealand Guardian Trust*
- *Taylor v BNZ*
- *Tubbs v Ruby*
- *HSBC Bank Canada v Kupritz* (2011) BCSC 788

Misleading registrations

- PPSA:
Organisation = “any body or organisation whether incorporated or unincorporated”
- PPS Regulations:
(to be included in a financing statement against an organisation)
 - (a) statutory / registered name; or
 - (b) name “as set out in its constitution or other document defining its constitution”; or
 - (c) if (a) or (b) don’t apply, its “trading name” or “name by which it is commonly known”.

Rabobank v StockCo

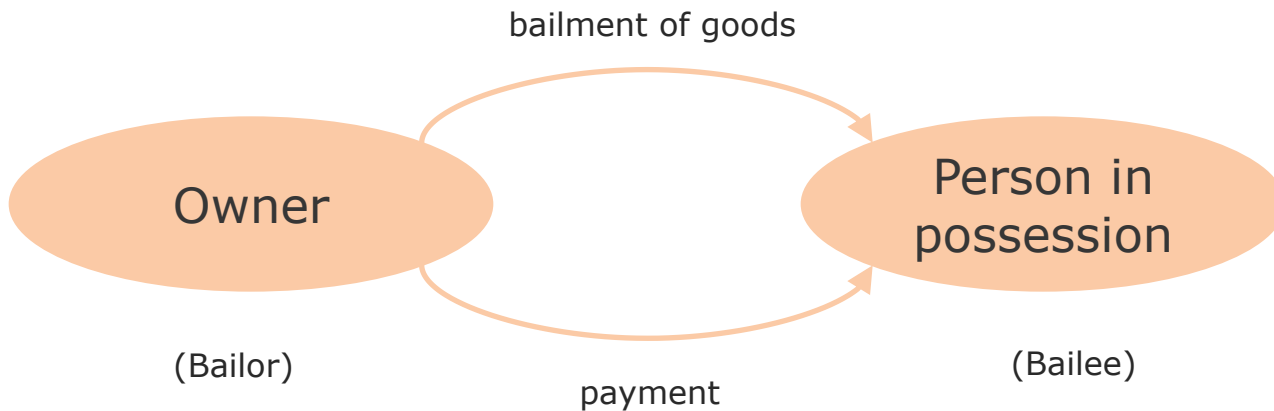
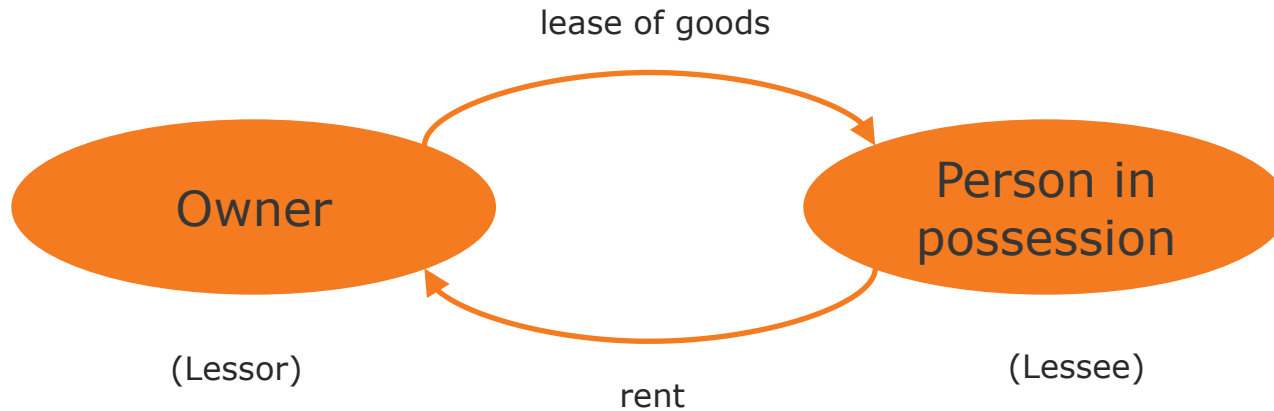
- Partners = Mr Alexander Campbell and Mrs Megan Campbell
- Partnership agreement = "Awapapa Station"
- Rabobank's registration = "Awapapa Station"
- StockCo's 1st registration = "Alex Campbell"
- StockCo's 2nd registration = "AM and MJ Campbell"

Lease for a term of more than 1 year

- a) A lease or *bailment* of goods for > 1 year
- b) Includes *lease* for:
 - ✓ indefinite term
 - ✓ term < 1 year but automatically renewable
 - ✓ term < 1 year where possession continues, but not until possession > 1 year
- c) Does not include a *lease* by lessor not regularly engaged in business of leasing goods

Rabobank v McAnulty (CA)

Bailment in the nature of a Lease



Accounts Receivable

“a monetary obligation ... whether or not that obligation has been earned by performance”

s.16 PPSA

“Broad definition”

