IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-454-543

BETWEEN	JOHN HOWARD ROSS FISK AND RICHARD DALE AGNEW AS LIQUIDATORS OF WHAITIRI POTATO COMPANY LIMITED (IN LIQUIDATION) A DULY INCORPORATED COMPANY HAVING ITS REGISTERED OFFICE AT WELLINGTON Applicants
AND	C R GRACE LIMITED First Respondent
AND	MICHAEL HURLEY Second Respondent
AND	BANK OF NEW ZEALAND Third Respondent

Hearing: 3 November 2008

Appearances: J Toebes for the applicants
D J S Parker for first and second respondents
S Gollin and R Kerr for third respondent

Judgment: 18 November 2008

RESERVED JUDGMENT OF JOSEPH WILLIAMS J

The facts

[1] The Whaitiri Potato Company ("Whaitiri") was in the business of growing crops – mainly potatoes.

[2] In October 2006 Whaitiri entered into separate agreements with C R Grace Limited ("Grace") and Michael Hurley ("Hurley") by which Grace and Hurley agreed to make available their respective lands in Manawatu and Taihape to Whaitiri for the purpose of cropping in the 2006-2007 growing season.

[3] The Hurley land comprised 60 acres to be divided equally between potatoes and onions. According to Mr Hurley's evidence a further 93 acres was planted in squash. The exact area of the Grace land was unclear on the materials before me but may have been as high as 268 acres – at any rate a more substantial area than that provided by Hurley. Some of the Grace land was to be planted in onions and squash but the bulk was to be planted in potatoes.

[4] In the case of Grace, the relevant agreement was partly written and partly oral. The written portion of the agreement was contained in a document entitled "Whaitiri Company Limited Ground Lease Agreement 2006-2007" and a subsequent letter from Whaitiri to Grace dated 15 October 2006. The agreement identified the areas to be planted, timing of planting and harvest and the ground rent for each planted area. It was agreed that a penalty of $50 per acre per week would be payable by Whaitiri if any of the crops remained unharvested at the end of April 2007. Presumably the penalty rate would apply until the crop was finally harvested. In addition to conditions as to timing, rental and penalties, Whaitiri also agreed to replant the land in agreed crops or pasture before vacating.

[5] Hurley's agreement was entirely oral. Under this agreement Whaitiri was to pay a per acre rental, all crops were to be harvested by the end of April with payment to be by 20 April and again there were obligations to re-sow the land back into pasture before vacating.

[6] Whaitiri harvested only four and a half acres of the Grace land and paid no rent to Grace. As far as I can tell the company harvested some of the squash on the Hurley land but left the bulk of the crop unharvested. It paid no rent there either.

[7] On 10 July 2007 the directors of Whaitiri placed the company in liquidation.

[8] On 19 July 2007 Grace re-entered into possession and locked the gates to the Grace land preventing Whaitiri and its liquidators, Messrs Fisk and Agnew, from completing the harvest. Hurley took the same step. The parties appear to be agreed that re-entry had the effect of validly terminating both the Grace and Hurley leases. It was common ground that these steps were taken because of Whaitiri's defaults under the leases. There was no argument as to Grace and Hurley's entitlement to do so.

[9] As at that date, Grace claimed debts of $273,293 and Hurley claimed $103,000.

[10] At the time of re-entry, the crops remained largely in the ground and steps had to be taken to harvest it before any residual value arising from the ground leases was lost to all parties.

[11] On 19 July the liquidators applied for interim orders to facilitate removal of the crops and protection of the proceeds of eventual sale. On 2 August MacKenzie J granted orders to the liquidators allowing them to harvest the crops from the Grace and Hurley lands provided a sum equal to the expected net proceeds of such harvest be paid into a solicitor's trust account.

[12] It is my understanding that pursuant to undertakings given to the Court by each of Grace and Hurley and minutes and directions given in these proceedings, the harvest was in fact carried out by the respondents. The crops were then sold by the respondents. The sum of $149,167.98 being the combined net proceeds thereof has been deposited by the respondents into the trust account of Cooper Rapley. That sum comprises $108,567.24 paid by Grace in respect of the Grace land crops, and $40,600.74 paid by Hurley in respect of the Hurley land crops.

[13] The debate between Whaitiri's liquidators on one side and Grace and Hurley on the other is essentially now over these proceeds.

[14] At some point during the proceedings the BNZ ("the Bank") joined as debenture holder with security over the assets of Whaitiri. It transpired that Whaitiri

had granted the Bank a debenture in respect of all of its present and future property on 27 September 2001 and on 1 May 2002 the Bank re-registered the debenture under the Personal Property Securities Act 1999 (the PPSA).

[15] By the terms of s 44 of that Act, the Bank's security attached to the after-acquired property of Whaitiri at the moment of acquisition and without further appropriation or formality. The value of the security exceeded the value of Whaitiri's assets with or without the proceeds of the crop.

