Court of Appeal for Saskatchewan
Docket: CACV4392

Citation: *Smiley Farming Co. Ltd. v John Deere Financial Inc.*, 2025 SKCA 25
Date: 2025-03-05

Between:

Smiley Farming Co. Ltd.

Appellant
(Respondent)

And

John Deere Financial Inc.

Respondent
(Applicant)

Before:	Kalmakoff, McCreary and Kilback JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Justice Jeffery D. Kalmakoff
In concurrence:	The Honourable Justice Meghan R. McCreary The Honourable Justice Keith D. Kilback
On appeal from:	QBG-SA-00631-2022 (Sask KB), Saskatoon
Appeal heard:	January 8, 2025
Counsel:	Randy Klein, K.C. for the Appellant Murray Sawatzky, K.C. and Nicole Krupski Oram for the Respondent

Kalmakoff J.A.

I. INTRODUCTION

[1] Smiley Farming Co. Ltd. [SFL] appeals from a decision made in Chambers by a judge of the Court of King's Bench (*John Deere Financial Inc. v Palin* (10 July 2024) Saskatoon, QBG-SA-00631-2022 (Sask KB) [*Decision*]). In the *Decision*, the Chambers judge: (i) granted an application by John Deere Financial Inc. [JDFI] for an order pursuant to *The Personal Property Security Act, 1993*, SS 1993, c P-6.2 [*PPSA*], granting it possession of a tractor; and (ii) denied SFL's application for an order consolidating JDFI's application with an action SFL had commenced against a third party and directing that the matters proceed to trial.

[2] SFL contends that the Chambers judge erred in various ways, including by: (i) determining the questions raised by JDFI's application summarily rather than directing them to trial; (ii) not consolidating JDFI's application with SFL's extant civil action; (iii) making unreasonable findings of fact concerning the ownership of the tractor in question; (iv) finding that a limitation period defence was not available to SFL; and (v) failing to address whether JDFI had a security interest that took priority over SFL's interest in the tractor.

[3] For the reasons that follow, I would dismiss the appeal.

II. BACKGROUND

A. The Tractor and the lease agreements

[4] The dispute in this case concerns a 2009 John Deere 9630T RW Track Tractor [Tractor]. On May 3, 2011, Thomas Palin [Mr. Palin] and Donald Palin [together, the Palins] acquired the Tractor from Agro Equipment [Agro] – a John Deere dealership in Ponoka, Alberta operating as a division of Cervus Ag Equipment LP [Cervus] – under a 60-month commercial lease agreement. The lease obligated the Palins to make an annual rental payment of $34,216.50 plus applicable taxes on each anniversary of the lease. The lease also provided that the Palins would have the option to purchase the Tractor for $190,000 plus taxes at the end of the lease term.

[5] Although the lease stated that the Tractor was to be located at Mr. Palin's address in Calgary, Alberta, the evidence led on the application established that the Tractor was delivered, with Agro's knowledge, to his farm site in Saskatchewan on May 5, 2011.

[6] Agro assigned the lease to John Deere Credit Inc. [JDCI]. On May 16, 2011, JDCI registered a security interest as lessor of the Tractor with the Alberta Personal Property Registry for a six-year term. Subsequent to that, JDCI became JDFI.

[7] At the time the Palins leased the Tractor, they had been involved in a long-standing joint farming operation with SFL on land the Palins owned in west-central Saskatchewan. SFL is a corporation owned and operated by members of the Smiley Hutterite Colony. SFL's arrangement with the Palins represented only a portion of its total farming operation.

[8] In broad terms, the arrangement between the Palins and SFL was that they shared inputs and the proceeds from crops grown on the Palins' land. SFL used its own equipment and some equipment belonging to the Palins to farm the land, and the parties accounted for the split of equipment use as part of the distribution of the crop sale proceeds. The terms of their arrangement in relation to the Tractor became the central issue in this case, as SFL took the position that it had entered into a verbal agreement with Mr. Palin to purchase the Tractor on a rent-to-own basis. Mr. Palin, however, was of the view that there was no agreement for sale. His evidence was that the Tractor was available for use by both the Palins and SFL in their joint farming arrangement, and that SFL merely paid a rental fee to the Palins based on the number of hours it used the Tractor.

[9] In July of 2012, Mr. Palin advised a representative of JDFI that the Tractor was located at his farm in Saskatchewan. Based on that information, JDFI also registered a security interest in the Tractor in the Saskatchewan Personal Property Registry, on July 9, 2012. That registration had an expiry date of July 9, 2017.

[10] Between May of 2011 and March of 2015, SFL made five payments to the Palins in relation to the Tractor, totalling $338,750. SFL took the view that those payments constituted "payment in full" for the purchase of the Tractor under their verbal rent-to-own agreement. The Palins took the view that the payments reflected only rent for the use of the Tractor.

[11] When the Palins' first lease expired in May of 2016, they did not return the Tractor or exercise the option to purchase it for $190,000. Instead, they entered into a new 60-month lease agreement [second lease] with Cervus. Under the terms of the second lease, the Palins and Cervus agreed that the present cash value of the Tractor was $190,000. The second lease required the Palins to make semi-annual rent payments in the amount of $16,150.81 plus taxes and provided that, at the end of the lease, they would have the option to purchase the Tractor for $65,000 plus taxes. It also provided that the Tractor was to be located in Calgary, Alberta.

