Waller v New Zealand Bloodstock Ltd

Court of Appeal CA 269/04
21 September; 27 October 2005
William Young, Robertson, Baragwanath JJ

Commercial law – Personal property securities – Competing security interests – Lease entered into prior to commencement of the Personal Property Securities Act 1999 – Leased property claimed by receiver – Collateral repossessed by lessor on default – Relevance of legal ownership of leased asset – Whether security interest perfected – Entitlement to proceeds of collateral – Personal Property Securities Act 1999, ss 16, 17, 23, 35, 36, 40, 41, 45 and 66.

S H Lock (New Zealand) Ltd (Lock) was the holder of a debenture over the assets of Glenmorgan Farm Ltd (Glenmorgan) registered in the Companies Office in 1999. The Personal Property Securities Act 1999 (the PPSA) came into force on 1 May 2002, and Lock registered its security interest on the same day.

In 2001, Glenmorgan entered a lease to purchase arrangement with New Zealand Bloodstock Ltd in respect of a stallion, "Generous". The arrangements were varied from time to time, but title to Generous remained with New Zealand Bloodstock. Generous was leased to an English company, Plantation Stud Ltd. No steps were taken by New Zealand Bloodstock to comply with the requirements of the PPSA.

In 2004, New Zealand Bloodstock terminated the agreement with Glenmorgan and took possession of Generous, and shortly thereafter Lock appointed Messrs Waller and Agnew as receivers of Glenmorgan pursuant to a power in the debenture. The receivers claimed that Lock was entitled to priority under the PPSA. They applied for an order by way of summary judgment requiring New Zealand Bloodstock to render up possession of Generous. They also sought a declaration that they were entitled to the service fees payable by Plantation Stud.

The High Court held that Lock was entitled to possession of the stallion, and granted summary judgment against New Zealand Bloodstock. It declined summary judgment in respect of the claim to stud fees.

New Zealand Bloodstock appealed to the Court of Appeal. It argued that the debenture had been executed before the PPSA came into force and that it did not purport to charge a statutory interest created under future law in property not belonging to Glenmorgan. In the alternative, it was contended that the language in the debenture was not sufficiently explicit to create a security interest in Generous.

Lock cross-appealed, arguing that the fees for the stallion's services were proceeds derived from the collateral, and therefore amounted to a security interest as defined in s 16 of the PPSA.

Held: (William Young J dissenting): 1 The lease of Generous had been for a term of more than one year, and therefore amounted to a security interest for the purposes of the PPSA. In terms of s 40, Lock had given value, Glenmorgan had rights in Generous, and the security was enforceable against New Zealand Bloodstock. From the date the PPSA came into effect, Glenmorgan had rights in Generous that it could in law provide as security to Lock (see paras [54], [55], [118]).

2 The debenture charged all present and future assets of Glenmorgan. The case was not to be determined by nuances in the charging clause; the PPSA was concerned with transactions that in substance secure payment for performance of an obligation. As of 1 May 2002, Generous was part of Glenmorgan's after-acquired property and Lock's security interest attached to the stallion (see paras [62], [63], [64], [68], [118]).

3 The PPSA regime was of general application to security transactions, regardless of when they were entered into. Competing interests were given priority in accordance with provisions of the Act. Lock's security interest had been perfected by registration under the Act, and therefore took priority over the interests of New Zealand Bloodstock. With respect to priority of competing security interests, the principle nemo dat quod non habet was ousted by the PPSA (see paras [69], [70], [74], [89], [115], [116]).

4 The stud fees were proceeds derived from the collateral, but it was not clear whether Lock had acquired an interest in them as required by s 16. The Court inclined to the view that the section referred to acquisition other than via the PPSA, but this was a matter that would have to be left for trial (see paras [78], [81], [119]).

Result: Appeal and cross-appeal dismissed.

Cases mentioned in judgment

Agnew v Commissioner of Inland Revenue [2001] 2 AC 710; [2002] 1 NZLR 30 (PC).

Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd [1949] 1 KB 322; [1949] 1 All ER 37 (CA).

Credit Suisse Canada v 1133 Yonge Street Holdings Ltd & Euromart Management Group Ltd (1999) 41 OR (3d) 632; (1998) 22 RPR (3d) 189.

Frazer v Walker [1967] NZLR 1069; [1967] AC 569 (PC).

Giffen, Re [1998] 1 SCR 91; [1998] 7 WWR 1.

Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528.

Honea v Laco Auto Leasing Inc 454 P 2d 782 (1969).

Lefebvre (Trustee of), Re [2004] 3 RCS 326; (2004) 7 CBR (5th) 243.

Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014; [1940] 3 All ER 549.

Parsons v Graham (High Court, Auckland, CP 601-IMO1, 20 June 2002, Baragwanath J).

Salomon v A Salomon & Co Ltd [1897] AC 22; [1895-9] All ER Rep 33.

Sprung Instant Structures Ltd v Caswan Environmental Services Inc [1998] 6 WWR 535.

Appeal

This was an appeal by New Zealand Bloodstock Ltd, the first appellant, and New Zealand Bloodstock Finance Ltd, the second appellant, from the judgment of Allan J (reported at [2005] 2 NZLR 549) granting summary judgment to S H Lock (New Zealand) Ltd, the second respondent, and John Anthony Waller and Richard Dale Agnew, the first respondents as receivers of the assets of Glenmorgan Farm Ltd, on an application requiring New Zealand Bloodstock to render up possession of a stallion pursuant to a priority right under the Personal Property Securities Act 1999, and a cross-appeal against a refusal by the Court to make declaration that Lock was entitled to stud fees earned by the stallion.

A R Galbraith QC and *J F Anderson* for New Zealand Bloodstock.
P Dale and *T Bowler* for Lock and the receivers.

The judgment of Robertson and Baragwanath JJ was delivered by **BARAGWANATH J.**

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Introduction

[1] In a judgment delivered on 2 December 2004, Allan J granted summary judgment in favour of S H Lock (New Zealand) Ltd (Lock) against New Zealand Bloodstock Ltd and New Zealand Bloodstock Finance Ltd (High Court, Auckland, CIV 2004-404-4093). For the purposes of this judgment, it is not necessary to distinguish between these two companies and we will refer to them both simply as "New Zealand Bloodstock". In his judgment, Allan J held that Lock was entitled to possession of a thoroughbred stallion, Generous, but he declined summary judgment in respect of a related claim as to stud fees.

[2] New Zealand Bloodstock appeals against the decision to grant summary judgment. Lock cross-appeals against the decision to decline summary judgment in respect of the fees.

Background

[3] On 17 November 1999, Glenmorgan Farm Ltd (Glenmorgan) granted a debenture to Lock over the assets of Glenmorgan. The charging clause is in these terms:

> "The Company charges in favour of the Debentureholder all its present and future assets as continuing security for the payment of the Secured Money and the performance of all other obligations of the Company to the Debentureholder."

The charge thus created was fixed in relation to:

> ". . . [T]he Company's freehold and leasehold land, plant and machinery, motor vehicles, chattels (except stock in trade), Book Debts, Other Monetary Debts, Intellectual Property Rights, unpaid or uncalled capital, goodwill and other assets . . ."

It was floating in relation to, inter alia, stock in trade. The term "assets" is defined by cl 1.2 in this way:

> "The 'assets' of any person is to be read as a reference to the whole or any part of its business undertaking, property, assets (including its uncalled capital, unpaid capital and goodwill) and revenues (including the right to receive revenues) present or future . . ."

This debenture was registered under the Companies Act 1993 on 19 November 1999.

[4] The Personal Property Securities Act 1999 (the PPSA) received royal assent on 14 October 1999 (that is, the month before the debenture was executed), but did not come into effect until 1 May 2002.

[5] On 31 August 2001, Glenmorgan entered into a lease to purchase agreement with New Zealand Bloodstock pursuant to which it was to acquire Generous. The lease was to expire on 31 July 2004, on which date New Zealand Bloodstock would sell Generous to Glenmorgan at a price equal to the residual value under the agreement. Under the lease to purchase agreement, title to Generous remained with New Zealand Bloodstock.

[6] On 1 May 2002, the day the PPSA came into force, Lock registered a financing statement (s 135) to perfect its security interest (s 17) on the register provided for by that Act.

[7] The contractual arrangements between Glenmorgan and New Zealand Bloodstock were subsequently varied from time to time (and expanded pursuant to what was styled a "Contract for Current Advances"). But at all times New Zealand Bloodstock retained ownership of Generous. A variation, entered into on 22 August 2003, provided:

> "All income received from the 2004 northern hemisphere breeding season shall be applied towards reducing Glenmorgan's debt to New Zealand Bloodstock under the Lease to Purchase Agreement or the Contract for Current Advances."

It extended the term of the lease to 28 March 2005.

[8] Generous was leased to an English company, Plantation Stud Ltd, and fees were payable by Plantation Stud under that arrangement. However, for reasons which were not explained in evidence, this leasing arrangement was not between Glenmorgan and Plantation Stud but rather between Plantation Stud and another company, Glenmorgan Stallion Management Ltd, which is, as its name suggests, associated with Glenmorgan.

[9] Plantation Stud has paid New Zealand Bloodstock £175,000 (a sum which was payable by Plantation Stud in relation to the 2004 northern hemisphere breeding season). This money is held in trust pending the outcome of the present dispute.