[16] The issue then is who owned the crop at the point of its sale? If Whaitiri owned the crop then the Bank takes the proceeds under the debenture. If Grace and Hurley owned it, then the proceeds are theirs.

The argument

[17] Whaitiri's liquidators claim that Whaitiri owned the crops because:

(a) it owned the seeds;

(b) it made arrangements with Grace and Hurley to plant the seeds on their lands;

(c) it cultivated the crops; and

(d) it sold the crops when harvested to Mr Chips Ltd and Potato Supplies Ltd.

[18] By the terms of s 248 of the Companies Act 1993 no proceedings can be brought against the property of a company in liquidation and no rights or remedies can be enforced against such a company unless by Court order.

[19] Both the liquidators and the Bank argued that in the absence of a Court order, the crop and the proceeds are subject to a first priority perfected security interest by

virtue of the PPSA and therefore that Grace and Hurley have no rights or remedies against them.

[20] The respondents submitted that the only claim available to Whaitiri was pursuant to the doctrine of emblements. According to the authors of *Hinde McMorland & Sim*, a tenant whose estate is of uncertain duration runs the risk that the estate may end unexpectedly before the crops that he or she has planted have been harvested. The law gives such tenants the right to re-enter the land after the determination of the estate to harvest and carry away the crops that have been planted by the tenant. This right is known as the right to emblements. But, the respondents argue, the right to emblements is available only in limited circumstances. It applies only to annual crops – *fructus industriales* rather than longer term crops such as trees. And there is no right to emblements if the interest of the limited owner is terminated by or because of the tenant's own act, for example where the tenancy is surrendered or forfeited for breach of a condition of the tenancy (see *Hinde McMorland & Sim, Land Law in New Zealand* paragraph 6.027).

[21] The respondents argued that, in the absence of a right to emblements, the crops belong to the landlord entitled to the reversion.

[22] The case for the first and second respondents was essentially that unless Whaitiri could prove a right to emblements, the crops are theirs.

Emblements and first principles

[23] The right to emblements is an ancient one – the leading classical reference to it being *Oland's case* (1602) 5 Co Representative 116a; 77 ER235. But considered in isolation it appears an odd doctrine. That is, in the sense that it seems strange that property in an asset (the crop) is determined by reference only to whether the tenant has been a good tenant or not. Nonetheless, the doctrine has been confirmed in New Zealand cases (see for example *Duncan and Davies Nurseries New Plymouth Ltd v Honnor Block Ltd* HC AK CIV 2004-404-2343, 10 June 2004 at [45] and following) and is clearly relevant to the present proceedings.

[24] A return to first principles assists in determining whether, and if so how, the doctrine of emblements assists in resolving the present case.

[25] The fundamental question is whether the crops planted by Whaitiri are chattels or part of the land. If they are chattels, then they belong to Whaitiri and the bank has a valid first priority security over them pursuant to the PPSA. If however, they are part of the land then, subject to any argument for emblements, they are the property of Grace and Hurley on the basis that they 'revert', with the land, to the 'reversioners' at the termination of the lease, and neither the liquidator nor the debenture holder is entitled to them.

[26] To answer the underlying question it is necessary to consider some of the fundamental principles of leases, land and the distinction between real and personal property.

[27] According to *New Zealand Land Law* (Bennion et al, 2005) at page 457:

> A lease is an estate in land. It may exist at law or in equity. It arises when one party, the lessor (or landlord) confers on another party (the lessee or tenant), the right to the exclusive possession of certain land for a period that is subject to a definite limit, or that can be made subject to a definite limit by either party.

[28] Given that the duration of a leasehold estate is either certain or capable of being made certain, when it is "determined" the lessee's estate in the land comes to an end and the land reverts to the landlord. Thus the landlord is sometimes known as the reversioner.

[29] The next question then is what is meant by land.

[30] The general mythology is that reflected in *Corbet v Hill* (1870) LR 9Eq 671: the owner of the soil is presumed to be "the owner of everything up to the sky and down to the centre of the earth".

[31] As the authors of *Hinde McMorland & Sim* say at 6.004, this maxim should not be taken literally. The authors cite the caution given by Lord Wilberforce in

Commissioner for Railways v Valuer-General [1974] AC 328 at 351-352. After referring to some of the older authorities he said:

> In none of these cases is there an authoritative announcement that "land" means the whole of the space from the centre of the earth to the heavens: so sweeping, unscientific and impractical a doctrine is unlikely to appeal to the common law mind. At most the maxim is used as a statement, imprecise enough, of the extent of the rights, prima facie, of owners of land.