[12] Cervus assigned its rights under the second lease, including its security interest in the Tractor, to JDFI. On September 1, 2016, JDFI registered that security interest in the Alberta Personal Property Registry.

[13] In 2019, the Palins fell into default of payment on the second lease. JDFI then took steps to seize the Tractor. In June of 2019, JDFI obtained a warrant to seize the tractor and engaged a bailiff to carry out the seizure. The bailiff made inquiries concerning the Tractor's location and its status. On September 9, 2019, Mr. Palin advised the bailiff that the Tractor was in the possession of SFL in Saskatchewan.

[14] On September 24, 2019, Mr. Palin wrote to SFL's representative, George Kleinsasser, demanding that SFL make "full and immediate payment" in the amount of $162,361.74, or return the Tractor to Mr. Palin. SFL did neither of those things.

[15] On October 9, 2019, Mr. Palin's lawyer wrote to JDFI to advise that the Tractor was in SFL's possession, and that SFL had not acceded to Mr. Palin's demand that it either pay the amount owing under the second lease or return the Tractor. The lawyer also indicated that Mr. Palin was prepared to cooperate with JDFI and to assist in its efforts to recover the Tractor.

[16] Subsequent to that, JDFI received correspondence from SFL's lawyer, who stated that SFL had purchased the Tractor from the Palins in good faith, and that it was not prepared to surrender the Tractor or consent to its seizure.

[17] On November 22, 2019, JDFI registered a security interest in the Tractor under the second lease in the Saskatchewan Personal Property Registry. Then, on December 13, 2019, JDFI sent a bailiff to SFL's property to seize the Tractor. SFL refused to surrender the Tractor to the bailiff.

B. The court proceedings

[18] On December 23, 2019, SFL commenced an action [QBG 1877] against the Palins, by filing a statement of claim in the Court of Queen's Bench in Saskatoon. In the claim, SFL framed its causes of action in conversion and unjust enrichment, alleging that the Palins had failed to deliver more than $800,000 worth of crops or proceeds to which SFL was entitled under their farming agreement. By way of relief, SFL sought an accounting, general and special damages, and judgment in the amount of "not less than half of the proceeds or value of the crops harvested over the duration of the Agreement". The Palins filed a statement of defence, in which they alleged that SFL had used the Tractor and had not paid the agreed-upon rental fees for it. They also counterclaimed against SFL for the unpaid rent. In its statement of defence to the counterclaim, SFL pleaded that it did not owe any rent to the Palins, because it had purchased the Tractor from them.

[19] In October of 2021, JDFI applied to the Alberta Court of Queen's Bench, pursuant to *The Personal Property Security Act*, RSA 2000, c P-7, for certain relief in relation to the Tractor. SFL was served with notice of that application but did not attorn to the jurisdiction of the Court. On November 24, 2021, a Master of the Alberta Court of Queen's Bench granted JDFI's application, made a declaration that JDFI had a valid security interest in the Tractor, and ordered that SFL or "any other party in possession of the [Tractor] in Alberta" immediately deliver up the Tractor or make it available for seizure by JDFI (*John Deere Financial Inc. v Palin* (24 November 2021) Edmonton, 2103-14691 (Alta QB)).

[20] JDFI then brought an application for similar relief in Saskatchewan. By way of a notice of application dated May 24, 2022, JDFI applied for an order for possession of the Tractor, pursuant to s. 63(2) of the *PPSA*. The Palins did not contest the application. SFL did. Extensive document disclosure ensued, as did cross-examination of persons who had provided affidavits in relation to JDFI's application. Responses to undertakings given during cross-examination were provided, and further cross-examination was conducted with respect to those responses.

[21] After all of that had occurred, SFL applied, by way of a notice of application dated May 30, 2023, for an order consolidating JDFI's application with the action in QBG 1877, or an order directing that the matters proceed to a trial and be heard at the same time.

[22] The Chambers judge heard JDFI's application for possession of the Tractor and SFL's application for consolidation together. He disposed of those applications in the *Decision*.

C. The *Decision*

[23] In the hearing before the Chambers judge, SFL took the position that the parties' claims of entitlement to the Tractor could only properly be determined at a trial and urged him to order that JDFI's application be consolidated with the action in QBG 1877 for that purpose. SFL argued that, in light of the conflicting evidence concerning the ownership of the Tractor, the issue of entitlement to possession should not be determined summarily under the *PPSA*. SFL also asserted that JDFI's application was statute-barred under s. 5 of *The Limitations Act*, SS 2004, c L-16.1.

[24] JDFI, on the other hand, took the position that the only impediment to the Chambers judge determining its application was SFL's claim that it owned the Tractor. It argued that, because there had been extensive cross-examination conducted on the affidavits filed in relation to the application, the Chambers judge was well-positioned to make the factual findings necessary to resolve that issue and, as such, there was no need for either a trial or the consolidation of its application with QBG 1877.

[25] The Chambers judge framed the issues to be determined as follows (*Decision* at para 33):

a) Should JDFI's application be resolved in summary proceedings?

b) If so, is there an enforceable verbal agreement for the sale of the Tractor to SFL?

c) Is JDFI's application barred by s. 5 of *The Limitations Act*?

