Dunphy v Sleepyhead Manufacturing Company Ltd

Court of Appeal Wellington CA 63/06; [2007] NZCA 241
23 May; 14 June 2007
Glazebrook, Hammond and O'Regan JJ

Company law – Liquidation – Creditor's security interest – Whether liquidators third parties for purpose of enforceability of security agreement – Personal Property Securities Act 1999, ss 36(1) and 40(1)(c).

Commercial law – Personal property securities – Security agreement with company in liquidation – Agreement not signed but financing statement registered – Whether security agreement enforceable as against liquidators – Whether creditor entitled to be paid out of surplus – Personal Property Securities Act 1999, ss 36(1), 40(1(c) and 117(1).

Tort – Conversion – Sale by liquidators of stock supplied under security agreement – Whether liquidators acting as agents of first-ranking creditor.

Mr Dunphy and others were the liquidators of a failed furniture retailer and Sleepyhead was a creditor in the liquidation, having supplied stock for which it had not been paid. Although Sleepyhead had registered a financing statement under the Personal Property Securities Act 1999 (the PPSA) in respect of the stock supplied, its security interest was postponed to the security interest of the retailer's principal lender, the Bank of New Zealand (the BNZ). This was because Sleepyhead had failed to obtain a signed security agreement from the retailer as required for enforceability against a third party. However, by s 40(1)(c) of the PPSA, the lack of a signed security agreement did not prevent Sleepyhead's security interest from attaching for the purpose of enforcing rights between the parties to the agreement. The liquidators believed that Sleepyhead's security interest was not effective against them, on the basis that they too were third parties. They refused Sleepyhead possession of the unsold stock and sold it, applying the proceeds (together with all other moneys realised in the liquidation) to paying the BNZ in full and meeting the expenses of the liquidation. Nothing remained for unsecured creditors. On a summary judgment application by Sleepyhead, it was held that the liquidators of a company were not third parties vis-à-vis a creditor of the company, and that the liquidators had converted Sleepyhead's property. Judgment was entered for Sleepyhead and the liquidators appealed.

Held: 1 The liquidators were the agents of the company and not third parties, with the result that Sleepyhead's security interest was enforceable against them (see paras [22], [33]).

2 In selling the stock that was subject to Sleepyhead's security interest, the liquidators had been acting as the agents of the BNZ. As such, they had been entitled to possession of the stock and had not converted it (see para [48]).

3 Nonetheless, the liquidators as agents of the BNZ were obliged to distribute the surplus under s 117 of the PPSA in accordance with that section, and in particular were obliged to pay Sleepyhead out of that surplus, which they had failed to do (see para [46]).

Result: Appeal dismissed.

Cases mentioned in judgment

Agnew v Pardington [2006] 2 NZLR 520 (CA).
Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528.
Knowles v Scott [1891] 1 Ch 717; (1891) 60 LJ Ch 284.
Waller v New Zealand Bloodstock Ltd [2006] 3 NZLR 629 (CA).
Your Size Fashions Ltd, Re [1990] 3 NZLR 727.

Appeal

This was an appeal by Christine Margaret Dunphy and Iain Bruce Shephard, as liquidators of King Robb Ltd, from the judgment of Harrison J (reported at (2006) 9 NZCLC 264,000) granting summary judgment against them on the application of Sleepyhead Manufacturing Company Ltd, the respondent.

H L Thompson for the liquidators.
M M B van Ryn and *M V Robinson* for Sleepyhead.

Cur adv vult

The reasons of the Court were given by
O'REGAN J.

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Introduction

[1] This appeal raises a narrow point of interpretation of ss 36 and 40 of the Personal Property Securities Act 1999 (the PPSA). Specifically, the issue is whether a security agreement which has not been signed or assented to by the debtor is enforceable against the liquidator of the debtor. Harrison J found that it was (*Re King Robb Ltd (in liq); Sleepyhead Manufacturing Co Ltd v Dunphy* (2006) 9 NZCLC 264,000). He found that the appellants, Ms Dunphy and Mr Shephard, who are the liquidators of King Robb, were liable for

conversion because they refused to hand over to the respondent, Sleepyhead, the goods subject to Sleepyhead's security agreement and refused to account to Sleepyhead for the proceeds of sale. The liquidators appeal to this Court against that finding.

