IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-002279

UNDER	the Companies Act
IN THE MATTER OF	of the matter of the liquidation of LBD Civil Limited and an Application for Orders under section 284 of the Companies Act 1993
BETWEEN	THE HEALY HOLMBERG TRADING PARTNERSHIP Applicant
AND	DAMIEN GRANT AND STEPHEN KHOV AS LIQUIDATORS OF LBD CIVIL LIMITED (IN LIQUIDATION) First Respondents
AND	RIGA INVESTMENTS LIMITED, 108 REDOUBT ROAD LIMITED AND DIANE MARIE RUDKIN Second Respondents

Hearing: 23 February 2011

Appearances: L Radich for the Applicant
D Wong for the First Respondents
S P McKenzie for the Second Respondents

Judgment: 24 February 2011

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
24.02.11 at 4:00 pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
P Radich/L Radich, Radich Law, Blenheim – Miriam@radichlaw.co.nz / luke@radichlaw.co.nz
A Hansen, Heimsath Alexander, Auckland – angela@halaw.co.nz
S McKenzie, Barrister, Howick – stephenm@xtra.co.nz

The application

[1] The applicant, The Healy Holmberg Trading Partnership (HH), seeks an order pursuant to s 284 of the Companies Act 1993 that it was a secured creditor holding registered securities over various items of property owned by LBD Civil Limited (LBD) at the time LBD was put into liquidation.

[2] The first respondents are the liquidators of LBD. They do not recognise the claim for they have doubts regarding its integrity. They prefer the claim of the second respondents (RIGA) whose own security interest claim was perfected on 17 August 2007.

Background

[3] HH's principals (Mr Healy and his wife) were friends with Ms Prujean and Mr Cull who later incorporated LBD to operate their landscape design and development business. Ms Prujean requested assistance from Mr Healy to purchase equipment. He said there was an agreement to advance funds on the basis that security interests would be retained. It is clear that over a period of years large sums were advanced by HH to LBD to purchase vehicles and equipment, some of these from Arren Civil Limited and others from other sources.

[4] On or about 20 January 2006 there was correspondence between Mr Healy and Ms Prujean about completion of security agreements. In evidence Mr Healy has provided copies of two agreements. One was dated 29 December 2005 showing a loan of $155,688.80 for security given over five items of equipment. The other agreement was dated 25 September 2006 and showed an amount of $170,407.08 secured over six items of Arren plant and equipment.

[5] Mr Healy says that on 20 January 2006 he registered securities over the various items of equipment secured. In evidence he has provided a copy of a verification statement showing registration of securities over the equipment in

question. The only item of equipment not included in the 20 January 2006 registration details was a Yanmar excavator.

[6] LBD was placed into liquidation on 17 April 2008. Mr Kumar on behalf of the liquidators requested Mr Healy for paperwork to document his claim. Specifically he sought the loan agreements and LBD's written consent to the securities registered in Mr Healy's name. Subsequently on 5 May 2008 the request was repeated. Mr Kumar deposed he became suspicious when by reply email of same date Mr Healy asked him what paperwork the liquidators had. He suspected Mr Healy did not have the paperwork. He brought his concerns to the notice of the liquidators.

[7] On 28 May 2008 Mr Healy emailed Mr Kumar advising he was still looking for the documents but could not provide them that day. The next day Mr Healy provided copies of nine finance agreements; two of those include the agreements dated 29 December 2005 and 25 September 2006 which provided security for the borrowings from HH. Save for one modest exception the other finance agreements did not provide security for monies advanced.

[8] Mr Healy explained (paragraph [8] first affidavit dated 26 March 2009):

> Over various periods, we made a number of these loans. In some cases the loans were documented contemporaneously with the advance of funds and in other cases subsequently. We are endeavouring to assist Mr Prujean and the company to keep costs at a minimum and so we agreed these arrangements would be documented among ourselves and not through solicitors.