[26] Regarding the first issue, the Chambers judge found that a trial was unnecessary, for two reasons: (i) each of the crucial deponents of the affidavits had been thoroughly cross-examined, which left him in a position where he was able to resolve the important conflicts in the evidence; and (ii) even if he accepted SFL's evidence, it did not establish the existence of an enforceable agreement for the sale of the Tractor (at paras 34–38). Having reached that conclusion, the Chambers judge determined that there was no need to consolidate the application with the action in QBG 1877, and dismissed SFL's application for that relief.

[27] Moving next to the question of whether there was an enforceable verbal agreement between SFL and the Palins for the sale of the Tractor, the Chambers judge began by reviewing the legal

principles governing the determination of whether a contract has been formed between two parties. Citing this Court's decision in *Neigum v Van Seggelen*, 2022 SKCA 108, 474 DLR (4th) 673, he noted that "[f]or a contract to exist there must be a meeting of minds with respect to its essential terms" (*Decision* at para 39). He went on to state that, in the circumstances at hand, SFL bore the onus as the proponent of the alleged agreement for sale to "demonstrate on a balance of probabilities that, 1) the Palins and SFL intended to enter into a contract for the sale of the Tractor, 2) they agreed on the essential terms of the sale, and 3) those terms are sufficiently certain to permit enforcement" (at para 43).

[28] The Chambers judge found that SFL had not met its onus. In large measure, this was because he did not accept Mr. Kleinsasser's evidence concerning the parties' intention to contract. He gave several reasons for this, including that Mr. Kleinsasser had admitted during cross-examination that: (i) SFL was part of a large farming operation that always purchased its equipment outright rather than by way of rent-to-own agreements; and (ii) no bill of sale was ever created for the Tractor, which was contrary to his regular practice when purchasing equipment for SFL. The Chambers judge also found that the way the Tractor had been insured did not suggest ownership by SFL. He went on to state the following:

> [50] The foregoing circumstances lead me to conclude that SFL's ownership claim is of recent invention precipitated by JDFI's application for possession. SFL's evidence does not demonstrate on a balance of probabilities that SFL and Mr. Palin formed a common intention to enter into a contract for the sale of the Tractor.

[29] The Chambers judge also held that SFL had failed to establish that there was a meeting of the minds with respect to an essential term of the alleged verbal agreement, namely the price of the Tractor. In that regard, he noted that Mr. Kleinsasser had admitted during cross-examination that there had been no discussion concerning the exact amount that SFL was to pay the Palins for the Tractor, when the payments were to be made, the amount of the payments, or whether interest would be charged on the unpaid purchase price. He concluded on this issue by stating:

> [57] SFL alleges it had an agreement to purchase the Tractor over time. If so, the purchase price, the amount of the periodic payments, when each was due, and the interest chargeable on the unpaid purchase price would all have been essential terms of the agreement. SFL's evidence fails to demonstrate that the parties even discussed these essential elements, much less achieved a meeting of minds with respect to them.
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> [58] SFL has not proven on a balance of probabilities that the parties to the alleged verbal agreement intended to contract with respect to the sale of the Tractor and achieved

> *consensus ad idem* with respect to its essential terms. The verbal agreement is therefore void for uncertainty and unenforceable.

[30] As for SFL's limitation period argument, the Chambers judge noted that SFL's position was that the limitation clock with respect to JDFI's application for possession of the Tractor began to run in December of 2019, because that was when JDFI became aware that SFL had the Tractor in its possession and was refusing to surrender it. According to SFL, this meant JDFI was out of time when it brought its application for relief under the *PPSA* in May of 2022.

[31] The Chambers judge rejected this argument as well. He concluded that s. 3(1)(b) of *The Limitations Act* was a complete answer to SFL's position, because it provides that the limitation periods set out in that statute do not apply to "proceedings in the nature of an application". In that regard, he said:

> [62] SFL's argument does not address whether JDFI's application is a "proceeding in the nature of an application" and in my view, that section provides a full answer to SFL's limitation defence. Whether a limitation defence is available in the context of an application as opposed to a proceeding commenced by statement of claim or originating application was squarely addressed in *Hanson v Hanson*, 2019 SKCA 102, 32 RFL (8th) 257 [*Hanson*], and the court concluded that it was not; see paras. 46 to 48 of that decision.
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> …
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> [69] SFL suggests the law relating to this question is "unsettled" but cites no jurisprudence one way or the other, stating only, "It is submitted, however, that the limitation period applies". I am not convinced that s. 3(1)(b) ought to be applied in some fashion in these proceedings other than is indicated by its clear wording. In my view, SFL is not entitled to raise s. 5 of the [*Limitations*] *Act* in opposition to JDFI's application under s. 63(2) of the *PPSA*.

[32] In light of those conclusions, the Chambers judge ordered SFL to deliver the Tractor to JDFI. He also awarded JDFI costs on Column 2 of the Tariff.

III. ISSUES

[33] SFL's arguments on this appeal raise five questions for determination:

(a) Did the Chambers judge err in holding that JDFI's application was not time-barred?

(b) Did the Chambers judge err by deciding JDFI's application summarily instead of consolidating it with the action in QB 1877 and/or directing a trial?

(c) Did the Chambers judge err in finding that SFL had not established the existence of an agreement for the sale of the Tractor?