[10] On 6 July 2004, New Zealand Bloodstock terminated the lease to purchase agreement (by reason of defaults on the part of Glenmorgan), and on 7 July 2004, it took possession of Generous.

[11] On 23 July 2004, Lock gave notice of default to Glenmorgan under the terms of the debenture and appointed the first respondents as receivers of Glenmorgan's assets.

The PPSA

[12] The PPSA is based closely on legislation enacted by provincial legislatures in Canada, which in turn have borrowed heavily from art 9 of the Uniform Commercial Code. This provenance is apparent in some of the key terms which appear in the PPSA. More importantly, however, the policies which underpin our PPSA are those which underpin corresponding legislative schemes in Canada and the United States. In this regard, an article by Bridge, Macdonald, Simmonds and Walsh, "Formalism, Functionalism, and Understanding the Law of Secured Transactions" (1999) 44 McGill LJ 567 provides much helpful background information.

[13] The key features of our PPSA and corresponding North American legislation are the adoption of a unitary concept of security (under which the legal forms by which security is obtained become largely irrelevant) and establishment of priority rules which depend primarily on time of registration save for the super-priority accorded to registered purchase money security interests (that is, in favour of unpaid vendors) over prior general securities.

[14] Our PPSA is not confined in its operations to the rights of secured creditors inter se and extends as well to those who purchase secured assets from debtors (see, for instance, s 52).

Construing the PPSA

[15] The PPSA is the response of the New Zealand legislature to what Professor Riesenfeld famously termed "The Quagmire of Chattels Security" ("The Quagmire of Chattels Security in New Zealand", New Zealand Legal Research Foundation Occasional Pamphlet No 4 (1970)). The Act followed a report to the Law Commission, NZLC PP6, by Professor John Farrar and Mr Mark O'Regan, "Reform of Personal Property Security Law", 1988, and that commission's report, NZLC R8, "A Personal Property Securities Act for New Zealand", 1989. The latter, which was prepared by a team of experts, contained a draft bill; both reports drew heavily on North American experience.

[16] Mr Galbraith QC for the appellants acknowledged that the tenor of the Law Commission report assisted the respondents' argument. But he submitted that, when carefully examined, the actual language of the measure does not have the effect for which academic writers, and notably Associate Professor Gedye of the University of Auckland, have contended (see para [92] below) and which in Allan J's judgment in this case and

Rodney Hansen J's in *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 the High Court has endorsed. Mr Galbraith's argument is consistent with the result of certain Canadian intermediate appellate decisions. Mr Dale's argument for the respondents supports both New Zealand High Court judgments and adopts the academic writings. His argument is consistent with the result of a judgment of the Supreme Court of Canada: *Re Giffen* [1998] 1 SCR 91. But the present decision must turn on the effect of the New Zealand legislation, which is not wholly identical to that of the various Canadian jurisdictions.

[17] Each argument is significant, not least as to the perspective to be adopted. Mr Galbraith's argument for particular care in construing the legislation receives some general support from the conclusion of the Law Commission of England and Wales. After careful consideration of both the New Zealand legislation and the North American models on which its architects drew, that Law Commission has concluded that further work is required even for its "companies-only" draft proposal (see "Company Security Interests", Cm 6654, 7 July 2005 at 1.60 – 1.66).

[18] Cautionary cases which Mr Dale's argument brings to mind include *Salomon v A Salomon & Co Ltd* [1897] AC 22, where at levels below the House of Lords there had been a failure to put aside old learning and to recognise that the provision for separate legal identity of the company (enacted by what is now s 15 of the Companies Act 1993) must be given literal effect. Likewise, in *Frazer v Walker* [1967] NZLR 1069 it was perhaps easier for the fifth member of the Board, Sir Garfield Barwick, to appreciate Sir Robert Torrens' concept of registration as the root of title than for the English Law Lords, to whom the notion that a forged mortgage could by registration deprive a landowner of his title was no doubt counterintuitive.

[19] The starting point directed by s 5 of the Interpretation Act 1999 requires that "[t]he meaning of [the] enactment must be ascertained from its text and in the light of its purpose".

[20] It is convenient to set out the statutory provisions relied on by the respondents and then to examine the appellants' challenge to their argument. The emphasis in the following citations and in those from Law Commission reports is added.

The respondents' argument

The text of the legislation

[21] The key purposes of the PPSA are stated in its long title. They include:

> (a) To provide for the *creation and enforceability of security interests* in personal property; and
>
> (b) To provide for the determination of priority between security interests in the same personal property; and
>
> . . .
>
> (e) To provide for the establishment of a register of security interests in personal property. (Emphasis added.)

[22] That the measure concerns the very creation of security interests, provides as to their priority and establishes a register of such interests, suggests radical reform. No doubt because of the nature of the reform, Part I contains what s 3 calls "only a guide to the general scheme and effect of the Act". It includes s 7, which sets out the key concepts on which the Act is based. One (later given effect by s 35) is:

• The effectiveness of a security agreement between the parties to the agreement:

[23] "Security agreement" means an agreement that creates or provides for a security interest and may include writing that evidences a security agreement (s 16). On Mr Dale's argument it includes both the New Zealand Bloodstock agreements to lease and Lock's debenture. A second key concept (given effect by ss 35 – 36) is:

> • *When a security agreement is enforceable against the parties to the security agreement and third parties* (persons who are not parties to the security agreement). (Emphasis added.)

Vis-à-vis Lock's debenture, New Zealand Bloodstock are third parties. The third key concept (given effect by s 40) is:

> • *The concept of attachment of a security interest (when a security interest comes into existence). Attachment occurs when the secured party gives value for the loan, the debtor has rights in the personal property that is used as security for the loan, and, in the case of third parties, the security agreement is enforceable against third parties.* (Emphasis added.)

[24] Mr Dale contends that: Lock gave value for its loan; from 31 August 2001 (or at least from 1 May 2002) Glenmorgan had rights in the stallion; it became security for the loan; and the debenture is enforceable against New Zealand Bloodstock, particularly because of the effect of the following concept (given effect by s 41):

> *The perfection of security interests. Perfection involves the concept of attachment together with* 1 of the methods of achieving perfection, such as *registration of a financing statement* or the secured party taking possession of the collateral (personal property that is subject to a security interest). *Perfection is relevant to giving a secured party priority over a third party.* (Emphasis added.)

[25] In this case the respondents rely on the registration of their claimed security interest in the personal property securities register on 1 May 2002, which they say perfected their security interest and gave it priority over the appellants' unregistered interest. The appellants rely on their original title to Generous and resumption of possession of the stallion following termination of the lease to Glenmorgan on 6 July 2004.

[26] The Act contains some unfamiliar terms and specifically defined concepts that must be understood. The main subject-matter of the Act, "personal property that is subject to a security interest", is given the North American definition "collateral".

[27] The core concept, "security interest", is defined in a manner that is reminiscent of tax-avoidance legislation. It is expressed to override certain conventional legal rules:

> **17. Meaning of "security interest" –** (1) In this Act, unless the context otherwise requires, the term ***security interest*** –
>
> (a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to –
>
> (i) *The form of the transaction; and*
>
> (ii) *The identity of the person who has title to the collateral; and* . . . (Emphasis added.)

Importantly, a lease of the kind from New Zealand Bloodstock to Glenmorgan, which was for a term of more than one year, is deemed by the next paragraph to constitute a security interest:

> (b) *Includes* an interest created or provided for by a transfer of an account receivable or chattel paper, *a lease for a term of more than 1 year*, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation). (Emphasis added.)

[28] The breadth of the definition of "security interest" is made plain by subs (3):

> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[29] Section 24 provides:

> **24. Application of Act not affected by secured party having title to collateral –** The fact that title to collateral may be in the secured party rather than the debtor does not affect the application of any provision of this Act relating to rights, obligations, and remedies.

This affords support to the respondents' argument that the PPSA subordinates the title of a secured party to the operation of the Act, not least its provisions as to registration and perfection of security. Implicit in it is that such party with title whose security interest has not been perfected may have its title subordinated to another's perfected security interest.

[30] Within Part III and pivotal to this case are the operative ss 35 – 36 and 40 – 41, which were introduced by s 34:

> **34. Purpose of this Part –** The purpose of this Part is to outline *the main principles* that are relevant –
>
> (a) *To determining the enforceability of a security interest against the debtor and third parties*:
>
> (b) *To determining the priority between security interests* in the same personal property:
>
> (c) To determining the priority between a security interest in personal property and other interests in the same property (for example, the interest of a buyer of goods). (Emphasis added.)

[31] The first operative section is s 35:

> **35. Effectiveness of security agreement –** *Except as otherwise provided by this Act* or any other Act or rule of law or equity, *a security agreement is effective according to its terms*. (Emphasis added.)

[32] Mr Galbraith emphasised the latter part of the section, pointing to the specific terms of the second lease to purchase, which kept title in New Zealand Bloodstock. Moreover, it contained provision for termination on [in the event] 6 July 2004. So there could be no Glenmorgan interest, proprietary or possessory, on which Lock's claim could continue to bite. His argument is to similar effect to the successful submission for the appellant noted at para [17] of *Re Lefebvre (Trustee of)* [2004] 3 RCS 326 and applied at paras [27] and [39] – [40] of the judgment of the Supreme Court of Canada delivered by LeBel J.