Context

[2] Sleepyhead supplied goods (bedding products) to King Robb on the basis that Sleepyhead retained title until paid, and that Sleepyhead had a security interest in the goods in terms of the PPSA. The terms of sale were set out in the invoices for goods supplied by Sleepyhead, but, although requested to do so, King Robb never signed the standard security agreement provided to it by Sleepyhead. Sleepyhead did, however, register a financing statement on the Personal Property Securities Register. It was accepted by the liquidators that there was a contract in terms of the invoices between Sleepyhead and King Robb. But, importantly, Sleepyhead accepted that King Robb had never assented to these terms in writing. This was significant because of the terms of s 36(1) of the PPSA, which provides:

> **36. A security agreement is enforceable against the third party –** (1) A security agreement is enforceable against the third party in respect of particular collateral only if –
>
> (a) the collateral is in the possession of the secured party; or
>
> (b) the debtor has signed, or has assented to by letter, telegram, cable, telex message, facsimile, electronic mail, or other similar means of communication, a security agreement . . .

[3] The term "third party" is not defined, but some assistance is provided by s 7, which gives a general description of Part 3 of the PPSA, in which s 36 appears. In the second bullet point, the reference to "third parties" is followed by: "(persons who are not parties to the security agreement)".

[4] An example of the application of s 36 is given immediately following the section. The example says:

> **Example**
>
> Person A sells a motor to person B.
>
> The invoice relating to the sale of the motor contains contractual terms, including a retention of title clause.
>
> Person B has not signed the invoice.
>
> Person A has a security interest in the motor which is enforceable against person B, but is not enforceable against anyone else.

[5] Under s 21 of the PPSA, examples are said to be illustrative of the provisions to which they relate, and not to limit the provisions. In the event of any inconsistency, the provision itself prevails.

[6] As is clear from the similarity between the present case and the example given after s 36, the security agreement between Sleepyhead and King Robb is not enforceable against a third party in respect of the collateral covered by the Sleepyhead security interest (the goods supplied by Sleepyhead to King Robb for which King Robb has not paid, and the proceeds of their sale).

[7] The significance of s 36 is accentuated by s 40, which deals with attachment of security interests. Section 40(1) provides:

> **40. Attachment of security interests generally –** (1) A security interest attaches to collateral when –
>
> (a) value is given by the secured party; and

(b) the debtor has rights in the collateral; and
(c) except for the purpose of enforcing rights between the parties to the security agreement, the security agreement is enforceable against third parties within the meaning of section 36.

[8] So Sleepyhead's security interest in the goods which it supplied to King Robb and for which it was not paid attached in terms of s 40(1) for the purpose of enforcing rights between it and King Robb, but not for any other purpose. That is significant in the present case because of the following two factors:

(a) King Robb had granted a security over all its present and future property to the Bank of New Zealand (the BNZ) and the BNZ had registered a financing statement. The BNZ therefore had a perfected security interest in terms of the PPSA over all King Robb's property, including the goods which are also subject to Sleepyhead's security interest. It was not disputed by Sleepyhead that its security agreement was not enforceable against the BNZ, because it was not enforceable against third parties within the meaning of s 36. If Sleepyhead had complied with s 36(1)(b), Sleepyhead's security interest would have ranked ahead of that of the BNZ in relation to the goods supplied by Sleepyhead because of the super priority given to perfected purchase money security interests under s 75 of the PPSA. So Sleepyhead's failure to comply with s 36(1)(b) means its security interest lost the priority it would otherwise have had over that of the BNZ; and
(b) the shareholders of King Robb had passed a resolution to put King Robb into voluntary liquidation and to appoint the appellants as liquidators. The liquidators say they are third parties within the meaning of s 36, and that Sleepyhead's security agreement is therefore not enforceable against them. Sleepyhead says that it is seeking to enforce the security agreement against the debtor, namely King Robb, and the fact that the debtor is now in liquidation does not alter its ability to do this. This is the key issue on the appeal.