[9] Ms Prujean deposes:

> I had originals of all loan documentation between the company and [Mr Healy] with me in Australia. When [he] was asked for the originals of those documents by the liquidator he contacted me and I provided them to him. [3]
>
> I can confirm absolutely that [Mr Healy] advanced substantial funds to the company to allow us to purchase equipment and fund work in capital. I further confirm that the company agree that [Mr Healy's] loans would be secured by financing statements registered over the equipment and that we documented those security agreements between us. [5]

[10] HH have brought this application because the first respondents would not acknowledge their security claims. Mr Healy perceived his claims were regarded as

dishonest notwithstanding he had proved he made the advances. Further, registration of his securities were made on 20 January 2006, 18 months before RIGA had perfected its own general security agreement.

[11] RIGA asserts:

> (1) At the earliest HH's security interests were not perfected before 31 August 2007;
>
> (2) Probably HH's security interests had not been perfected as at the date of LBD's liquidation on 17 April 2008. If it was not then, of course, LBD had no authority through Ms Prujean, to provide securities at all for the company was then in the hands of the liquidators.

Issue

[12] It concerns whether or not the HH security interests have priority over the RIGA security interest. It is a matter about which security interest was perfected first. It is a matter concerning the interpretation of the relevant provisions of the Personal Property Securities Act 1999. It is also in this case a matter about evaluating the evidence of Ms James a police document examiner.

[13] Other matters in issue between HH and the first respondents have been dealt with previously by Associate Judge Robinson and myself. Those issues do not concern us here. However in a hearing before Associate Judge Robinson the first respondents claimed they had only seen copies of HH's loan agreements and not the originals. Associate Judge Robinson ruled on 28 September 2009 that HH was to provide copies of the original documents securing the advances made, to the respondents.

[14] That was done and on 20 October 2009 the respondents' solicitors wrote to the applicant's solicitors indicating preparedness to accept the validity of HH's security if there was no objection by another creditor.

[15] About that same time the first respondents forwarded HH's original finance agreements to Ms James for examination.

[16] On 12 November 2009 Ms James reported that the security agreements, while dated as having been signed on 29 December 2005 and 25 September 2006 respectively, bore indentations from other agreements dated between 2005 and 2007 indicating that the security agreements were likely signed simultaneously with the other agreements and backdated. By her affidavit dated 3 November 2010 Ms James concludes that:

> (a) documents bearing dates ranging between December 2005 and August 2007 are linked by latent indentations which shows the documents were physically together when the handwritten signatures and dates appearing in the indentations were completed;
>
> (b) physical evidence in the form of indentations and ink transference show the document marked as 'effective from' 28 December 2005 were signed on top of the document marked as 'effective from' 28 September 2006. According to its date, the 2006 document would not have been in existence until 9 months after the 2005 document;
>
> (c) overall the physical evidence reveals dating inconsistencies which suggests the dates printed/written on the documents do not reliably reflect their actual date/years of production.

[17] Ms James further notes in paragraph 4 of her report which was attached to her affidavit:

> One explanation which could account for all of the physical evidence located is that the documents linked by indentations have been signed while they were physically together; that is, in a 'stack' or 'stacks' consisting of multiple pages. In addition, the dating inconsistencies revealed by the indentations and transference suggest the dates printed on the documents do not reliably reflect their actual dates of production.

Personal Properties Security Act 1999

[18] The Act sets out when a security interest is perfected.

[19] Section 36 provides when security agreements are enforceable 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 debtors present and after – acquired property; or

(iii) a statement that a security interest is taken in all of the debtors present and after – acquired property except for specific items or kinds of personal property.

[20] Section 40 provides:

(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.

[21] Section 41 provides:

(1) ..., a security interest is perfected when –

(a) the security interest has attached; and

(b) either –

(i) a financial statement has been registered in respect of the security interest; or

(ii) the secured party, or another person on the secured party's behalf, has possession of the collateral...