(d) Did the Chambers judge err by failing to address whether JDFI had a perfected security interest?

(e) Did the Chambers judge err in awarding costs to JDFI?

IV. ANALYSIS

A. Did the Chambers judge err in holding that JDFI's application was not time-barred?

[34] In the hearing before the Chambers judge, SFL argued that JDFI's application for relief under Part V of the *PPSA* was time-barred, because JDFI did not bring the application within two years of learning that SFL was in possession of the Tractor. As set out above, the Chambers judge rejected that argument because he concluded that the limitation period set out in s. 5 of *The Limitations Act* does not apply to proceedings that are in the nature of an application.

[35] SFL raises the same argument on appeal, and I would not give effect to it. In my view, the Chambers judge was correct to reach the conclusion that he did.

[36] Subject to certain well-defined exceptions, *The Limitations Act* bars the commencement of proceedings more than two years after the day on which a claim is discovered. But not all legal proceedings are subject to the limitation periods established in that Act. As s. 3(1) states, the limitation periods set out in *The Limitations Act* apply to "claims pursued in court proceedings that: (a) are commenced by statement of claim; or (b) are commenced by originating notice and are not proceedings in the nature of an application" (emphasis added).

[37] The proceeding at issue in this case was, in accordance with s. 63 of the *PPSA*, *in the nature of an application*; it was not commenced by a statement of claim, or by an originating notice. As this Court has held on several occasions, *The Limitations Act* does not apply to proceedings that are not commenced by a statement of claim or originating notice (see, for example: *MFI Ag Services Ltd. v Kramer Ltd.*, 2023 SKCA 10 at paras 29–44; *Hanson v Hanson*, 2019 SKCA 102,

32 RFL (8th) 257; and *Charles v Saskatchewan Government Insurance*, 2021 SKCA 11, 456 DLR (4th) 132).

[38] JDFI's application under Part V of the *PPSA* was clearly not a proceeding commenced by statement of claim or originating notice. It was one that was in the nature of an application, and involved the enforcement of JDFI's rights as a secured party. Accordingly, the Chambers judge was correct to conclude that the limitation period prescribed in s. 5 of *The Limitations Act* did not apply.

B. Did the Chambers judge err by deciding JDFI's application summarily instead of consolidating it with the action in QB 1877 and/or directing a trial?

[39] Under this branch of its argument, SFL contends that the Chambers judge was wrong to find that JDFI's application could be determined without holding a trial and, consequently, by dismissing SFL's application for consolidation. In this respect, SFL says that the Chambers judge failed to identify the inconsistencies and conflicts in the evidence that made the matter inappropriate for a summary determination. Citing *Eagle Eye Investments Inc v CPC Networks*, 2012 SKCA 118, [2013] 2 WWR 260 [*Eagle Eye*], and *Jeffrey Pinder & Associates Inc. v Trollhaugen Management Inc.*, 2002 SKQB 484 [*Jeffrey Pinder*], SFL submits that, in an application of the nature brought by JDFI under the *PPSA*, a trial must be directed where there is any real live issue as to the credibility of conflicting evidence, or where making a determination of the issue raised in the application creates the risk of an inconsistent result in an associated action. SFL says that both problems existed in this case, which meant that the Chambers judge erred by refusing to order that JDFI proceed by way of a statement of claim, consolidate the matters, and direct the issue to trial.

[40] I am not persuaded that the Chambers judge erred in this way. Let me explain why.

1. No error in not directing a trial of the issue or requiring JDFI to commence an action

[41] By virtue of the second lease, the Palins granted a security interest in the Tractor to JDFI. The Palins defaulted under the terms of that lease. Accordingly, s. 58(2)(a) of the *PPSA* gave JDFI "the right to take possession of the collateral or otherwise enforce the security agreement by any

method permitted by law". SFL, the party in possession of the secured collateral, refused to cede possession of it. Therefore, JDFI was entitled to apply, as it did, under s. 63(2) of the *PPSA* for relief that included "a binding declaration of right and an order for injunctive relief" (s. 63(2)(a)), and for "any order that is necessary to ensure protection of [its] interest … in the collateral" (s. 63(2)(e)).

[42] When a secured party brings an application under s. 63(2) of the *PPSA*, s. 66(1) provides that "the court may: (a) make an order determining questions of priority or entitlement to collateral; or (b) direct an action to be brought or an issue to be tried". As is apparent from its language, s. 66(1) confers a discretion upon a judge to either decide the questions raised by an application and grant or not grant the relief sought, or to decline to settle those questions and direct that the matter proceed by way of an action or a trial of the issue.

[43] Discretionary decisions, such as those made under s. 66(1) of the *PPSA*, are subject to appellate review in accordance with the standards set out in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. This means the applicable standard of review depends on the nature of the error alleged. Where it is argued that a Chambers judge erred in law (including by misidentifying or misapplying the legal criteria that govern the exercise of their discretion), the standard of review is correctness. Alleged errors of fact, or of mixed fact and law, are reviewed on a standard of palpable and overriding error (see: *MacInnis v Bayer*, 2023 SKCA 37 at paras 38–39; and *Kolodziejski v Maximiuk*, 2023 SKCA 103 at paras 24–25). An appellate court may intervene where an error of the relevant sort is established, but it is not entitled to substitute its own decision for that of a Chambers judge simply because it would have exercised the discretion differently (*MacInnis* at para 39).