[9] The dispute came to a head when, immediately after the appointment of the liquidators, Sleepyhead tried to take possession of the goods it had supplied to King Robb which remained unsold. These had an invoiced price of $43,354.22, none of which had been paid. The liquidators refused to allow this. However, it transpired that King Robb had sold many of the goods and those remaining in King Robb's possession at the date of liquidation had an invoiced value of $22,979 excluding GST. The liquidators arranged a sale by auction of all assets of King Robb. The amount realised was $147,524 from which $32,011.83 was paid as sales commission to the auctioneer. The sale of other assets and collection of amounts owed to King Robb yielded another $25,000 or so. The liquidators paid the BNZ in full ($39,618.07) but refused to pay any of the surplus (after payment to the BNZ) to Sleepyhead. The liquidators treated Sleepyhead as an unsecured creditor. As it turned out, unsecured creditors received nothing – the $100,000 remaining after payment of the sales commission and of the amount owing to the BNZ was exhausted in paying preferential creditors, legal fees and the liquidators' own fees. It is common ground that the net proceeds realised from the auction that related to the unsold goods supplied by Sleepyhead amounted to $26,225, including GST.

[10] Sleepyhead sought summary judgment in the High Court on three alternative bases:

(a) the liquidators had, by preventing Sleepyhead from taking possession of the goods, and by then selling the goods and failing to account to Sleepyhead for the proceeds, converted the goods;
(b) the liquidators had failed to comply with their obligation as liquidators to account to Sleepyhead for the proceeds of the sale of the goods; and
(c) the liquidators had sold the goods as agents of the BNZ and were accordingly obliged to comply with Part 9 of the PPSA in relation to the sale. That obligation included the obligation under s 117 to account to Sleepyhead as a subsequent security holder and the liquidators had failed to do so.

[11] Harrison J found that Sleepyhead had a security interest in the goods which was enforceable against the liquidators. He found the liquidators liable for conversion. Summary judgment was entered for $26,225 plus interest.

Summary judgment

[12] There was no dispute that this case was appropriately dealt with in a summary judgment context. The issues in dispute are all amenable to resolution without the need for a trial, because the areas of controversy are all legal issues. There is no material dispute about the facts.

Issues

[13] It was common ground that, if Sleepyhead was entitled to possession of the goods after the appointment of the liquidator, the liquidator's actions would have amounted to conversion of the goods. In order to determine whether Sleepyhead had a right to possession of the goods, it is necessary first to determine whether Sleepyhead's security interests had attached to the goods. There was no dispute that the requirements of s 40(1)(a) and (b) were met in this case, and that the requirement of s 40(1)(c) was not. So the issue requiring determination is whether Sleepyhead's enforcement of its security agreement after the appointment of the liquidators was an enforcement of rights "between the parties to the security agreement". If it was, then Sleepyhead has an attached security interest which is enforceable against the liquidators.

[14] Even if Sleepyhead did have such an interest, however, its right to possession of the goods would be affected by the existence of the BNZ's security interest, against which the Sleepyhead security interest is not enforceable. Sleepyhead accepted that the action of the liquidators in retaining possession of, and subsequently selling, the goods could have been undertaken by the liquidators as agents of the BNZ. In that event, the liquidators would be acting with the authority of the BNZ, whose right to possession of the goods would have outranked that of Sleepyhead. The liquidators denied that they were acting as agents for the BNZ. The second issue is, therefore, whether the liquidators were acting as agents for the BNZ for that purpose.

[15] Once that issue is determined, it is then necessary to consider whether the liquidators had any obligation to account to Sleepyhead for the proceeds of the sale of the goods.

Was Sleepyhead attempting to enforce rights between the parties to the security agreement?