[33] Mr Dale relied on the initial part of s 35, submitting: that on 1 May 2002, immediately the PPSA came into force, Glenmorgan's rights under its agreement to lease for more than one year constituted a security interest in its favour; that Lock's rights under the debenture gave rise to a s 17 security interest in its favour which included the stallion; that Lock's security interest had been perfected the same day by registration; and that s 36 thereafter gave it priority over the New Zealand Bloodstock claims.

[34] Mr Dale further relied on what he submitted was a statutory code for making security agreements enforceable in s 36:

> **36. Enforceability of security agreements against third parties –** (1) A security agreement is enforceable against a 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 that contains* –
>
> (i) *An adequate description of the collateral* by item or kind that enables the collateral to be identified; or
>
> (ii) *A statement that a security interest is taken in all of the debtor's present and after-acquired property; or*
>
> (iii) A statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property. (Emphasis added.)

He submitted that Lock had complied with these requirements.

[35] Mr Galbraith argued that it had not: that the debenture executed on 1 November 1999 *before the PPSA came into force and without any reference to it* was limited to Glenmorgan's then and potential future assets *measured by the then law* and did not purport to charge any different kind of statutory interest created *under future law* and *in property not of Glenmorgan but of New Zealand Bloodstock* which Glenmorgan might thereafter secure power to effect.

[36] We mention for completeness that, since no steps were taken in terms of the transitional provisions of the PPSA (ss 193 – 201) which effectively suspended its full operation for six months to allow parties to securities the opportunity to comply with the new regime, we find it unnecessary to discuss those provisions.

[37] The provision most debated was that relied on by Allan J, following Rodney Hansen J, as giving rise to Lock's claimed security interest. His analysis may be summarised by importing in parentheses references to the present facts:

> **40. Attachment of security interests generally –** (1) *A security interest* [in favour of Lock] *attaches to collateral* [the stallion owned by New Zealand Bloodstock and leased to Glenmorgan] *when* –
>
> (a) *Value is given by the secured party* [Lock]; *and*
>
> (b) *The debtor has* [by taking possession of the stallion on 31 August 2001: s 40(3)] *rights in the collateral* [the stallion]; *and*
>
> (c) *Except for the purpose of enforcing rights between the parties to the security agreement* [Glenmorgan and Lock], the security agreement is enforceable against third parties [New Zealand Bloodstock] *within the meaning of section 36* [s 36 has been complied with by Glenmorgan's signature of the debenture].

. . .

(3) *For the purposes of subsection (1)(b), a debtor* [Glenmorgan] *has rights in goods that are leased to the debtor* [that occurred under the successive agreements to lease the stallion], . . . *or sold to the debtor under a conditional sale agreement* [the lease is in substance also such an agreement in terms of s 17] (including an agreement to sell subject to retention of title [as the lease agreement provided in this case]) *no later than when the debtor obtains possession of the goods* [namely 31 August 2001]. (Emphasis added.)

[38] Mr Dale submitted that Glenmorgan "had", that is, obtained, "rights in goods . . . leased to [it]" and Lock's security interest attached "to collateral", namely to the stallion ("personal property that is subject to a security interest"). As a result of the following section, that interest was perfected on 1 May 2002 when Lock's financing statement was registered in respect of it:

41. When security interest perfected – (1) *Except as otherwise provided in this Act, a security interest is perfected when –*

(a) *The security interest has attached; and*

(b) . . .

(i) *A financing statement has been registered in respect of the security interest* . . . (Emphasis added.)

[39] It follows from s 66 that Lock's perfected interest has priority over New Zealand Bloodstock's unperfected security:

66. Priority of security interests in same collateral when Act provides no other way of determining priority – *If this Act provides no other way of determining priority between security interests in the same collateral –*

(a) *A perfected security interest has priority over an unperfected security interest in the same collateral:*

Example

Person A's security interest in person B's car has been perfected by registering a financing statement.

Person C's security interest in person B's car has not been perfected.

Person A's perfected security interest in person B's car has priority over person C's unperfected security interest in person B's car. (Emphasis added.)

[40] Such conclusion is consistent with the definitions referable to Part 10 (Personal Property Securities Register) and the other sections in that Part:

135. Interpretation – In this Part, unless the context otherwise requires,

. . .

financing statement –

(a) Means the data required or authorised by this Act or the regulations to be entered in the register to effect a registration for the purposes of perfecting a security interest in collateral under this Act; and

(b) Includes a financing change statement (if the context permits):

register means the register of personal property securities established under section 139:

Registrar means the Registrar of Personal Property Securities . . .

secured party includes the person named as the secured party in the financing statement or financing change statement, as the case may be:

verification statement means the data that is required or authorised by this Act or the regulations to confirm the registration of a financing statement or financing change statement.

. . .

139. Personal property securities register – (1) The Registrar must ensure that a register of personal property security interests known as the personal property securities register is kept in New Zealand.

(2) The register is to be –

(a) An electronic register; and

(b) Maintained for the purposes of registrations under this Act; and

(c) Operated at all times, unless –

(i) The Registrar suspends the operation of the register, in whole or in part . . . or

(ii) Otherwise provided in the regulations.

. . .

140. Contents of register – The register contains the following data:

(a) The name and address of the debtor and . . . if the debtor is an organisation, the name of the organisation and the name and address of the person acting on its behalf:

(b) If the debtor is an organisation that is incorporated, the unique number assigned to it on its incorporation:

(c) . . . if the secured party is an organisation, the name of the organisation and the name and address of the person acting on its behalf:

(d) A description of the collateral . . . if required . . . by this Act or by the regulations:

. . .

(f) Any other data specified in the regulations.

. . .

142. Data required to register financing statement – The following data must be contained in the financing statement in order to register it:

(a) . . . if the debtor is an organisation, the name of the organisation and the name and address of the person acting on its behalf:

. . .

(c) If the debtor is an organisation that is incorporated, the unique number assigned to it on its incorporation:

(d) . . . if the secured party is an organisation, the name of the organisation and the name and address of the person acting on its behalf:

(e) A description of the collateral . . . if required . . . by this Act or by the regulations:

. . .

(g) Any other data required by this Act or the regulations to be contained in the financing statement.

The appellants' argument

Primary argument

[41] Mr Galbraith began with an analysis of the legal effect of the documents which the parties had signed. The original lease to purchase agreement of

31 August 2001 recorded that possession of the stallion was deemed to have been delivered to Glenmorgan at the commencement of the lease. By cl 4 the lessee acknowledged and warranted:

> "(f) The title to and property in the Animal shall from the date of purchase thereof by the Lessor always be and remain in the Lessor for the term of this Lease and the Lessee shall not by reason of this Lease acquire any right title or interest in or to the Animal other than as Lessee or than by purchase in accordance with the terms of this Lease."

And by cl 6 it was agreed that if default should be made by the lessee:

> ". . . then and in any such event the Lessor may at its option and at any time thereafter and notwithstanding that the Lessor may have waived some previous default or matter referred to immediately above . . . without notice terminate the leasing created hereby and shall immediately thereon become entitled to possession of the Animal . . ."

The second lease to purchase agreement of 28 June 2002 confirmed the original lease to purchase agreement and the parties' obligations thereunder.

[42] Mr Galbraith submitted that:

(a) at all material times title to the stallion remained in Glenmorgan;
(b) the bundle of rights created by the agreement to lease included New Zealand Bloodstock's entitlement to resume possession if the lease were terminated; and
(c) Lock's appointment of the first respondents as receivers on 23 July 2004 postdated New Zealand Bloodstock's resumption of possession of the stallion.

[43] He argued that there were simply no proprietary rights in Glenmorgan which were capable of passing to Lock, while the possessory right, which the parties had agreed would terminate in the event of default, ceased on 6 July 2004 and thus could not be claimed by Lock and its receivers.

[44] He submitted that such agreement was effective in terms of s 35 and that the only "rights in goods" acquired by Glenmorgan were those for which the agreement to lease provided. There was no provision of the PPSA under which Lock and its receivers could claim a security interest in priority to the rights of New Zealand Bloodstock as owner. For New Zealand Bloodstock to be deprived of its proprietary rights, clear language would be required demonstrating a specific legislative purpose to that effect. The language of s 40 is insufficiently precise and emphatic to have such consequences.

Alternative argument

[45] As an alternative argument, Mr Galbraith submitted that the language of Lock's debenture was insufficiently explicit. The charging clause is reproduced at para [3].

[46] Mr Galbraith submitted that at the time of the agreement the only proprietary interest in contemplation was that of Glenmorgan. Here cl 4(f) of the lease to purchase agreement made plain that the only relevant proprietary interest in the stallion was not of Glenmorgan but of New Zealand Bloodstock.

Cross-appeal

[47] Section 45 provides:

> **45. Continuation of security interests in proceeds –** (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds –

(a) Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
(b) Extends to the proceeds.

Example

Person A has a security interest in person B's car.

Person B sells the car without person A's consent.

Person A has a security interest in the car and in the money received by person B from the sale of the car.