[44] SFL takes issue with the Chambers judge's determination that the state of the evidence was sufficient to permit him to comfortably resolve the material conflicts in the evidence. As I will discuss, I find no error in this aspect of the *Decision.*

[45] On this point, it is important to understand that one of the purposes of the *PPSA* is to promote efficiency in the enforcement of the rights protected by personal property security legislation, by dispensing with the costs and complexity involved in commencing an action to enforce those rights (see, generally: *Cimmer v Niessner*, 2022 SKCA 60 at paras 74–83, [2023] 2

WWR 153). To that end, s. 63 of the *PPSA* has been described as a provision that "expands the authority of the Court to hear matters in Chambers without an action being commenced beforehand" (*Eagle Eye* at para 27). As the Supreme Court observed in *Bank of Montreal v Innovation Credit Union*, 2010 SCC 47, [2010] 3 SCR 3, the *PPSA* has simplified and rationalized the law of secured lending in personal property, largely because it:

> [19] …does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity of redemption to resolve property disputes. Rather, for those interests that come within the scope of the Act, the *PPSA* provides a compendium of rules establishing priority rankings both as between different security interests as well as between security interests and other interests in the collateral, with no regard to the question of who actually has title to the collateral.

[46] In *Andrews v Mack Financial (Canada) Ltd. et al.* (1987), 61 Sask R 311 (CA), this Court held that the basic assumption underlying s. 63 of the *PPSA* is that a secured party is entitled to realize on their collateral, and that the procedures under Part V were designed to provide a summary procedure for ensuring that the rights of respective parties are protected, and a "mechanism for ensuring that a commercially just result will be obtained" (at paras 25–26). In other words, as I read the decision in *Andrews*, a judge faced with an application of the sort made by JDFI in this case should start from the premise that disputes concerning the priority of parties' interests in secured collateral are properly resolved through the measures provided by the *PPSA*.

[47] SFL is correct to observe that, generally speaking, judges should not decide applications heard in Chambers based on affidavit evidence alone where the evidence is in conflict in relation to material matters of fact. This general proposition has been held to apply to applications under s. 63(2) of the *PPSA* (see: *Jeffrey Pinder* at para 5), and in applications brought under analogous provisions of similar statutes in other provinces (see, for example: *Discount Auto Sales v Cash Store Inc.*, 2005 ABQB 212 at paras 30–31; and *Avina v Sea Senor (Ship)*, 2016 BCSC 749).

[48] None of this means, however, that the existence of a material conflict in the affidavit evidence automatically precludes a judge from determining the matter in a summary fashion. Under Part V of the *PPSA*, as in other matters, the question of whether a judge in Chambers is able to find necessary facts and decide if the issues in an application can be resolved without a full trial "depends on the nature and quality of all the material" (*Pippin v Pippin*, 2014 SKQB 348 at para 24, 459 Sask R 313; *Davis v Davis*, 2016 SKQB 273 at para 7). While evaluations of credibility should not be made by simply choosing one affidavit over another, a Chambers judge may properly

resolve conflicts in the evidence where there is an appropriate basis upon which to do so. Such a basis may arise, for example, where there is documentary evidence that is definitive of a factual point, or where the evidence includes affidavits from independent witnesses, other independent evidence, or evidence adduced in cross-examination or questioning (see: *Kyrylchuk v Kyrylchuk Estate*, 2020 SKCA 62 at para 29, 58 ETR (4th) 201, citing *Brissette v Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at paras 26–27, 413 DLR (4th) 317). In the context of applications under s. 63 of the *PPSA*, in *Jeffrey Pinder*, Klebuc J., as he then was, observed that while requiring a trial with *viva voce* testimony may be the preferable means to resolve conflicts in the affidavit evidence, "[i]n some cases, mere cross-examination of [the] deponents may be adequate" (at para 5).

[49] There are also a number of decisions which have held that an application for relief under s. 63 of the *PPSA* should be directed to proceed by way of an action, or that a trial should be directed, where there is a contentious issue about whether a party claiming a security interest actually has one that brings the matter within the purview of the *PPSA*, or where the application engages other issues between the parties that cannot be resolved under the *PPSA* (see, for example, *Prosperity Cattle Co-Operative v Lowe*, 2003 SKQB 318; and *Concentra Financial Services Association v Kille*, 2008 SKQB 42, 43 CBR (5th) 245). However, if the facts are not in dispute, or if the factual disputes can be properly resolved, and the material permits the Court to make a determination concerning the issue of priority or entitlement that is raised by the application, then the Court should resolve the issues under the *PPSA* (see, generally: *Parsons v JWB Timber Ltd.*, 2024 BCSC 1192).

[50] Although the *PPSA* was enacted well before the summary judgment provisions of *The King's Bench Rules*, in my respectful view, a Chambers judge should have regard for the same considerations that apply in summary judgment applications when deciding whether an application under s. 63 of the *PPSA* can be disposed of summarily in the face of material conflicts in the affidavit evidence. That is to say, if the state of the evidence (including the affidavits, other documentary evidence and answers given during cross-examination or questioning) is such that it permits the judge to make the necessary findings of fact, fairly apply the law, and resolve all the issues raised in the application in a just and proportionate way, then a summary determination under s. 63 will be appropriate, and a trial will not be required (see, for example: *Hryniak v Mauldin*, 2014 SCC 7 at para 49, [2014] 1 SCR 87 [*Hryniak*]; *McCorriston v Hunter*, 2019 SKCA

106 at para 44; *Michel v Saskatchewan*, 2021 SKCA 126 at para 116; and *Tchozewski v Lamontagne*, 2014 SKQB 71 at para 31, [2014] 7 WWR 397).