[16] The parties took quite different approaches to this aspect of the case. Sleepyhead's starting point was that its security agreement was clearly enforceable against King Robb prior to the liquidation, because any

enforcement action at that time was undoubtedly an enforcement of rights between the parties to the security agreement so that only the requirements of s 40(1)(a) and (b) were prerequisites to the attachment of the security interest.

[17] Sleepyhead argued that, once that was established, the next question was whether the advent of the liquidation changed the position. It argued that the answer was No, because the liquidation did not result in a change in the parties to the security agreement. This was said to be so because there is nothing in the PPSA or the Companies Act 1993 to indicate that any security interest (or charge, to use the term adopted in the Companies Act) ceases to exist at the time of liquidation and there is therefore no good reason why a pre-liquidation enforceable security interest becomes unenforceable against the debtor at the moment of liquidation. On this basis, Sleepyhead argued that the fact that control of the company passed from the directors to the liquidators did not have any impact on the enforceability of its security interest.

[18] The approach taken by the liquidators was that liquidators are separately identifiable parties from the company of which they are liquidators, and are therefore to be considered as third parties for the purpose of ss 36(1) and 40(1)(c). Since Sleepyhead is now seeking to enforce its security agreement against the liquidators, it is enforcing rights against a party other than the parties to the security agreement. It is prevented from doing so because it has not complied with the requirements of s 40(1)(c), that is, it has not complied with s 36(1)(b), and so the liquidators can treat it as a security interest that did not attach to the goods supplied by Sleepyhead (this argument is also made in Widdup and Mayne, *Personal Property Securities Act: A Conceptual Approach* (rev ed, 2002), para [30.9]).

[19] Much of the debate about this approach to the case centred on the proposition that a liquidator is not an agent of the company, but stands apart from the company to the extent that it is appropriate to classify the liquidator as a third party for the purposes of ss 36(1) and 40. This was the focus of the case in the High Court.

[20] After consideration of the authorities, Harrison J determined that the liquidators were not third parties. He said at para [29]:

> "**[29]** In my judgment the law is clear. The liquidators were acting as King Robb's agents, for and on its behalf, when they sold the goods subject to Sleepyhead's security interest. In this respect I endorse statements to the same effect by the text book writers, Keay, McPherson, *The Law of Company Liquidations* (pp 286 – 289); *Brookers Insolvency Law*, para CA260.30; and Gedye, Cuming and Wood, *Personal Property Securities in New Zealand*, para 36.9. Alternatively put, the liquidators were the company and thus the debtor for the purposes of the PPSA. They were not collectively a third party."

[21] As corporate bodies, companies must always act through agents of one form or another. Prior to liquidation, a company normally acts through its employees or directors. After liquidation, the position of the directors is effectively supplanted by the liquidator, but the obligations of the liquidator reflect the reality that, in most cases, liquidation occurs because the company is unable to meet its obligations to creditors and the principal focus of the liquidator is the protection of the creditors' interests.

[22] We do not consider that there is any real doubt that a liquidator is an agent for the company. As noted in Keay, McPherson (eds), *The Law of Company Liquidation* (4th ed, 1999), p 287, this is not a "normal" agency position because the liquidator controls the principal (the company) and has

statutory duties under the Companies Act which are focused on protecting the interests of creditors. But it is still an agency. It is simply an agency subject to external rules and ethical obligations (see Reynolds, *Bowstead and Reynolds on Agency* (18th ed, 2006), para [6-009]). In our view Keay and McPherson correctly state the position at p 288 as follows:

> "In relation to the company, viewed as a corporate entity, there is little doubt that the liquidator occupies the position of agent. This gives her or him power to bind the company without personal liability and imposes upon the liquidator certain fiduciary duties and duties of skill and care. From this it follows that the liquidator's position is similar to that of the directors – (to whom he or she is often likened) . . ." (Citations omitted.)