Section 16 contains material definitions:

debtor
(a) Means –
. . .
(iii) A lessee under a lease for a term of more than 1 year
. . .

proceeds
(a) Means identifiable or traceable personal property –
(i) That is derived directly or indirectly from a dealing with collateral or the proceeds of collateral; and
(ii) In which the debtor acquires an interest . . .

[48] Mr Dale submitted on the cross-appeal that the proceeds of the stallion's services (paras [8] – [9] above) fall plainly within the language of s 45.
[49] Mr Galbraith supported the Judge's conclusion that the case arguably falls within s 23(e)(ix):

23. When Act does not apply – This Act does not apply to –
. . .
(e) an interest created or provided for by any of the following transactions:
. . .
(ix) An assignment of a single account receivable or negotiable instrument in whole or in partial satisfaction of a pre-existing indebtedness:

[50] Mr Galbraith submitted: that, in terms of a renewal and variation of the stallion leasing agreement dated 17 December 2003, the base rental for the stallion for the 2004 northern hemisphere breeding season was the £175,000 held in trust (para [9] above); that by cls 7(b) and (c) of the agreement of 22 August 2003 between New Zealand Bloodstock and Glenmorgan that income was to be applied towards reducing Glenmorgan's debt to New Zealand Bloodstock; and that there had been:

"An assignment of a single account receivable . . . in partial satisfaction of a pre-existing indebtedness"

falling outside the Act.

Discussion
The appeal
Summary of analysis
[51] We set out in summary form the steps to our conclusion that Lock's debenture takes priority over New Zealand Bloodstock's title to the stallion.

(a) The lease to purchase being for more than one year, for the limited purpose of fixing priorities of competing proprietary interests, New Zealand Bloodstock's title became a "security interest" (s 17(1)(b)).
(b) By s 40(3) Glenmorgan, which apart from the PPSA had no property rights in the stallion, secured "rights in [the stallion]".
(c) Whether the debenture as a security agreement is "effective according to its terms" (s 35) to capture Glenmorgan's rights in the stallion is a question of construction which we answer in favour of Lock.
(d) Given such construction, Glenmorgan's statutory rights in the stallion potentially form part of Lock's security, provided they "attach" (s 40).
(e) The attachment conditions of s 40 are satisfied by Lock because:
  (i) Lock has given value (s 40(1)(a));
  (ii) Glenmorgan has rights in the collateral (s 40(1)(b)); and
  (iii) by s 36, Lock's security agreement is enforceable against New Zealand Bloodstock's as a third party (s 40(1)(c)). That is because Glenmorgan has signed the debenture that contains a statement that a security interest is taken in all of the debtor's (Glenmorgan's) present and after-acquired property (s 36(1)(b)(ii)).
(f) Lock has perfected its security interest (s 41).
(g) Since New Zealand Bloodstock has not perfected its security interest, Lock's security interest takes priority (s 66(1)(a)).

Appellants' primary argument

[52] Mr Galbraith's primary argument is that the Court should on construction, especially of s 40, presume the application of the nemo dat rule which Professor Farrar and Mr O'Regan described at p 19 of their report:

> "Where property in goods has not passed to a buyer, subject to certain exceptions, he or she cannot confer a good title on a sub-buyer – nemo dat quod non habet, no one can give a better title than he or she possesses."

So, he argues, Glenmorgan cannot deprive New Zealand Bloodstock of its title to the stallion.

[53] But there have long been exceptions to the nemo dat rule. Farrar and O'Regan cited Denning LJ's statement in *Bishopsgate Motor Finance Corporation Ltd v Transport Brakes Ltd* [1949] 1 KB 322 at pp 336 – 337:

> "In the development of our law, two principles have striven for mastery. The first is the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transaction: the person who takes in good faith and for value without notice should get a good title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times."

They stated at p 20:

> "Continental systems go much further than common law systems in recognising the doctrine that the possessor of a chattel can confer a good title to it. Thus Article 2279 of the French Civil Code lays down the principle 'en fait de meubles la possession vaut titre' – in the case of movables possession is equivalent to title. In all continental systems, however, the rule is subject to exceptions . . ."

[54] In the present case, the lease to purchase was a "lease for a term of more than 1 year" within the meaning of s 17(1)(b) (it is unnecessary to resort to the definition of that expression in s 16). Accordingly, for the limited purpose of priority of securities, the contractual language of cl 4(f) of the agreement to lease (providing that title to the stallion would remain with New Zealand Bloodstock (para [41] above)) was overridden by statute: because its lease was for a term of more than one year, New Zealand Bloodstock was deemed by s 17 to have a statutory "security interest". That being the case, instead of enjoying its previous inviolable title to the stallion, New Zealand Bloodstock's interest, now a "security interest", was liable to be overridden by a competing security interest. The policy underlying such result is described in the New Zealand Law Commission's report at p 89:

> "LEASES FOR A TERM OF MORE THAN ONE YEAR
>
> In practical and legal effect, many commercial leases are indistinguishable from hire purchase agreements or conditional sale contract. They create the same degree of apparent ownership which justifies the traditional regulation of chattel mortgages and charges as well as the proposed regulation of title-based securities and assignments."

[55] If on its true construction the debenture was "effective according to its terms" (s 35 (see para [31] above) to subject Glenmorgan's "rights in [the stallion]" (s 40(3)) to Lock's security interest, in terms of s 36 (see para [34] above) the debenture is enforceable not only against Glenmorgan but also against New Zealand Bloodstock. That is because Glenmorgan had executed the Lock debenture, which also is a security agreement (defined in s 16: ". . . an agreement that creates or provides for a security interest"). The debenture would be enforceable against New Zealand Bloodstock in respect of the stallion (being "particular collateral"). Further, by s 40 (para [37] above), Lock's security interest (by receipt of the charge over Glenmorgan's rights in the stallion) would attach to the stallion, since:

(a) Lock gave value; and
(b) Glenmorgan had rights in the stallion; and
(c) the security was enforceable against New Zealand Bloodstock (s 36).

In terms of s 40(3), Glenmorgan "[had] rights in [the stallion] . . . no later than when [it] obtain[ed] possession of the [stallion]"; that is, on 1 August 2001.

[56] On such analysis, from that date there was such relationship between Glenmorgan and the stallion as would from 1 May 2002, when the PPSA came into force, constitute "rights in [the stallion]" which it could in law provide as security to Lock.

[57] The question is whether what happened had that effect in fact and in law. Regard must be had to both the charging clause (para [3] above) and the language of s 36.

[58] If the charging clause is "effective according to its terms" to subject Glenmorgan's rights in the stallion to Lock's security interest, we construe s 36 as meaning that compliance with it is not only a necessary but also a sufficient condition of making a security agreement (here the debenture) enforceable against a third party (New Zealand Bloodstock) in respect of particular collateral (the stallion).

[59] Such result is consistent with and confirmed by s 24 (para [29] above).

[60] William Young J (at para [91] below) cites in support of such result the commentary on s 40 in the report of the New Zealand Law Commission. It is also supported by the consultation paper *Company Security Interests: A Consultative Report*, No 176 (2004) of the Law Commission of England and Wales. Following study of the North American and New Zealand experience, it had prepared and attached draft rules based upon that legislation. The commission acknowledged but rejected the nemo dat point advanced by Mr Galbraith:

> "2.107 The argument that the scheme would mean some re-characterisation of the transaction is quite correct. The question is whether the degree of re-characterisation involved is justified by the advantages that it would bring. In fact re-characterisation may refer to a number of changes that need to be considered separately.
>
> RE-CHARACTERISATION (1); THE SUPPLIER MAY LOSE ITS TITLE
>
> 2.108 One form of re-characterisation is that legal title may be lost if the SI [security instrument] is not perfected. Thus if a finance lease or an operating lease for over a year has not been perfected by registration, a sale or further lease to a buyer or lessee who does not have actual knowledge of the SI will give the buyer or lessee a title free of the SI. The degree of change on this point may easily be overstated. We are used to the idea that a buyer in possession can pass title that it does not have [s 9 of the Factors Act 1889; s 25 of the Sale of Goods Act 1979]; we are less used to it in relation to hire-purchase . . . and quite unfamiliar with it in relation to finance leases. *Our scheme involves widening the exceptions to the basic principle that a person cannot pass a title he or she does not have. [Often still expressed in the Latin tag "nemo dat quod non habet".] But the basic principle is already riddled with exceptions; and it should be noted that what the motor vehicle financiers – who usually are the legal owners of the vehicles – seem to be seeking is just this form of re-characterisation, at least with finance leases and possibly with operating leases of over one year . . . The hirer or lessee is not an owner, but if the financier has not filed, a sale or other disposition by the hirer or lessee should give the innocent purchaser rights in priority to those of the financier. What to lawyers may be a painful change to familiar conceptual structures may be precisely the practical relief that industry needs.*
>
> 2.109 *The scheme also has the effect that if the financier has not perfected its SI the collateral may be seized by an execution creditor . . . and the debtor may create a second SI in the collateral – an SI that, if the first SI had not been perfected by filing, will take priority but that otherwise will be junior to the earlier SI . . . These rules apply even though the agreement contains a contractual restriction . . . Similarly, if the debtor becomes insolvent, the collateral may be taken by the liquidator . . . These are further aspects of the same form of re-characterisation. Those in the industry who have welcomed the scheme seem to view these rules as necessary sanctions to encourage filing.*" (Emphasis added.)