[51] I am also of the opinion that, much like the question of whether a genuine issue requiring a trial exists in an application for summary judgment, the determination a judge must make under s. 66(1) of the *PPSA* involves a question of mixed law and fact (see, for example: *Hryniak* at para 81; *Deren v SaskPower*, 2017 SKCA 104 at para 41; and *Frank and Ellen Remai Foundation Inc. v Bennett Jones LLP*, 2024 SKCA 71 at para 3). That being so, absent an extricable error in principle, a judge's decision concerning whether an application under s. 63(2) of the *PPSA* can be resolved summarily by making an order under s. 66(1)(a), as opposed to directing that action be brought or an issue be tried under s. 66(1)(b), is reviewable only for palpable and overriding error.

[52] I see no reviewable error in the Chambers judge's decision that the state of the evidence was sufficient to permit JDFI's application to be fairly and properly determined on a summary basis. As I read the *Decision*, the Chambers judge correctly oriented himself to the law that governed that determination. His reasons demonstrate that he understood that if the evidence did not permit him to fairly and justly resolve the conflicts on the material issues, he could not decide the matter summarily. He also correctly identified the material issue in the s. 63 application, which was whether any other party had an interest in the Tractor that took priority over JDFI's security interest. He properly recognized that, unless SFL could establish its claim that it was a *bona fide* purchaser for value without notice, based on its alleged agreement with the Palins for the purchase of the Tractor, it could not have an interest in the Tractor that defeated JDFI's security interest. He carefully catalogued the evidence, which included nine affidavits from six different deponents. He observed that four of the six deponents had been cross-examined, and that two of them had been further cross-examined on the responses to their undertakings. All of that caused him to remark that no additional evidence would be adduced if there were a trial, and that all of the evidence that was relevant to the central issue of the ownership of the Tractor had been "scrutinized and tested through cross-examination" to such an extent that he could resolve the conflicts, and that a summary determination was appropriate (*Decision* at para 37). In other words, the Chambers judge fully understood the legal principles that he was to apply and, after carefully considering the nature and state of the evidence, he determined that it was sufficient to permit him to make the necessary findings of fact and fairly apply the law. His decision in that regard is entitled to deference.

[53] I also reject SFL's argument that the Chambers judge erred by not finding that its potential limitation period defence was a reason to direct a trial of the issue and order that JDFI proceed by way of an action, instead of deciding the matter on a summary basis. There are two reasons for this.

[54] The first is that there was no material conflict that demanded a trial to resolve. By this, I mean the evidence clearly established that JDFI had a valid security interest in the Tractor, which had not lapsed. SFL's claim to ownership of the Tractor was the only matter raised that could have affected JDFI's assertion of priority under the *PPSA*. That being so, if SFL was unable to establish that it had an enforceable agreement with the Palins for the sale of the Tractor, there was no impediment to deciding JDFI's application for relief under the *PPSA*. The existence or non-existence of such an agreement was not affected by any limitation period argument SFL may have wished to raise against JDFI. Accordingly, once the trial judge had decided that the evidence was sufficient to permit him to summarily decide whether there was an enforceable agreement between SFL and the Palins for the sale of the Tractor, there was no need for him to direct a trial to permit SFL to raise an issue that could have no bearing on the outcome.

[55] The second reason lies in the statutory language of the *PPSA*, which permits a party that wishes to avail itself of any of the remedies set out in s. 63 to seek that relief in the court by bringing an *application*, as opposed to requiring some other form of commencement document. This is significant, because the Legislature must be presumed to have acted intentionally in that respect, and to have understood the implications of such language as it relates to the application of *The Limitations Act*. That being the case, in my respectful view, SFL's argument that the Chambers judge should have exercised his discretion in a way that would effectively displace that existing statutory process is one rooted in equity and, as such, it cannot succeed. Section 65(2) of the *PPSA* provides that the principles of equity apply to matters governed by the *Act*, but only to the extent that they are not inconsistent with the provisions of the *Act*. Directing JDFI to bring an action so that SFL could raise a limitation period defence that was unavailable to it under the *PPSA* would, in my opinion, amount to applying the law of equity to circumvent or rearrange the priorities that the Legislature has established. The jurisprudence instructs that courts should not use the principles of equity in that way (see: *Sun Indalex Finance LLC v United Steelworkers*, 2013 SCC 6 at para

178, [2013] 1 SCR 271 [*Sun Indalex*]; and *KBA Canada Inc. v Supreme Graphics Limited*, 2014 BCCA 117 at paras 31–32, 59 BCLR (5th) 273).

2. No error in not ordering consolidation

[56] SFL also takes issue with the Chambers judge's decision to not consolidate JDFI's application with the action in QBG 1877. On that point, as set out above, the Chambers judge determined that his conclusion regarding the ability to decide the matter summarily under s. 66(1)(a) of the *PPSA* was dispositive of SFL's consolidation application. SFL argues that this was an error. In this regard, its arguments closely track its submissions concerning the Chambers judge's decision to decide the matter summarily.