[23] Similarly, in *Knowles v Scott* [1891] 1 Ch 717 at p 723, Romer J explicitly recognised that the liquidator's agency, especially when disposing of the company's assets, was subject to obligations beyond those owed to its principal:

> "In my view a voluntary liquidator is more rightly described as the agent of the company – an agent who has, no doubt, cast upon him by statute and otherwise special duties, amongst which may be mentioned the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders."

[24] The language in which the powers of liquidators are expressed in the Sixth Schedule to the Companies Act is consistent with that analysis. The liquidator can carry on the company's business, and carry on litigation commenced by or against the company, enter into legal documents in the name of and on behalf of the company, sell or dispose of the company's property, and so on. We do not think that it can realistically be said that, in doing so, the liquidator is occupying a position as a third party vis-à-vis the company.

[25] Counsel for the liquidators said that it was wrong to classify a liquidator as an agent of the company. He said the liquidator occupied a unique position, governed by the provisions of the Companies Act dealing with liquidations. He pointed to a number of differences between the role of the director and that of a liquidator, and noted that a company would normally be vicariously liable for the actions of its agent but that that was obviously not the case in relation to a liquidator. He emphasised that while the liquidator acts for and represents the company as its agent, he or she also has an important statutory role in representing the interests of creditors. In our view, all of those points illustrate the points made by Keay and McPherson, to which we have referred at para [22] above, but they do not lead us to conclude that a liquidator of a company is to be regarded as a party separate from the company itself for the purposes of ss 36 and 40.

[26] Unlike its North American antecedents, the PPSA does not attribute any special status to the position of liquidator. In particular, unperfected security interests remain enforceable against a liquidator, in contrast to the position which applied under some pre-PPSA law (see s 103 of the Companies Act 1955 and s 18 of the Chattels Transfer Act 1924). The New Zealand legislature adopted the same policy in this regard in the PPSA as it had in the Motor Vehicle Securities Act 1989. This was a matter of some controversy (see Gedye, Cuming and Wood (eds), *Personal Property Securities in New Zealand* (2002), [Intro.5]).

[27] A proposal that the PPSA be amended to provide that a liquidator is a "third party" for the purposes of ss 36 and 40 was included in a Ministry of Economic Development discussion document published in May 2001. The

proposed amendment was not carried forward to the Business Law Reform Bill which was later introduced, although a number of the other proposed amendments to the PPSA were. This appears to have been, at least in part, because of opposition from the New Zealand Law Society, which submitted that, as the liquidator was not an independent third party, but an alter ego of the company, an amendment to modify that "fundamental aspect of insolvency law" was not appropriate for a Business Law Reform Bill, and should be subject to full consultation and review. In fact, it would have been a straightforward matter to amend ss 36 and 40 to refer specifically to liquidators *as well as* third parties if there was a concern about defining liquidators themselves as third parties, but, whatever the reason, the proposed amendment was never made.

[28] Counsel for the liquidators highlighted a reference in the Law Commission report which recommended the enactment of the PPSA to "third parties such as receivers and liquidators" (New Zealand Law Commission, "A Personal Property Securities Act for New Zealand" (NZLC R8, 1989), p 107). He said this suggested that the promoters of the PPSA considered liquidators to be third parties for the purpose of ss 36 and 40. However, the reference occurs in the course of a description of pre-PPSA law and we do not attribute to it the same significance that counsel did.

[29] Counsel for the liquidators referred us to two case notes on the High Court decision in this case and argued that the criticisms that they made supported his contention that the High Court decision was wrong. The first of these, Webb, "Commercial Law" [2006] NZ Law Rev 337, p 345, made the point about the unique nature of the liquidator's role to which we have already referred at para [22]. Having done so, the author suggested that the best categorisation of the liquidator was that of a "holder of a power". He argued that such a categorisation would lead to the result that liquidators were not bound by the terms of unsigned security agreements on the basis that, while they have powers to deal in the property of the company, they do not do so as the agent for the company any more than as a mortgagee is the agent of the mortgagor when realising the mortgage property. We respectfully disagree with that analogy. In our view, it fails to engage with the statutory role and responsibilities of a liquidator vis-à-vis the company which put a liquidator in a position which is quite different from that of a secured creditor exercising its power to enforce its security.