Appellants' alternative argument: the issue of construction

[61] The appellant relied in the alternative on the fact that Lock's debenture did not describe the stallion "by item or kind" and so s 36(1)(b)(i) is not satisfied. We accept that subcl (i) does not apply.

[62] Turning to subcl (ii) – "a statement that a security interest is taken in all of the debtors present and after-acquired property" – it is true that the charging clause does not use those words. It states:

> "The Company charges in favour of the Debentureholder all its present and future assets as continuing security."

But "future assets" clearly captures "after-acquired property".

[63] Section 17, however, emphasises that, for priority purposes, the form of the transaction is to be disregarded. This is a major consideration in our respectful decision to differ from William Young J on the point of construction. We do not see the case as turning on the fine nuances of how the charging clause was drafted. Rather, what matters is that the transaction "in substance secures payment for performance of an obligation".

[64] While until 1 May 2002 the charge did not extend to the stallion, on that day Glenmorgan acquired "rights in goods" in relation to the stallion (s 40(3)). With respect to the view of William Young J (at para [116](b) below) that:

> "Glenmorgan had the same rights in [the stallion] prior to 1 May 2002 as it did after 1 May 2002 . . ."

it does not acknowledge the effect of s 40(3). Prior to 1 May 2002, because of the terms of cl 4(f) (see para [41] above), Glenmorgan had no proprietary rights in the stallion. With effect from that date s 40(3) created new "rights in goods" in favour of Glenmorgan. So Glenmorgan's rights did not remain the same. Such "rights" in our view fall clearly within the scope of the charging clause (see para [3] above), which embraces that part of Glenmorgan's "business undertaking" comprising the leasehold interest in the stallion as a revenue source which constitutes "after-acquired property". It would be difficult to find language more apt to embrace whatever security may be available than that contained in the charging clause. Since that leasehold interest constitutes "rights in goods", Lock's security interest attaches to the stallion (s 40(1)).

[65] We are satisfied that the charge by Glenmorgan in favour of Lock of:

> ". . . all its present and future assets as continuing security for the payment of the secured money and the performance of all other obligations of the Company to the Debentureholder."

as well as extending to Glenmorgan's "rights in [the stallion]" gives rise to:

> "An interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation (s 17(1)(a))."

and constitutes:

> "A statement that a security interest is taken in all the debtor's present and after-acquired property (s 36(1)(b)(ii))."

Our reasons are in summary:

(a) the stallion is "after-acquired property" (s 16), having been acquired after Glenmorgan entered into a security agreement with Lock;

(b) by s 43, Lock's security interest could attach to Glenmorgan's after-acquired property, where the security agreement has so provided;
(c) the charging clause in the security agreement captures after-acquired property; and
(d) it follows that the combined effect of s 43 and the charging clause is to attach Lock's security interest to the stallion.

[66] Value had been given by Lock when the loan facility was made available under the agreement. See *Honea v Laco Auto Leasing Inc* 454 P 2d 782 (1969) at pp 785 – 786:

> "Defendant gave a binding commitment to extend credit, and this commitment was acted upon. Defendant's promise to pay the pump company was consideration sufficient to support a simple contract. Thus, the requirement 'value' be given had been met, and this was prior to any installation. The actual fulfilment, and the time, of the obligation to make payment to the pump company are not determinative of the questions as to whether and when 'value' was given."

[67] Value does not continue to be given (or could not be said to have been given anew) for PPSA purposes whenever credit is drawn down. That is merely performance of the contract; the consideration was the promise to make that loan available within the terms of the contract. This accords with the nature of a loan contract. See *Chitty on Contract Vol 2: Specific Contracts* (29th ed, 2004) at p 38-223:

> "**Definition of loan**. A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest."

[68] The provision of value by Lock antedated the enactment of the PPSA and the perfection of Lock's security by registration, both occurring on 1 May 2002. William Young J (at para [116](c) below) considers that, the giving of value having antedated the enactment of the PPSA, the language of s 40 is not engaged. Our respectful view is that, having concluded on construction that the form of the charging clause is apt to bring the lease of the stallion within s 40, it does not matter even if no further consideration was provided after 1 May 2002. We interpret s 40 (see para [37] above) as providing the criteria for attachment to collateral, including Glenmorgan's new statutory rights in the stallion (s 40(3)). On 1 May 2002, Lock had provided value (s 40(1)(a)); Glenmorgan had rights in collateral (s 40(1)(b) to which the security interest could attach and had attached by Glenmorgan's obtaining possession of the stallion (s 40(3)); and there was also an enforceable security agreement (s 40(1)(c); s 36). Lock therefore had satisfied s 40: on 1 May 2002, Lock's security interest attached to all of Glenmorgan's collateral (or assets), which included the stallion.

[69] We see no reason of policy why the new regime should fail to apply to such collateral when, on our construction of it, it would have fallen within the debenture if it had been executed after 1 May. William Young J (at para [116](e)) considers that more explicit language is needed to achieve such effect. We prefer the view that the new regime is of general application once the transition period has passed, with the competing parties' respective interests given priority according to (in this case) whether they have been perfected by registration. The difficulty of any other approach to competition

between pre- and post-PPSA interests is obvious: the transitional provisions do not deal with the case where the security is not or cannot be replaced by a new security; and if our construction is not adopted, a security agreement which if executed after 1 May 2002 would have captured an after-acquired stallion has a different effect if executed before that date. We do not accept such construction.

[70] It follows that Lock has obtained a security interest which, having been perfected by registration, takes priority over the prior interests of New Zealand Bloodstock.

[71] The consequence is that, while according to its language Glenmorgan's lease from New Zealand Bloodstock would otherwise subsist only for its term, having become a "security interest" it gives rise to consequences under ss 36, 40 and 41 that, in the context of competing priorities, survive the normal expiration.

[72] The approach to the alternative argument that we prefer, turning on the function of the security document and the purpose of the legislation rather than on nuances of drafting, squares with the English Law Commission's perception of the common approach underlying the United States, Canadian and New Zealand legislation. In its Consultation Paper No 164, "Registration of Security Interests: Company Charges and Property other than Land" (2002), that commission considered the report of the Committee on Consumer Credit (1971) Cmnd 4596, the "Crowther Report", Professor A L Diamond, *A Review of Security Interests in Property* (1989) performed for the Department of Trade and Industry and the legislation in the United States, Canada and New Zealand. It said:

> "7.2 A major criticism of the current law, made by the Crowther and Diamond reports and underlying all the overseas schemes to which we have referred, is that the current law does not have a functional basis . . .
>
> 7.3 . . . there are a number of transactions that operate, in purpose, as securities, but are not regarded by the law as creating a security . . .
>
> . . .
>
> **A RADICAL RETHINK – QUASI-SECURITIES . . .**
>
> 7.12 *The approach of the Crowther and Diamond reports was that any transaction that was designed to perform a security function should, in principle, be treated as a security and registerable accordingly*:
>
> The definition of security interest should be such that it would include not only mortgages, charges and security in the strict sense but also any other transfer or retention of any interests in rights over property other than land which secures the payment of money or the performance of any other obligation (Diamond report at 9.3.2).
>
> *The intention to create a security should be all important, and it would not matter what form of agreement was used, provided that the intention was manifested* (Diamond report at 10.7.6). *The new legislation proposed would not determine whether title to the secured property was in the creditor or debtor; where title lay would not affect the rules of the proposed system.*
>
> . . .

> 7.13 *All of the overseas systems which we have considered contain a section setting out the scope of the application of the statute concerned, and all take a functional approach to what amounts to a security interest. The UCC, Saskatchewan and New Zealand systems all apply to a transaction that creates a security interest in personal property, regardless of its form . . .*
>
> 7.18 *It does not make any difference where the title to the property is in the creditor or in the debtor.*" (Emphasis added.)

In its subsequent Consultative Report No 176, "Company Security Interests" (2004), the English Law Commission provided the following definition, essentially echoing the approach of the PPSA:

> "*Meaning of 'security interest'*
> 3. (1) 'Security interest' means an interest in personal property which secures payment or performance of an obligation without regard –
>
> (a) to the form of the transaction which creates or provides for the interest,
> (b) to the person who has title to the collateral.
>
> (2) For the avoidance of doubt, and without limiting paragraph (1), 'security interest' includes –
>
> (a) charges, mortgages, pledges, hire-purchase agreements and conditional sales (including agreements to sell subject to retention of title), and
> (b) the following arrangements if they secure payment or performance of an obligation, namely: leases, consignments, security trust deeds, trust receipts, transfers of accounts and transfers of promissory notes.
>
> (3) 'Security interest' also means –
>
> (a) sales of accounts,
> (b) sales of promissory notes,
> (c) leases for a term of more than one year which do not secure payment or performance of an obligation, and
> (d) commercial consignments which do not secure payment or performance of an obligation;
>
> but see regulation 56(1) which provides that Part 5 (rights and remedies on default) does not apply to security interests falling within this paragraph.
>
> (4) 'Security interest' does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods.
>
> (5) For the avoidance of doubt, a security interest may exist whether or not an obligation is outstanding and whether or not the security interest has attached."