[32] One exception to this prima facie position may be found in the long-standing distinction in real property law between fixtures and chattels. The authors of *Land Law in New Zealand* articulate the key distinction in these terms at page 10:

> First, real property is property that cannot be moved. There is an obvious contrast here between land and any buildings on it, which are removable, and say, a car or furniture or other movable items, including cash – all of which are commonly referred to as "chattels" …

[33] Fixtures then, are described in these terms at page 28:

> Under the categorisation of all property as real or personal property, one can readily see that all things that go to make up a structure such as a house (timber boards, windows etc) are, on their own, personal property. However, the common law allows that where these objects become so fixed or annexed to the land that they essentially add to it, they are treated as real property and part of the land itself. *Borderline cases obviously arise*. (emphasis added)

[34] It is in the context of rights in possession of limited tenure that the distinction between fixtures and chattels becomes most controversial. Thus the authors again of *Land Law in New Zealand* explain the problem at 540:

> Where a lessee brings on to the premises chattels that remain chattels (items of personal property) throughout the lease, the lessee may remove them from the premises at any time before the end of the lease. Where a lessee brings on to the premises items that become fixtures (part of the realty) the lessee is not entitled to remove these at all, unless they are "tenant's fixtures" or there is an express provision in the lease permitting their removal. The general rule is that fixtures are part of the realty and remain to enhance the lessor's reversion. (footnotes excluded)

The concept of tenant's fixtures was developed because it was seen that the rule of annexation to the land could in some circumstances cause serious injustice to the tenant with only a limited interest in the land.

[35] Thus the principles in relation to fixtures seem to operate in a kind of intermediate zone between personalty on the one hand and realty on the other (for a similar observation see *Garrow and Fenton Law of Personal Property* (6th ed 1998) at 3.001), where some items go one way in some circumstances and other items in other circumstances go the other way.

[36] Against this broad background I turn now to consider the principles in relation to crops and more specifically, the right to emblements. The right to emblements appears to have developed for policy reasons. As the authors *Hinde McMorland & Sim* suggest (at paragraph 6.027):

> To encourage a limited owner to cultivate the land, the law gives that owner … the right to re-enter the land after determination of the estate to harvest and carry away the crops which have been planted. This right is known as the right to emblements. It applies only to a crop "of a species which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed", and not, for example, to young fruit trees and young timber trees. The right to emblements extends only to crops actually planted by the limited owner and to crops which are growing when the interest determines. There is no right to emblements if the interest of the limited owner is determined by or in consequence of his or her own act, for example, where the estate is surrendered, or forfeited for breach of condition, or when a life estate is granted to a widow until remarriage and she remarries: in such cases the crops belong to the remainderman or reversioner.
>
> … A lessee for a fixed term of years is not entitled to the right to take emblements because the lessee knows when the lease will expire and it is the lessee's own fault if he or she sows crops which will not come to maturity until after that date; hence, at common law, such a lessee was entitled to emblements only if the lease determined prematurely through no fault of the lessee … (footnotes excluded)

[37] The doctrine developed to resolve internal contests between three groups of contestants; executors v heirs under intestacies; life tenants v remainderman; and agricultural tenants v landlords (see *Saunders v Pilcher* [1949] 2 All ER 1097 at 1104). The old English distinction between executors and heirs on intestacy no longer applies, but the other two categories remain to give the owner of a limited interest in the land prior right to the fruit of their labour even after the tenancy has ended. It was felt that this result was fairer. It also avoided discouraging tenants from leaving the land unutilised because they feared losing the benefit of their labour

where their limited interest terminated at a time that could not be predicted in advance.

[38] In summary, the limitations on emblements are:

(a) It applies only to leases of uncertain duration such as tenancies at will or periodic tenancies;

(b) It applies only where the tenancy comes to an end by some reason other than the tenant's action or default [*Coke on Littleton (Co. Lit) 55b*, *Meganry and Wade The Law of Real Property* (7th ed 2008) *Oland's Case* (1602) 5 Co Rep 116a];

(c) It applies only to crops that once planted mature within a single growing season [*Graves v Weld* (1833) 5 B & Ad 105 at 119].

[39] The last mentioned element is often referred to as the difference between *fructus industriales* – fruit arising primarily from human industry, and *fructus naturalis* – fruit that recurs naturally even though originally the result of human planting.

[40] The "clean hands" limitation in (b) above is demonstrated by the English case of *Bulwer v Bulwer* (1819) 2 Nbarn. and Ald. 470. In this case the defendant had been the rector of a parish and had sown crops on parish land but had resigned before the crop matured. He harvested the crops after relinquishing his rights to the land and the Court held that he was liable for the value of the crops since he had ended the tenancy by his own act.

