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## THE INTERPRETATION OF A PROGRESS PAYMENT AGREEMENT BY A BANKRUPTCY JUDGE SITTING IN THE PROVINCE OF QUEBEC

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A RECENT SUPERIOR COURT DECISION RENDERED IN THE PROVINCE OF QUEBEC IS OF INTEREST. THIS DECISION RENDERED BY JUDGE JEAN-FRANÇOIS EMOND, SITTING IN BANKRUPTCY DIVISION FOR THE SUPERIOR COURT IN THE DISTRICT OF QUEBEC CITY, DEALS WITH A PROGRESS PAYMENT AGREEMENT AND A MASTER LEASE AGREEMENT BETWEEN A FINANCING COMPANY, MAXIUM FINANCIAL SERVICES INC. (HEREINAFTER: "MAXIUM") AND A GOLF CART RENTAL COMPANY, DESROSIER'S GOLF INC. (HEREINAFTER: "DESROSIER'S").

Desrosiers is a company involved in the leasing and sale of golf carts. Maxium had financed for Desrosiers approximately two hundred (200) golf carts, which it purchased and delivered to Desrosiers under the terms and conditions of a Master Lease Agreement and a Progress Payment Agreement. The Master Lease Agreement stated that when particular units were to be leased to third parties by Desrosiers, Schedules would be filled out which would state the particular units to be leased by Maxium to Desrosiers under the terms and conditions of the Master Lease Agreement. The Progress Payment Agreement stated that Desrosiers had ninety (90) days from the delivery of a particular unit to lease it and enter into a Schedule or to purchase it from Maxium.

All units that became the object of such Leasing Schedules (hereinafter: the "Lease Plan") were the object of the Lessor's reserves of ownership filed at the *Registre des droits personnels et réels mobiliers* (hereinafter: "RDPRM"), the Quebec equivalent of the PPSA. The Master Lease Agreement was also registered with the RDPRM. However, the Progress Payment Agreement was not registered. The units that were delivered to Desrosiers but not leased to a third party remained on Desrosiers' Floor Plan (the "Floor Plan").

In February 2009, Desrosiers was declared bankrupt. On the bankruptcy date, approximately 50 units were part of the Lease Plan and the object of Schedules under the terms and conditions of the Master Lease Agreement. Another 70 units had not been sold or leased to third parties and were still part of the Floor Plan, e.g. they had not yet been the object of Schedules, had not been purchased by Desrosiers and were therefore still governed by the Progress Payment Agreement. However, on the bankruptcy date, the ninety (90) days stated in the Progress Payment Agreement had elapsed.

The Progress Payment Agreement stated that Desrosiers had to purchase any units that had not been leased after 90 days:

4. You will, not later than 90 days subsequent to the date on which any unit of Equipment has been purchased by Maxium hereunder (the "Purchase Period"), lease such unit from Maxium pursuant to the Master Agreement. If for any reason whatsoever, including failure of the parties to agree on rental terms, failure or loss of any of the Equipment, or default by You pursuant to the Master Agreement, You and Maxium do not enter into such a lease with respect to any unit of the Equipment that has been purchased by Maxium hereunder, You will purchase from Maxium, and Maxium will sell to You, on the next business day following the expiry of the applicable Purchase Period, at a price equal to 102% of the Price for such unit, all right, title and interest of Maxium in and to such unit. Each such purchase and sale transaction will be made on an "as is, where is" basis without any representation or warranty by Maxium, other than Maxium has done no act to encumber such unit and is fully entitled to sell its right, title and interest therein as contemplated hereby.

Maxium filed its proof of claim with the Trustee to the Bankruptcy of Desrosiers and claimed ownership of all units it had financed and delivered and that were part of both the Lease Plan and the Floor Plan. The Trustee granted Maxium's proof of claim for the 50 units on the Lease Plan, but not for the

70 units of the Floor Plan, alleging that they had not been registered with the RDPRM and also alleging that by virtue of Section 4 of the Progress Payment Agreement, ownership of the carts had been transferred to Desrosiers and the carts were therefore in the estate of Desrosiers ("You will purchase from Maxium and Maxium will sell to you"). The Trustee alleged that Section 4 of the Progress Payment Agreement contained a bilateral promise of sale and purchase that affected sale and transfer of ownership of the units, even if Desrosiers had not paid the price.

Maxium appealed the decision of the Trustee before the Superior Court sitting in Bankruptcy. Maxium alleged it still owned the units of the Floor Plan and that the units could not have been transferred to Desrosiers since Desrosiers had not paid for them. Maxium also stated that the Progress Payment Agreement stipulates that the units were to remain the sole property of Maxium at all times.

Judge Jean-François Emond of the Superior Court confirmed the enforceability and the opposability to the Trustee of the Payment Progress Agreement, even in a context where it had not been registered with the RDPRM. Judge Emond stated that the Progress Payment Agreement did not have the same value as a security. The Payment Progress Agreement is a contract between the parties stating that the units delivered will either (a) be the object of a Schedule under the Master Lease Agreement or (b) be purchased by Desrosiers if not leased or sold to third parties within ninety (90) days.

According to the Court, the Payment Progress Agreement confirmed Maxium's argument that right of ownership could not be transferred to Desrosiers as long as the conditions stated therein were not fulfilled. Amongst these conditions was the payment of the units by Desrosiers, which had not been made. Judge Emond stated that even if the Progress Payment Agreement contained a bilateral promise to sell and purchase, such a promise did not amount to a sale, but only to a pre-contract. Even if Desrosiers was in possession of the units that were the object of this promise, it did not possess them in its quality of owner.

Maxium remained the owner of the Floor Plan as long as a sales agreement had not been executed and payment made. Judge Emond stated that the presence of a default clause allowing Maxium to repossess the units also supported this interpretation of the Progress Payment Agreement.

To pretend the opposite would amount to saying that Desrosiers could take advantage of its default, which was clearly not the parties' intent.

The Court therefore reversed the Trustee's decision and declared that Maxium had remained at all times the owner of all units delivered to Desrosiers (Floor Plan and Lease Plan) since the conditions of the Progress Payment Agreement had not been fulfilled and since payment of the Floor Plan units had not been made by Desrosiers.

To our knowledge, there has been no other decision rendered in Quebec on the enforceability of a Progress Payment Agreement. This decision demonstrates that units delivered under a Progress Payment Agreement but not yet the object of a lease schedule will remain the ownership of the Lessor, even though no reserve of ownership has been filed in the public registers.

However, as a precautionary measure, it would be advisable to ensure that any document susceptible to provide help in evidencing rights of ownership be filed and published in the appropriate registers, such as the *Registre des droits réels et personnels mobiliers*, which is used in the Province of Quebec.

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