It commented at pp 73 – 74:

> "3.31 As drafted for the purposes of consultation, *the definition of an SI means 'an interest in personal property which secures payment or performance of an obligation' [DR 3(1)]. This is without regard to the form of the transaction which creates or provides for the interest or to the person who has title to the collateral. This definition is thus wide enough to encompass those devices currently regarded by English law as security, such as* mortgages, charges and pledges, and *title-retention devices such as conditional sales, hire-purchase agreements and finance leases, as they can be said to have a security purpose*.
>
> . . .
>
> 3.32 *Whether the interest secures payment or performance of an obligation is not a question of the intention of the parties or merely of interpretation; it is one of characterisation of the transaction to which they have agreed [Compare the characterisation of a charge as fixed or floating: see, for example,* Agnew v Commissioner of Inland Revenue *[2001] 2 AC 710 at para 32.]*" (Emphasis added.)

[73] The analysis therefore concludes with the *Agnew* appeal from New Zealand reported also at [2002] 1 NZLR 30, to which the issue of characterisation was crucial (see *Parsons v Graham* (High Court, Auckland, CP 601-IMO1, 20 June 2002, Baragwanath J) at para [5]). It confirms our preference for a broad characterisation of the security instrument when applying the ss 17 and 36 criteria, rather than the narrower approach preferred by William Young J.

Conclusion on appeal

[74] Such conclusion means that with respect to priority of competing security interests under the PPSA the nemo dat principle is ousted. The consequence is to empower Glenmorgan to add to the security passing to Lock under Lock's debenture a proprietary interest in the stallion, even though the agreement between New Zealand Bloodstock and Glenmorgan had provided to the contrary. We therefore reach the same conclusion on the appeal as Allan J for like reasons.

[75] The result follows Parliament's decision that the kind of leasehold interest retained by New Zealand Bloodstock should, as a matter of policy, be treated as a mere security interest which requires registration to be perfected. Since that did not occur, Lock's competing security interest which was duly registered and so perfected took priority. The major lessons of the case are twofold: the statutory altering of the proprietary rights of a lessor; and the crucial importance of registration. These are policy choices which have been made and significantly alter what would otherwise have been the position.

[76] Similar lessons may result from the decision of the Supreme Court of Canada in *Re Giffen* (see para [16] above). But it is unnecessary to consider Mr Galbraith's careful analysis and argument for distinction of that decision or to comment further upon it and the other Canadian authorities cited. Our decision turns on the legislation adopted by the Parliament of New Zealand.

Cross-appeal

[77] We consider that the matter is more complex than the arguments of counsel suggest. The stud fees were the subject of a contract expressed to be between Glenmorgan *Stallion Management* and Plantation Stud (see paras [8] and [50] above). While Lock and its receivers no doubt have access to the

records of Glenmorgan, which should record what it did with the stallion which New Zealand Bloodstock had leased to it, no documents recording how Stallion Management came to be shown as lessor to Plantation were produced.

[78] The £175,000 fees received by Stallion Management undoubtedly fell within the first limb of the definition of "proceeds", being:

> . . . identifiable or traceable personal property –
>
> (i) That is derived directly or indirectly from a dealing with collateral or the proceeds of collateral

namely the return for the service by the stallion. But what is meant by the second limb:

> (ii) In which the debtor acquires an interest . . . ?

[79] If the first limb stood alone the service fees would pass under s 45 to whoever was entitled to the stallion. But it does not; subcl (ii) must be given effect. The question is, what effect?

[80] A practical instance arises on the present facts. No doubt Plantation Stud charged its customers for stud fees to provide the revenue that enabled it to pay Stallion Management. Aside altogether from questions of conflict of laws, any construction that extended s 45 to pass those fees to Lock would be absurd.

[81] It must follow that subcl (ii) does not refer to "an interest" created simply by the operation of ss 17 and 40. The point was not developed in argument and because the answer is not obvious it must be left for trial. We incline to the view that "in which the debtor acquires an interest" must refer to acquisition *otherwise than via the PPSA*. That would mean that Plantation Stud would not be at risk because the debtor Glenmorgan has not acquired an interest in the stud fees earned by Plantation. Stallion Management may or may not be at risk; it is conceivable that Glenmorgan has acquired an interest in its £175,000 fees, perhaps by way of resulting trust if Stallion Management did not provide due consideration for the right to the fees.

[82] But those are matters requiring further information and argument. We respectfully agree with the Judge's conclusion that the cross-appeal for summary judgment fails.

Result

[83] Both appeal and cross-appeal should be dismissed. Costs memoranda should be filed by the respondents within ten working days and by the appellants within a further ten working days if counsel are unable to agree.

WILLIAM YOUNG J.

Table of contents

Introduction

[84] I propose to discuss the case under the following headings:

(a) Does the Personal Property Securities Act 1999 (the PPSA) create a deemed ownership interest in a debtor?

(b) Can a security holder with retained title defeat other security holders by terminating the security and taking possession of the chattel?

(c) Did S H Lock (New Zealand) Ltd have a security interest in Generous?

(d) The cross-appeal.

Of these issues, (a) and (b) are of general significance. Issue (c) involves a transitional issue which arises because the security agreement between Lock and Glenmorgan Farm Ltd was entered into prior to the coming into effect of the PPSA. The fourth issue, the cross-appeal, gives rise to a point of general significance (the effect of s 23(e)(ix) of the PPSA) but, on the approach that I prefer, can be resolved by reference to circumstances particular to the parties to this appeal.

Does the Personal Property Securities Act create a deemed ownership interest in a debtor?

[85] The question I have just posed is perhaps not entirely happily expressed, as its language harks back to the nemo dat principle. None the less it captures the difference between the competing positions adopted by the parties. I say this because:

(a) The broad argument advanced on behalf of New Zealand Bloodstock by Mr Galbraith QC was that title to Generous was always vested in New Zealand Bloodstock and that accordingly Glenmorgan was not able to confer on Lock a security interest other than in Glenmorgan's contractual rights under the lease agreement to purchase.

(b) Mr Dale, for Lock, maintained that the new regime introduced by the PPSA means that a debtor in the position of Glenmorgan has a deemed ownership interest in the collateral (notwithstanding the original owner's retained title) and is able to create a security interest that, depending on the operation of the priority rules in the PPSA, may defeat that retained title.

[86] The provisions of the PPSA that are primarily relevant in the present context are:

> **16. Interpretation –** (1) In this Act, unless the context otherwise requires –
>
> . . .
>
> **collateral** means personal property that is subject to a security interest:
>
> . . .
>
> **17. Meaning of "security interest" –** (1) In this Act, unless the context otherwise requires, the term **security interest** –
>
> (a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to –
>
> (i) The form of the transaction; and
>
> . . .
>
> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.
>
> . . .

24. Application of Act not affected by secured party having title to collateral – The fact that title to collateral may be in the secured party rather than the debtor does not affect the application of any provision of this Act relating to rights, obligations, and remedies.

. . .

36. Enforceability of security agreements against third parties – (1) *A security agreement is enforceable against a 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 that contains –*

(i) An adequate description of the collateral by item or kind that enables the collateral to be identified; or

(ii) *A statement that a security interest is taken in all of the debtor's present and after-acquired property; or*

(iii) A statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

(2) To avoid doubt, a security agreement may be enforceable against a third party in respect of particular collateral even though the security agreement is not enforceable against a third party in respect of other collateral to which the security agreement relates.

. . .

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.

(2) Subsection (1) does not apply if the parties to a security agreement have agreed that a security interest attaches at a later time, in which case the security interest attaches at the time specified in the agreement.

(3) *For the purposes of subsection (1)(b), a debtor has rights in goods that are leased to the debtor, consigned to the debtor, or sold to the debtor under a conditional sale agreement (including an agreement to sell subject to retention of title) no later than when the debtor obtains possession of the goods.*

(4) To avoid doubt, a reference in a security agreement to a floating charge is not an agreement that the security interest created by the floating charge attaches at a later time than the time specified in subsection (1). (Emphasis added.)

[87] The approach urged on us by Mr Galbraith is consistent with legal notions as they were prior to the PPSA. Further, it would have been very easy for the legislature to say in simple language that any chattel in the possession of a debtor which is subject to a retained title security is to be treated, for the purposes of all other securities, as being owned by the debtor and thus potentially subject to such other securities. Yet there is no express provision in the PPSA to that effect. As well, it is possible to construe (although with some

difficulty) the key provisions of the PPSA (and in particular ss 36 and 40) in the manner contended for by Mr Galbraith (see Bridge, Macdonald, Simmonds and Walsh, "Formalism, Functionalism, and Understanding the Law of Secured Transactions" (1999) 44 McGill LJ 567, p 602).

[88] None the less, I have no difficulty in rejecting Mr Galbraith's argument as being inconsistent with the overall scheme and purpose of the PPSA, the way in which similar legislation has been interpreted in Canada and the clear and published intentions of those who promoted the legislation.