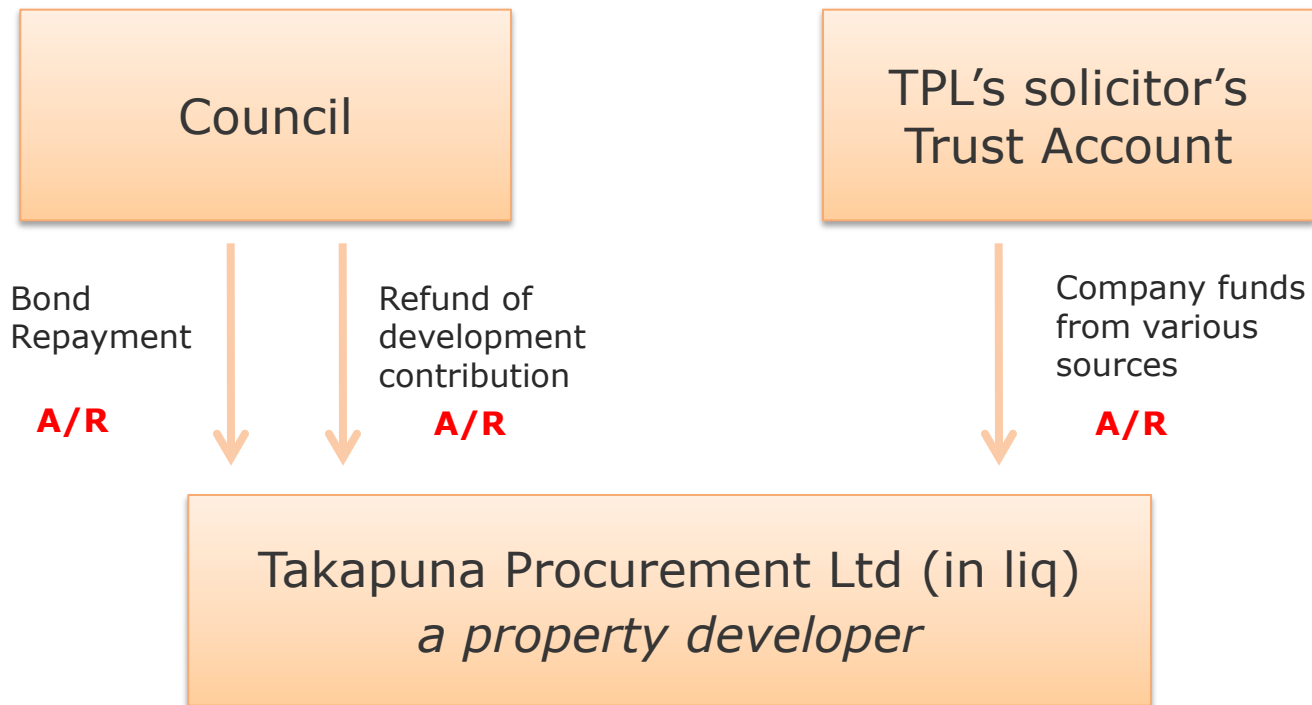
“not limited to Book Debts”

“only limits ... are the exclusions contained in the definition and contained in s23”

“owed to the company, at the time of liquidation”

Burns v CIR

Accounts Receivable



PPSA cases over the last 12 months

- *Stiassny v Commissioner of Inland Revenue* (unreported) 4 November 2010, Allan J, HC Auckland, CIV-2008-404-0459.
- *Gibson v StockCo Ltd* (unreported) 17 December 2010, White J, HC Auckland, CIV-2009-404-7120.
- *The Healy Holmberg Trading Partnership v Grant and Khov* (unreported) 24 February 2011, Associate Judge Christiansen, HC Auckland, CIV-2009-404-002279.
- *Rabobank New Zealand Ltd v Stockco Ltd* (unreported) 11 March 2011, Simon France J, HC Napier, CIV-2009-441-207 (HC).
- *Marac Finance Ltd v Greer* (unreported) 17 March 2011, Associate Judge Doogue, HC Auckland, CIV-2010-404-4957 (HC).
- *David John Taylor & Ors v Bank of New Zealand & Ors*, 14 December 2010, Panckhurst J, HC Christchurch, CIV-2008-409-000964.
- *Toll Logistics (NZ) limited v A J McKay and J J Cregten*, 16 May 2011, Arnold, Randerson and Harrison JJ, Court of Appeal, CA442/2010 [2010] NZCA 188.
- *Rabobank New Zealand Limited v McAnulty & Ors*, 23 May 2011, O'Regan P, Chambers and Harrison JJ, Court of Appeal, CA617/2010 [2010] NZCA 212.
- *Stockco Limited v Janette Florence Walker*, 24 June 2011, Allan J, HC Napier, CIV-2011-441-110
- *Nichibo Trading Company New Zealand Limited v A L Lucich and E A Minter*, 15 July 2011, Toogood J, HC Auckland, CIV-2010-404-3869
- *Tubbs & Gower and Anor v Ruby 2005 Limited*, 27 July 2011, Chisholm J, HC Timaru, CIV-2009-476-000615
- *Burns v Commissioner of Inland Revenue*, 10 August 2011, Gendall AJ, HC Auckland, CIV-2010-404-7387