[57] Rule 3-81 of *The King's Bench Rules* provides judges with the power to consolidate two or more actions "for any reason the Court considers appropriate", including that the actions "have a common question of law or fact", or that they arise out of the same transaction or occurrence (Rule 3-81(2); see also *Burnouf v Burnouf*, 2022 SKCA 6 at para 60, 466 DLR (4th) 521 [*Burnouf*] at para 59).

[58] Consolidation of actions is rooted in considerations of economy and justice. Under the economy heading, saving time and expense for litigants and the justice system is a legitimate aim, and one that can often be realised through consolidation. Justice, or the perception of justice, may also be enhanced by consolidating actions so as to avoid inconsistent rulings where there are facts or issues in common (*1348623 Alberta Ltd. v Choubal*, 2012 SKQB 144 at para 13). Deciding whether to consolidate actions requires the court to consider a number of factors, including the extent to which there are common questions, the possibility that consolidation may save time and resources in both pre-trial procedures and at trial, and the potential prejudice to the parties that may arise from consolidation (*Munro v Munro*, 2011 ABCA 279 at para 7, 341 DLR (4th) 635; see also *Qaisar v SGI Canada*, 2019 SKQB 68 at para 112).

[59] The decision to grant or deny an application to consolidate two actions also involves the exercise of a discretionary power that is reviewable under the standard of appellate review described above for discretionary decisions (*Burnouf* at para 60).

[60] I see no basis to interfere with the Chambers judge's decision not to consolidate JDFI's application with the action in QBG 1877. There were significant differences between the two matters, both in terms of what was in dispute and the nature of the remedies sought. The only common issue was whether there was an agreement between SFL and the Palins for the sale of the Tractor. The Chambers judge determined that he could resolve that issue in the summary process available under the *PPSA* and that doing so would entirely dispose of JDFI's involvement in the matter. With the issue being excisable in that way, no purpose would have been served by consolidating the matters, as neither of the goals of economy or justice would have been achieved by requiring JDFI to be dragged along for the litigation ride as the Palins and SFL fought over the intricacies of their long-term farming arrangement.

[61] Accordingly, this ground of appeal must fail.

C. Did the Chambers judge err in finding that SFL had not established the existence of an agreement for the sale of the Tractor?

[62] The Chambers judge found that the evidence did not establish the existence of an enforceable agreement between SFL and the Palins for the sale of the Tractor. This determination rested on his conclusions that the evidence did not establish that the parties intended to contract for the sale of the Tractor or that there was a *consensus ad idem* with respect to the essential terms of an agreement for sale.

[63] Contractual interpretation generally involves issues of mixed law and fact and, as such, attracts appellate review on the palpable and overriding error standard, unless there is an extricable question of law (*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at paras 50–53, [2014] 2 SCR 633). As McCreary J.A. explained in *Khaira v 102007987 Saskatchewan Ltd.*, 2024 SKCA 78, where the live question is whether a contract was actually formed, the applicable standard of appellate review may be correctness or palpable and overriding error, depending on what aspect of the decision under appeal is being attacked:

> [46] Respecting contractual formation, the Supreme Court of Canada has said that "the requirements for the formation of [a] contract" constitute an extricable question of law, reviewable for correctness (*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 53, [2014] 2 SCR 633, cited in *Neigum v Van Seggelen*, 2022 SKCA 108 at para 46, 474 DLR (4th) 673). That is a legal standard. The application of that legal standard to the facts of the case is also a question of law, reviewed on the correctness standard. However,

> the underlying findings of fact must be owed deference absent a palpable and overriding error: see *R v Shepherd*, 2009 SCC 35 at para 20, [2009] 2 SCR 527.

[64] Under this branch of its argument, I do not understand SFL to assert that the Chambers judge misidentified or misapplied the legal test that governs the determination of whether a contract has been formed. Instead, it argues that the Chambers judge made palpable and overriding errors of fact when deciding whether SFL and the Palins had agreed on the essential terms of an enforceable and binding contract for the sale of the Tractor.

[65] In that regard, SFL points to the Chambers judge's finding that the parties had not reached an agreement concerning the price of the Tractor. It contends that error is demonstrated in paragraph 57 of the *Decision.* There, after identifying that the "purchase price, the amount of periodic payments, when each was due, and the interest chargeable on the unpaid purchase price would all have been essential terms of the agreement", the Chambers judge stated that the "evidence fails to demonstrate that the parties even discussed these essential elements, much less achieved a meeting of minds with respect to them". SFL submits that there was, in fact, evidence on this point from Mr. Kleinsasser that SFL and the Palins had agreed that the purchase was equal to the cash price the Palins had paid for the Tractor, and that although that number was not specified in their discussions, it was readily ascertainable.

[66] SFL also contends that the Chambers judge erred by overlooking or ignoring several other pieces of evidence which supported its position that an enforceable verbal agreement for sale had been reached between it and the Palins. This included evidence about the amount of money SFL actually paid to the Palins on account of the Tractor, evidence that SFL retained and continued to use the Tractor from 2015 until 2018 even though it made no further payments after 2015, and evidence of other communications and accounting exchanged between the parties.