[89] The PPSA equates what the law previously regarded as true security interests (for example, created by a chattel mortgage) and in substance security interests (for example, pursuant to a *Romalpa* clause). Priority between competing securities is always to be determined in accordance with the priority rules provided for in the PPSA. Subject to the special super-priority which is accorded to registered purchase money security interests, the priority rules apply irrespective of the form in which security is taken. In this respect, s 24 is very important. Further, the policy of the PPSA is to encourage the registration of security interests. The more the holders of such interests are incentivised to register, the better this policy will be effectuated. It is true that, even on Mr Galbraith's argument, there would still have been some purpose in New Zealand Bloodstock registering its interest (for instance, to protect itself against subsequent purchasers obtaining priority under s 52; see para [104] below). But it is perfectly clear that those who obtain security through retention of title would be better incentivised to register if Mr Dale's argument is accepted.

[90] The PPSA is closely based on legislation that has been enacted by provincial legislatures in Canada. The Canadian provincial statutes (in company with our PPSA) do not expressly provide for a deemed ownership interest by the debtor in the collateral. This point is discussed by Bridge, Macdonald, Simmonds and Walsh at p 588 in these terms:

> ". . . Pursuant to [art 9 of the Uniform Commercial Code], any retention or reservation of ownership by a seller is limited in its substantive effect to the reservation of a security interest, with the general property in the goods passing to the buyer. The Canadian *PPSA* provisions do not effect an equivalent express conversion. Nonetheless, *PPSA* analysts are of the unanimous opinion that it is necessary to reconceptualise the arrangement so as to involve an executed sale to the buyer followed by the grant back of a security interest to the seller in order to rationalise the application of the legislation to conditional sales and analogous title reservation security transactions. Pursuant to this approach, the seller is a 'secured creditor and not an owner of the collateral; the owner of the collateral is the buyer,' and it is to the debtor's undivided ownership interest that the security interest attaches." (Footnotes omitted.)

As Bridge, Macdonald, Simmonds and Walsh observe (at p 593), this approach has been taken by the Canadian Courts.

[91] The PPSA is, in large measure, a result of work carried out by (and for) the New Zealand Law Commission which was published as NZLC R8, "A Personal Property Securities Act for New Zealand", 1989. That report included a draft Personal Property Securities Act upon which the PPSA was largely modelled. In the commentary in that report to the proposed s 10 (which corresponds to s 40 in the PPSA), the following comment was made at p 110:

> "Where a creditor holds a floating security interest over a retailer's presently-owned and after-acquired inventory, attachment of that interest to subsequently acquired inventory should not be defeated by the fact that certain inventory is delivered under title retention (*Romalpa*) clauses. It is the clear intention of the statute that the relative claims of the holder of the floating security interest and the *Romalpa* supplier should be resolved by reference to the priority rules in sections 27 and 28. In such a case, subsection (3)(c) makes clear that the retailer's possession of the inventory qualifies as sufficient rights for attachment of the security interest."

[92] All in all, I think it perfectly clear that Mr Dale is right on this aspect of the case; an opinion which coincides with the view taken by Rodney Hansen J in *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 and with academic writing on the point (see two case notes by Associate Professor Gedye, "What's Yours is Mine: Attachment of Security Interests to Third Party Assets" (2004) 10 NZBLQ 203 at p 205 and *Waller v New Zealand Bloodstock Ltd* (2005) 11 NZBLC 11 (a case note on the first instance decision in this case), Cynthia Hawes, "PPSA: Ownership or Priority" [2005] NZLJ 45 at p 46 and Duncan Webb, "A Generous Interpretation of the PPSA" [2005] *New Zealand Law Review* 259).

Can a security holder with retained title defeat other security holders by terminating the security and taking possession of the chattel?

[93] This issue arises because New Zealand Bloodstock terminated the lease agreement on 6 July 2004 and did not repossess Generous until the next day, namely 7 July 2004.

[94] Mr Galbraith argued that this meant that by 7 July 2004, when New Zealand Bloodstock repossessed Generous, the lease to purchase agreement was no longer in effect, with the result that New Zealand Bloodstock was no longer a security holder. According to Mr Galbraith, this means that the issue between Lock and New Zealand Bloodstock is not between competing security holders, and therefore the priority rules in the PPSA are irrelevant. If all of this is right, then it follows that New Zealand Bloodstock can rely on its ownership of Generous.

[95] I accept that this line of argument is supported (apparently anyway) by the cryptically succinct judgment of the Alberta Court of Appeal in *Sprung Instant Structures Ltd v Caswan Environmental Services Inc* [1998] 6 WWR 535. I am, none the less, well satisfied that it is unsustainable in light of the overall scheme and purpose of the PPSA. The action of New Zealand Bloodstock in terminating the lease to purchase agreement was by way of enforcement of its security interest. If Lock has a security interest in Generous (a point which I will be discussing in the next section of this judgment), the entitlement of New Zealand Bloodstock (vis-à-vis Lock) to enforce its security necessarily depends on the relative priorities of the securities under the PPSA.

Did Lock have a security interest in Generous?

[96] This question arises only because the security agreement Lock relies on was entered into before the coming into effect of the PPSA and is drafted by reference to the legal regime which was superseded by the PPSA.

[97] In the High Court, Allan J held that the charging clause in the debenture is sufficiently wide to confer on Lock a security interest in Generous.

[98] In support of that conclusion, Allan J applied the approach of Rodney Hansen J in *Portacom*. In that case, the debtor company had, prior to the coming into effect of the PPSA, charged in favour of the debenture holder "all its right, title and interest (present and future legal and equitable) in, to, under

or derived from the secured assets". "Secured assets" were defined as "all assets of the Company of whatever kind and wherever situated". Rodney Hansen J held that the leasehold interests of the debtor in the buildings which were the subject of the case were sufficient to engage s 40 of the PPSA, with the result that the debenture holder, with the coming into effect of the PPSA, obtained security over the buildings and not just the debtor's leasehold interest in them. Allan J acknowledged that the charging clause in *Portacom* was materially different from the clause in the debenture to Lock, but considered that the same broad approach ought to be adopted in the present context.

[99] Allan J also referred to *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at p 1033, where Lord Atkin stated that the word property includes "property, rights and powers of any description". He considered (at para [49]) that this, and other authority to which he referred, demonstrated:

> ". . . that the term 'property' generally takes a wide meaning, which is not lightly to be read down."

He was also influenced by the fact that the debenture was executed after the PPSA had received royal assent.

[100] Mr Galbraith's argument on this aspect of the case rested on the proposition that the terms of the contract (that is, the debenture) regulate the relationship between Lock and Glenmorgan and that the debenture could not credibly be construed as extending to assets not owned by Glenmorgan.

[101] This aspect of the case throws up two issues. The first relates to the construction of the debenture and the second to the application of the PPSA.

[102] I do not read the debenture as recording an intention to confer security over assets not owned by Glenmorgan. In the pre-PPSA environment, such a security could not be created. To be more specific, I do not construe references in the debenture to assets that are the property of Glenmorgan as fairly extending to assets that are the property of third parties. I do not overlook the fact that this debenture was executed the month after the PPSA received royal assent. But it is perfectly clear that the debenture was drafted by reference to the legal regime as it then was, rather than the prospective regime under the PPSA.

[103] The result is that as at 30 April 2002 (the day before the PPSA came into effect) the debenture in favour of Lock extended only to the contractual rights in Generous that were held by Glenmorgan. The difficult question in the case is whether that changed on 1 May 2002, when the PPSA came into effect.

[104] The transitional provisions of the PPSA (ss 193 – 201) provided for a "transitional period" (of six months) which commenced when the PPSA came into effect. During this period it would have been open to New Zealand Bloodstock to have registered its security interest and this would have ensured that it retained priority over all other security interests. The same provisions make it clear that, in the absence of registration, its security interest could be defeated under s 52 (had Glenmorgan sold the assets to another party) or by operation of the priority rules (had Glenmorgan entered into a further general security agreement with, say, Lock which directly engaged ss 36 and 40 of the PPSA). However, the transitional provisions of the PPSA do not directly address whether a security agreement entered into prior to the PPSA coming into effect and, on its true interpretation, confined to assets actually owned by the debtor can, by reason of the operation of the PPSA, extend to third-party owned assets.

[105] The result, if not the reasons, of Allan J have been welcomed in the case notes already referred to by Associate Professor Gedye and Duncan Webb (see para [92] above). I am not unsympathetic to this approach, particularly as New Zealand Bloodstock could have registered its security interest in Generous

during the transitional period provided for by the PPSA and preserved its priority. In light of its failure to do so, New Zealand Bloodstock will only have itself to blame if it loses this case. Indeed, if the issues raised by the case were confined to competition between security holders, I would regard policy considerations as favouring the argument presented by Lock.

[106] It is, however, important to realise that the issues raised by the case are relevant not only to the rights inter se of security holders, but also, at least indirectly, to the rights of security holders vis-à-vis debtors. On the approach taken by Allan J, Lock acquired rights against Generous which it did not have prior to 1 May 2002. The acquisition of these new rights had the tendency to improve Lock's commercial position as against Glenmorgan (by increasing the assets to which it could have resort under the debenture) and likewise to prejudice the commercial position of Glenmorgan as against New Zealand Bloodstock (which may have been reluctant to enter into, say, the August 2003 refinancing if it had realised that it no longer had an ownership interest in the horse). So, on the approach of Allan J, Lock obtained rights against Glenmorgan which exceeded those which Glenmorgan, on the true construction of the debenture, conferred on Lock.