[30] The other case note, Dwyer and Bainbridge, "Role of Liquidators under the PPSA" (21 April 2006) *NZ Lawyer* 10, criticised the High Court finding that the liquidator was an agent of the company. The authors suggested that in determining whether a liquidator was a third party for the purpose of s 36, the question should be:

> "[I]n the context of the creditor seeking to assert a property right against assets of the company in liquidation, does the liquidator represent the interests of the debtor company, or does the liquidator represent the interests of competing claimants to those assets such that the creditor must meet the standard of documentary evidence laid down by legislation?"

They concluded that the liquidator represented the interests of competing claimants to the assets of the company in liquidation and that a secured party must therefore ensure that its security agreement complied with s 36 in order for it to be enforceable against the liquidator.

[31] That is essentially a policy argument which could be made for reform of the PPSA (see, for example, similar arguments in McLauchlan, "Unperfected Securities Under the PPSA" [1999] NZLJ 55, p 56). But in our view it does not address the essential point of interpretation of the current wording of s 40(1)(c). The question we must answer is this: Is Sleepyhead continuing to enforce its security agreement against King Robb, even after King Robb's liquidation? There is nothing in s 36 or s 40 to deflect us from answering that question Yes. Nor do we see anything in the commentary by Dwyer and Bainbridge that deflects us from doing so.

[32] Dwyer and Bainbridge also criticised the High Court judgment on the basis that, if a liquidator is treated as an agent of the debtor company, then so must a receiver, given the unequivocal terms of s 6(3) of the Receiverships Act 1993. Thus, they argued, the effect of the High Court decision is that an unsigned security agreement is also enforceable against a receiver, though not enforceable against the secured party which appointed the receiver. We disagree. By definition, an attempt to enforce the security agreement against a receiver would involve enforcing it against the secured party who appointed the receiver. In the context of the present case, if the BNZ had appointed a receiver, the receiver in exercising his or her powers would be in no worse a position than the BNZ itself was. Thus the receiver would be entitled to take possession of the goods which were subject to both the BNZ's and Sleepyhead's security interests, because Sleepyhead's security interest was not enforceable against the BNZ. Having said that, the receivers would be required to account to Sleepyhead as a subsequent holder of a security interest under s 30B of the Receiverships Act, whether or not King Robb was by that time in liquidation (see also *Agnew v Pardington* [2006] 2 NZLR 520 (CA)).

[33] We think there is much to be said for the analysis by Gedye, Cuming and Wood at para [36.9] of their text, where they comment that a "third party" for the purposes of s 36(1) (and s 40(1)(c)) would generally be a person who has an interest in the collateral, and that it would not be usual to speak of enforcing a security interest against an unsecured creditor of the debtor. Again, that is consistent with the approach taken to non-perfection of security interests in the PPSA: the holder of the unperfected security interest loses out to holders of perfected security interests and transferees of the collateral, but not to a liquidator or an unsecured creditor.

[34] We acknowledge that this analysis would suggest that a security interest in assets of a non-corporate debtor under a security agreement that did not comply with s 36(1) would not be enforceable against the Official Assignee. That is because when a debtor is adjudicated bankrupt the property of the bankrupt vests in the Official Assignee (s 42(1) of the Insolvency Act 1967 and s 64(1)(e) of the Insolvency Act 2006). Thus the Official Assignee has a proprietary interest in the property of the bankrupt and a secured party wishing to assert its interest must do so against the Official Assignee, not the debtor. That is not the case for a liquidator. Section 248(1)(a) of the Companies Act provides that the liquidator has "custody and control" of the company's assets, but they remain the property of the company.

[35] We conclude that Sleepyhead's efforts to enforce its security agreement in this case involved enforcement between the parties to the security agreement, namely Sleepyhead and King Robb. Having complied with s 40(1)(a) and (b), Sleepyhead's security interest had attached to the collateral, the goods which it had supplied to King Robb and their proceeds of sale, for the purpose of enforcing rights between Sleepyhead and King Robb. The liquidators were

therefore wrong when they refused to recognise Sleepyhead's security interest. In the absence of any superior interest (here, the BNZ security interest), Sleepyhead would have been entitled to possession of the goods subject to its security interest under s 248(2) of the Companies Act. The liquidators would have been bound to respect that.