[41] It is clear however that the right to emblements, confined as it is within specific requirements, is an exception to the generally applicable rule. In *Saunders v Pilcher* (*supra*), the English Court of Appeal had to consider whether a cherry crop was separate from or a part of the land for tax purposes. Jenkins L J set out the first principle as follows (at p 1104):

> Again, where agricultural tenancies are concerned, independently of any statutory regulation, it was obviously right and proper that the outgoing tenant should take his last crop, but it by no means follows that the distinction has the same materiality as between vendor and purchaser. When the owner in fee simple of a farm in hand sells for a like estate to a purchaser, the common practice, of course, is for the contract to contain special provisions in regard to such things as growing crops, and, generally, they are either expressly reserved to the vendor with a right to gather them or the purchaser is required to take and pay for the crop when ripe at a valuation. *Where, however, the contract is silent as to such matters, and there is simply an out and out sale of a farm in hand from an absolute owner to a purchaser, then, I apprehend, the crops in the ground, whether they be fructus industriales or fructus naturales, pass with the land in the ordinary way*. (emphasis added)

[42] In other words, except for the exceptional right of the agricultural tenant to take emblements, there is no distinction to be drawn in principle between annual crops and tree crops. They all form part of the land and are sold as such in the absence of specific provision in the contract. Thus, the position is that a crop will be treated as a chattel if it fits into one of the emblements exceptions, but if it does not, it will be part of the land.

Emblements as goods

[43] The applicants argued that emblements and growing crops are both referred to in the Sale of Goods Act 1908 and the PPSA as if they are chattels rather than fixtures. For example, s 2 of the Sale of Goods Act 1908 says:

> Goods includes emblements, growing crops and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale.

[44] Similarly in the PPSA crops means:

> crops whether matured or otherwise, and whether naturally grown or planted, attached to land by roots ….

[45] While it is clear that crops can be chattels in some circumstances, I do not see any support for the argument for the applicants in these provisions. Similarly, while the cases of *Jones v Flint* (1839) 113 ER 285 and *Scully v South* [1931] NZLR 1187 provide examples of instances in the sale of goods context in which emblements will or have been treated as chattels, they do not evidence a general rule to that effect.

[46] It is obvious that the parties to an agreement can treat a crop as a chattel separate from the land if they choose to do so. The definition in the Sale of Goods Act uses exactly that language. However, as McGregor J said in *Pasley v Commissioner of Inland Revenue* [1958] NZLR 332 (SC) in respect of the sale of land containing an immature tomato crop (at 335):

> It seems, therefore, that in all these instances, growing crops may be treated as chattels in cases of sale only if it is a term of the contract that such crops shall be severed from the land before, or for the purposes of, the sale of such crops. In the present case, under the contract, the crops were intended to, and would pass to the purchaser not as something severed from the land, but with the land itself. *In my view, therefore, the growing crop does not come within the exceptional cases where such growing crops are treated as something distinct from the land.* (emphasis added)

[47] In the PPSA, s 100 makes it clear that:

> A security interest in crops does not prejudicially affect the rights of a lessor … of land on which crops are growing if:
>
> (a) those rights existed at the time the security interest was created; and
>
> (b) the lessor … has not consented in writing to the creation of the security interest.

[48] In my view, once the crops were planted and growing they were annexed to the land subject only to emblements. Whatever right the Bank had in the unplanted seed that right disappeared as the seed itself became annexed to the land and slowly transformed into the much larger crop that was finally harvested.

[49] These provisions show only that crops can sometimes and in some circumstances be treated as chattels but they do not speak to the real question in this case: What is the *starting point* for determining who owns crops in these circumstances? The answer to that question seems quite clear.

Application to this case

[50] The essential principles applicable to the present case therefore appear to be as follows: crops that fruit once within a single growing season run with the land as a first principle. They belong to the party with the right in possession at the point

they are harvested except where the emblements exception applies. In this case although the leases were terminated before harvest, a right of emblements does not apply to allow Whaitiri to harvest the crop after termination of the lease because the lease was determined as a result of the plaintiff's own act, namely failure to pay rent or comply with any of the other lease covenants during the period prior to re-entry and termination. I am satisfied therefore that the crop belonged to Grace and Hurley as at the date it was harvested. It must follow that the proceeds of sale of that crop once severed from the land belong also to those two parties.

[51] Having found that the crop and proceeds belong to the respondents, it is clear that the liquidation of Whaitiri can have no effect on their title.

[52] Judgment for the first and second respondents accordingly. The proceeds of sale of the crop held in the trust account of Cooper Rapley therefore belong to the first and second respondents in accordance with their respective contributions.

[53] I apprehend that this judgment resolves all matters between the parties and that no further issue of quantum now arises, and that it is appropriate for final orders to be made.

[54] However, in case I have misunderstood the position, I give leave for the parties to make any further applications within seven days. For that purpose this judgment is to be treated as interim. Costs are reserved and may be dealt with by memoranda in the usual way.

"Joseph Williams J"

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