[107] There is nothing explicit in the PPSA to suggest that such statutory inflation of pre-existing rights of security holders was intended, and there is likewise nothing in the travaux préparatoires equivalent to the passage from the Law Commission Report cited at para [91] above which supports Lock's argument on the first question I have addressed. Indeed, I do not think that it could be credibly argued that the result reached by Allan J is compelled by the language of the PPSA.

[108] My view is that, properly construed, the language of the PPSA is against Lock on this point.

[109] I start with s 35, which provides:

> **35. Effectiveness of security agreement –** Except as otherwise provided by this Act or any other Act or rule of law or equity, a security agreement is effective according to its terms.

[110] There being nothing "otherwise provided in the Act", the governing consideration should be the terms of the security agreement. If the terms of such a security agreement (when properly construed) do not confer a security interest in particular property, that should be the end of the case. This approach, at least in general terms, is consistent with that taken (albeit in a slightly different context) by the Ontario Court of Appeal in *Credit Suisse Canada v 1133 Yonge Street Holdings Ltd & Euromart Management Group Ltd* (1999) 41 OR (3d) 632 at para [13]:

> ". . . the PPSA has preserved the principle of freedom of contract as between the parties in securities transactions, subject to any restrictions appearing in the PPSA itself or in other provincial legislation . . ."

And at para [21]:

> "In each case, it is a matter of examining the terms of the security interest in question to determine what precisely are its terms as between the parties, because subsection 9(1) of the PPSA makes it clear that the security instrument is only effective in accordance with those terms . . ."

[111] I see the tests provided for by s 36 as necessary but not sufficient preconditions to the enforceability of a security agreement against particular collateral, and such a security agreement is not enforceable against particular collateral if, on its true construction, it was not intended to create an interest in that collateral.

[112] Section 40 and the transitional provisions of the PPSA are not a good fit with Lock's argument.

[113] If s 40 were to be applied literally (that is, leaving aside the timing problem associated when the PPSA came into effect), Lock's security attached to Generous when value was given by Lock and Glenmorgan had rights in Generous. But this occurred on 31 August 2001, prior to the PPSA coming into effect, and plainly, on that date, the debenture did not confer a security interest in Generous (other than over Glenmorgan's contractual rights). So a literal application of s 40 is not possible.

[114] Under the transitional provisions of the PPSA a "prior security interest" continued, during the transitional period, to be enforceable against third parties (see s 194) and could be perfected by later registration (s 195). The word used in s 194 ("continues") and the concept of a "prior security interest" (which necessarily refers to an interest in property) provided for Lock's existing security rights to persist, but do not suggest that they were expanded. I note in passing that I accept that a pre-PPSA general security (along the lines of the Lock debenture) would, in accordance with its tenor, catch assets acquired by the debtor after the PPSA came into effect.

[115] If the majority are right in the result they favour, Lock's security attached to Generous when the PPSA came into effect, a conclusion which is neither provided for nor dictated by s 40 and the transitional provisions of the Act.

[116] This point is in part addressed in the judgment delivered by Baragwanath J at para [64] and, more particularly, at para [68] above. Despite the perhaps dense nature of the issue, it is worth setting out where his approach differs from the one which I prefer:

(a) At para [64] Baragwanath J expresses the view that Glenmorgan "acquired 'rights in goods'" in relation to the stallion on 1 May 2002, being the day that the PPSA came into effect.

(b) I disagree. Glenmorgan had the same rights in Generous prior to 1 May 2002 as it did after 1 May 2002, albeit that those rights had somewhat greater significance in the post-PPSA environment.

(c) Value was given prior to 1 May 2002. The point I am making is not that value given prior to the coming into effect of the PPSA is necessarily to be ignored. Indeed, in the sort of case postulated at para [114] such value would be of significance. Rather, my point is that the language of s 40(1) is not engaged by the facts of the present case.

(d) Nor do the facts of the present case engage the transitional provisions which provide for prior security interests to continue, but not for the creation, by operation of law, of new security interests.

(e) If the legislature intended that a pre-PPSA security should, with the coming into effect of the PPSA, attach to new assets (being assets which, on the true construction of the security agreement, were not caught by it), I would have expected that to be expressed either in s 40 or in the transitional provisions. But there is no such provision.

[117] This line of argument is not necessarily, in itself, decisive of the appeal. I say this because in all probability Lock provided value after 1 May 2002 as well (in that it is at least likely that it provided further credit). It might be possible to postulate a category of pre-PPSA securities which none the less operate in a post-PPSA way when value is given by the secured party after the coming into effect of the PPSA. This, however, would involve further and unwelcome complexity – a complexity that makes it preferable to confine Lock to the security for which it bargained when it obtained the debenture from Glenmorgan. There can be no injustice in this approach and necessarily no injustice to either Glenmorgan or New Zealand Bloodstock.

[118] I therefore conclude that Lock did not obtain security in relation to Generous other than in relation to the contractual rights of Glenmorgan and thus its security and that of New Zealand Bloodstock were not in competition. Accordingly, there is no need to resort to the priority rules to determine ownership in Generous, which must be regarded as remaining, at all times, with New Zealand Bloodstock. I would, accordingly, allow the appeal.

The cross-appeal

[119] On my approach to the case, Lock did not obtain a security interest in Generous and therefore has no entitlement to the fees payable by Plantation Stud. On this basis, I would dismiss the cross-appeal. I also, in any event, am troubled by the absence of evidence as to why the fees in question were payable not to Glenmorgan but rather to its associated company, Glenmorgan Stallion Management Ltd. There being no adequate explanation for this, I would dismiss the cross-appeal. I note in passing, as well, the possibility that s 95 might provide New Zealand Bloodstock with a defence, a point which is mentioned by Dr Webb at p 263.

[120] The cross-appeal, however, does raise a significant issue of importance as to the application of the PPSA, and although this issue is not decisive to the outcome of the cross-appeal on my preferred approach to the case, it is sufficiently significant to justify brief discussion.

[121] The Judge addressed this part of the case on the basis that Lock, by reason of its priority security interest in Generous, had a prima facie entitlement to the fees paid by Plantation Stud. That conclusion was based on s 45 of the PPSA:

> **45. Continuation of security interests in proceeds –** (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds –
>
> (a) Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
>
> (b) Extends to the proceeds.

However, Allan J held that s 23(e)(ix) of the PPSA operated to defeat Lock's application for summary judgment in relation to this aspect of the case.

[122] Section 23(e)(ix) provides:

> **23. When Act does not apply –** This Act does not apply to –
>
> . . .
>
> (e) an interest created or provided for by any of the following transactions:
>
> . . .
>
> (ix) an assignment of a single account receivable or negotiable instrument in whole or in partial satisfaction of a pre-existing indebtedness:

[123] The Judge concluded that the mechanism by which the Plantation Stud fee was in the end paid to New Zealand Bloodstock was literally within the terms of s 23(e)(ix). He went on to hold that New Zealand Bloodstock therefore had an arguable defence to the summary judgment in relation to the £175,000 in issue and went as far to observe that, on the view he took of the case, New Zealand Bloodstock was entitled to retain the money paid by Plantation Stud.

[124] The effect of the judgment of Allan J is that an account receivable owed to a debtor, in respect of which a secured creditor has security, can be assigned by that debtor, free of the security interest, to a third party, providing the assignment is by way of whole or partial satisfaction of pre-existing indebtedness. If this is law, it would be pretty surprising.

[125] If I were otherwise with Lock on the case (that is, I had concluded that Lock did have a security interest in Generous, was able to reconcile the apparent anomaly as to the identity of the company to whom the fee was payable and was persuaded that s 95 did not preclude recovery), I would have allowed the cross-appeal. This is not because of the issues argued before us (which focused on whether what happened was literally within s 23(e)(ix)), but rather because that subsection has no application to the circumstances of a case such as this.

[126] Section 23(e) provides that the Act does not apply to a variety of interests as defined in the succeeding portions of the subsection. I think it clear that the phrase "an interest" which appears in s 23(e) refers to an interest which, but for s 23, would otherwise be a "security interest" for the purposes of the Act. That is consistent with the structure of s 23 as a whole. The only point in exempting an interest from the operation of the Act is if that interest would otherwise be subject to the Act (that is, would otherwise be a security interest).

[127] In my view s 23(e)(ix) provides simply that where there is a relevant assignment of an account receivable (that is, satisfying the s 23(e)(ix) requirements) which is in the nature of a security interest, competition between the assignee of the account receivable and any security holder falls to be determined in accordance with the general law rather than the particular priority rules provided for in the PPSA. Accordingly, a failure to register such an assignment as a security interest would not defeat the priority of the assignee against a later, but registered, security interest. What is important for present purposes is that I do not see the section as giving a default priority to an assignee of an account receivable against the holder of a prior relevant security over that account receivable.

[128] On that basis, if Lock's debenture applied to the fee payable by Plantation Stud, an assignment by Glenmorgan to a third party would be ineffective against Lock not because of the way the priority rules under the PPSA work, but simply because Lock would have a prior claim to the account receivable under the general law.

Appeal and cross-appeal dismissed.

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Reported by: Andrew Beck, *Barrister*