[36] We add that we agree with Harrison J that Sleepyhead's security interest amounts to a "charge" as defined in s 2(1) of the Companies Act. That definition includes:

> . . . a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 313 . . .

[37] In pre-PPSA terms, the goods supplied by Sleepyhead would not have been "owned" by King Robb – they would have been wholly outside the liquidation because title remained with Sleepyhead. Now that the PPSA governs the method by which creditors obtain security, "owned" must be read in a manner that is consistent with the PPSA, which means that King Robb's interest in the goods must be treated as sufficient for them to be "owned" by King Robb for the purposes of this definition (*Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 at para [28] and *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) at para [89]). As Sleepyhead has a security interest which has attached for the purpose of enforcing its rights against King Robb (and its liquidators), it is entitled to claim payment in priority to unsecured creditors. Its security interest is, therefore, a "charge" and Sleepyhead is a "secured creditor" as defined in s 2(1) of the Companies Act.

Did the liquidators act as agents for the BNZ?

[38] The basis on which the liquidators sold the goods subject to Sleepyhead's security interest (and that of the BNZ) is a matter of dispute. Of course, only the liquidators and the BNZ can assist in establishing what the relationship was. The liquidators filed affidavits from Mr Shephard, and from the Manager, Credit Restructuring, of the BNZ, Ms Ramsay.

[39] In his affidavit Mr Shephard said that, after the liquidators advised the BNZ that the assets of King Robb were sufficient to ensure that the BNZ was paid in full, the BNZ did not appoint a receiver or take further steps in relation to its security. He said the BNZ was "content to allow us, as liquidators, to realise the collateral and pay creditors in accordance with the priority rules established by the [PPSA] and the Companies Act 1993".

[40] On the other hand Ms Ramsay described the situation as follows:

> "In the circumstances, Bank of New Zealand was content to allow the liquidators to realise the collateral subject to the Bank's security. The Bank did not surrender or subordinate its security in any way. On the contrary, the Bank regarded the liquidators as the Bank's agents for the purpose of realising the Bank's security and paying the Bank."

[41] Counsel for the liquidators argued that, notwithstanding Ms Ramsay's evidence, the liquidators were not acting as the BNZ's agents but were acting in accordance with s 254(a) of the Companies Act, which provides that a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge.

[42] In view of the apparent conflict in the descriptions of the position by Mr Shephard and Ms Ramsay, we have considered whether it is appropriate for us to resolve the position in the context of a summary judgment application.

Of course, this is not a conflict between witnesses for opposing sides, but between witnesses supporting the liquidators' opposition to the entry of summary judgment. Ultimately we are satisfied that the position must have been that the liquidators were, as Ms Ramsay describes, acting as agents for the BNZ in enforcing the BNZ's security interest. There are a number of reasons for this.

[43] The scheme of Part 16 of the Companies Act is to exclude from the ambit of the liquidation property which is subject to a charge. The Act contemplates that secured creditors will operate independently of the liquidation, unless they decide to surrender their security in terms of s 305(1)(c). The definition of "creditor" in s 240(1) makes it clear that secured creditors are excluded except for very limited purposes, none of which are relevant in the present case. Section 248(2) makes it clear that the liquidation does not limit the secured creditors' rights of enforcement, and s 253 provides that the liquidator's principal duty is to take possession of the assets and distribute them or their proceeds to "creditors" (which, for this purpose, excludes secured creditors). Similarly, ss 312 and 313, which provide for the payment of creditors by the liquidator, exclude from their ambit secured creditors.

[44] All this suggests that s 254 should be read in the limited sense that it absolves a liquidator from any duty to realise assets on behalf of a secured creditor, reversing the result of *Re Your Size Fashions Ltd* [1990] 3 NZLR 727.