[67] I reject these arguments.

[68] The Chambers judge made no legal error, in my view, in identifying what essential terms SFL and the Palins would have needed to agree upon to form an enforceable contract for sale, or in identifying the nature of the legal test that he was to apply to his analysis of whether such an agreement had been reached. He self-instructed by citing relevant and authoritative case law. Then, having calibrated the legal lens in that way, he proceeded to examine the evidence through it and

concluded that he was not satisfied on a balance of probabilities that SFL and the Palins had formed a common intention to enter in a contract for the sale of the Tractor, or that they had achieved *consensus ad idem* with respect to the essential terms of such a contract. I see no basis to interfere with that bottom-line determination. SFL's argument under this heading reduces to an invitation to this Court to re-weigh the evidence by focusing on the portions of it that were favourable to SFL's position and come to a different conclusion about the underlying facts. In the absence of a palpable and overriding error, the governing standard of review does not permit us to do that, and I can find no such error here. While there were certainly aspects of the evidence that favoured SFL's position, there were also many portions, especially the evidence from cross-examination, that militated against a finding that an objective observer would have been able to conclude that SFL and the Palins had formed an enforceable contract for the sale of the Tractor. The Chambers judge's reasons demonstrate that he was fully aware of the extent of the evidentiary record, and the factual conclusions that he reached were ones that the record supports. I am also not persuaded that he misapprehended or failed to consider any relevant evidence along the way. Accordingly, his conclusion on this point is entitled to deference. This ground of appeal must fail.

D. Did the Chambers judge err by failing to address whether JDFI had a perfected security interest?

[69] SFL contends that the Chambers judge erred by failing to consider whether JDFI had a perfected security interest and by failing to determine whether its alleged security interest was duly signed, registered, and properly and duly assigned to it.

[70] I would not give effect to this argument. The evidence clearly established that JDFI had a valid security interest in the Tractor at all relevant times. The Chambers judge concluded that SFL had not purchased the Tractor from the Palins, and I have found no error in that conclusion. Accordingly, SFL had no interest in the Tractor that could have defeated JDFI's security interest under the *PPSA*, whether or not it was perfected. It follows that the Chambers judge did not err by failing to address whether JDFI's security interest was perfected, because that was immaterial to the outcome.

E. Did the Chambers judge err in awarding costs to JDFI?

[71] SFL's final ground of appeal pertains to costs. The Chambers judge determined that JDFI was entitled to costs on column 2 of the Tariff because: (i) "JDFI was entirely successful on its application"; and (ii) SFL had "lengthened and complicated the proceedings unnecessarily" by searching for some way to "retain possession of the Tractor to strengthen its bargaining position in [QBG 1877]" (*Decision* at para 72).

[72] SFL invites this Court to intervene and set aside the costs award, asserting that it was actually JDFI's conduct of the application and the inconsistent evidence it provided concerning the location of the Tractor at relevant times that lengthened and complicated the proceedings. According to SFL, the Chambers judge erred by not recognizing that JDFI's conduct disentitled it to costs, notwithstanding its success on the application.

[73] I would not give effect to this ground of appeal.

[74] Costs awards are quintessentially discretionary, but the discretion is one that must be exercised judicially (*British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71 at para 42, [2003] 3 SCR 371). An appellate court may only interfere with a costs award if it is demonstrated that the judge who made the award "misapplied some governing principle or rule or disregarded some critical fact or other consideration" or if "the costs award itself is so obviously unjust as to invite intervention" (*6517633 Canada Ltd. v Gibson Creek Farms Ltd.*, 2023 SKCA 19 at para 43; see also: *A.P. v J.P.*, 2020 SKCA 134 at para 52; *Sun Indalex* at para 247; *Nolan v Kerry (Canada) Inc.*, 2009 SCC 39 at para 126, [2009] 2 SCR 678; *Hamilton v Open Window Bakery Ltd.*, 2004 SCC 9 at para 27, [2004] 1 SCR 303).

[75] Bearing in mind that standard of review, I can see no basis for intervention in this case. Although the Chambers judge's analysis with respect to the question of costs was not lengthy, his reasons demonstrate that he recognized the general rule that costs follow the event and that the successful party in a matter should be entitled to costs in the absence of strong reasons to the contrary (see, for example: *Thomas v Lafleche Union Hospital Board* (1991), 93 Sask R 150 (CA) at para 16; *Martin v Martin*, 2022 SKCA 79 at para 63; and *Zoerb v Saskatoon Regional Health Authority*, 2022 SKCA 111 at para 72, 86 CCLT (4th) 271). It is also apparent that he did not view

JDFI as being guilty of any vexatious or oppressive litigation conduct, or any other type of misconduct that would militate against the operation of that general rule. In fact, he found the opposite, namely, that SFL's conduct had unnecessarily lengthened and complicated the proceedings. The Chambers judge was well-positioned to make those assessments, and I see no reviewable error in them.

[76] Accordingly, this ground of appeal must also fail.

V. CONCLUSION

[77] For the foregoing reasons, I would dismiss the appeal, with costs to JDFI calculated in the usual way.

"Kalmakoff J.A."
Kalmakoff J.A.

I concur. "McCreary J.A."
McCreary J.A.

I concur. "Kilback J.A."
Kilback J.A.