[45] There is a policy reason for approaching the matter in this way. As counsel for Sleepyhead emphasised, it would defeat the purpose of Part 9 of the PPSA, which is designed to protect the interests of, among others, the debtor and holders of subsequent security interests, if secured parties could acquiesce in liquidators enforcing rights on their behalf, without triggering any of the obligations which Part 9 of the PPSA would otherwise impose on the secured parties.

[46] We are satisfied that the evidence from Ms Ramsay correctly characterises what happened in this case: the BNZ entrusted to the liquidators the enforcement of the BNZ's rights under the BNZ's security agreement, and in undertaking that role the liquidators were acting as the BNZ's agents. While we do not need to decide the point, we consider it likely that the undertaking by liquidators of the task of selling property subject to a charge will usually (if not always) involve the liquidators acting as the agents for the secured creditor holding the charge.

[47] If the liquidators had not been acting on the BNZ's behalf in selling property subject to the BNZ's security interest, they could not have acted without the agreement of Sleepyhead, which had a security interest (in PPSA terms), and a charge (in Companies Act terms) over some of the goods which the liquidators sold. In that sense, the finding that they were acting as agents for the BNZ validates their action. Of course, the liquidators were proceeding on the basis that Sleepyhead did not, in fact, have a security interest/charge, but we have found that the liquidators were wrong in that respect.

[48] However, this also means that the liquidators, in their capacity as agents for the BNZ, were entitled to possession of the goods subject to the BNZ's security interest. They were therefore entitled to reject Sleepyhead's attempt to take possession of the goods that were subject to both the BNZ's and Sleepyhead's security interests. They are not, therefore, liable to Sleepyhead for conversion of those goods.

Did the liquidators have an obligation to account to Sleepyhead?

[49] As the liquidators were acting as the agents for the BNZ in realising the assets subject to the BNZ's security interest, the liquidators were obliged to comply with the duties imposed on the BNZ as a secured party under Part 9 of the PPSA. For present purposes, the most significant of these is the obligation to distribute the surplus under s 117 in accordance with the provisions of that section. There was no dispute that, properly applied, s 117 required the liquidators to pay Sleepyhead out of the surplus, and that the amount to which Sleepyhead was entitled in that regard was $26,225. Accordingly, it is appropriate to enter summary judgment against the liquidators for that sum.

[50] Even if, as the liquidators argued, they were acting independently of the BNZ in selling the property subject to the BNZ's security interest, the same obligation to account to Sleepyhead would have applied. Even if s 117 had not been applicable, Sleepyhead had a security interest in the proceeds of the sale of the goods subject to its security interest and was entitled to enforce it against the liquidators. The goods had been sold by King Robb (through the liquidators) and the proceeds were identifiable. We agree with Harrison J that, as the liquidators refused to hand over those proceeds to Sleepyhead, they would have been liable for conversion of the proceeds if s 117 had not applied.

Result

[51] We conclude, therefore, that Harrison J correctly found that Sleepyhead had a security interest in the goods which it had supplied to King Robb and for which it had not been paid, and in the proceeds of the sale of those goods. He was also correct to conclude that that security interest was enforceable against the liquidators and was a charge for the purposes of the Companies Act. While the liquidators are not liable for conversion of the goods subject to Sleepyhead's security interest, they are required to account to Sleepyhead for the proceeds of the sale of the goods subject to Sleepyhead's security interest, by virtue of s 117 of the PPSA. We conclude, therefore, for slightly different reasons from those of the High Court Judge, that summary judgment was properly entered in the High Court against the liquidators for $26,225 plus interest, and we therefore dismiss the appeal. We also award costs of $6000 and usual disbursements to Sleepyhead.

Appeal dismissed.

Solicitors for the liquidators: *Knight Coldicutt McMahon Butterworth* (Auckland).

Solicitors for Sleepyhead: *Simpson Grierson* (Auckland).

Reported by: Andrew Borrowdale, *Barrister*