[22] Section 66 provides how the priority of a security interests in the same collateral will be determined if the 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;

(b) Priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest): -

(i) the registration of a financing statement;

(ii) a secured party, or another person on the secured party's behalf, taking possession of the collateral (except where possession is a result of seizure or repossession);

(iii) the temporary perfection of the security interest in accordance with this Act.

[...]

Legislative summary

[23] Section 36 provides that for a security interest to be enforceable against third parties it needs to be in writing.

[24] Section 40(c) states that a security interest does not attach until the security agreement is enforceable against third parties within the meaning of s 36.

[25] Section 41 then confirms that a security interest is perfected when the security interest has attached and a financing statement has been registered. It is clear from s 41(2) that a financing statement may be registered before a security interest has attached. It is also the case that both events (attachment and registration) must occur if the security interest is to be perfected.

[26] Therefore, a party whose security interest has attached to the collateral and who has registered a financing statement perfects its security interest and takes priority over a party whose security interest has attached but not been registered or whose security interest has been registered but has not attached.

The competing securities in this case

[27] There is clear evidence that HH registered financing statements on 20 January 2006. Section 36 requires that attachment would have needed to be by way of written agreement with LBD. In this case the focus of the Court's enquiry is upon

the evidence about the date that attachment occurred and when LBD signed the two security agreements.

[28] In this case a completing creditor (RIGA) registered, attached and thereby perfected its security interest on 9 August 2007. Their claim to priority would not succeed if HH can satisfy this Court on the balance of probabilities that its written security agreements were completed prior to 9 August 2007. But, even if perfection occurred after 9 August 2007 (and before LBD was put into liquidation), HH relies on s 66(b) in support of its claim of priority because its security interest was registered before RIGA's security was registered.

[29] Section 41(2) makes it clear that a financing statement may be registered before a security interest has attached.

[30] Section 66 is a "residual priority" rule. That is, section 66 determines priority between security interests in the same collateral only if the Act provides no other way of determining priority. Section 66 will recognise a security agreement as having been perfected on the date of registration where a financing statement is registered in anticipation of entering into the security agreement.

[31] It might appear that if a financing statement is registered in anticipation of entering into a security agreement, then a later security interest could take priority over an earlier security interest where that security interest has been orally created previously but not documented until after a competing security interest has been documented.

[32] I have some difficulty about the ability of an orally created interest taking precedent over a competing security interest that has been documented. Regardless, the facts in this case strongly suggest that the terms of any security agreement between HH and LBD had not been concluded when HH's financing statements were registered on 20 January 2006. This, notwithstanding the first security agreement is dated 29 December 2005.

[33] It appears therefore that HH's registration of the financing agreements on 20 January 2006 was, no more than a registration in anticipation of a security agreement being entered into between the parties. Arguably it was not a perfected security interest. Indeed, there was no security interest available to be perfected at the time. The terms of any security agreement had yet to be determined.

[34] I accept Ms Wong's submission that HH cannot claim that its time of registration is the time of priority pursuant to s 66 given its failure to comply with s 36 and the fact that, at the time of registration, there was no security agreement, oral or otherwise capable of being perfected. Therefore perfection pursuant to s 41 could only occur upon attachment pursuant to s 40, being the time that security agreement was reduced to writing as per s 36. It follows the Court is able to treat s 36 as a priority rule and that HH's security interest was perfected at the time of attachment, being the time HH entered into the security agreements with the company.

Ms James' document examination report

[35] It is clear from Ms James' report that there is no way of determining with certainty when the security agreements were executed. It is however clear that they were executed on a date other than the dates they were signed. A strong inference to be drawn is that the security agreements were backdated. One option is that all agreements were signed on 31 August 2007 being the date the last agreement was dated. That is an available inference if the agreements were signed in a "stack". If that is the case then HH's security interest was not perfected until 31 August 2007. RIGA claims that in that event their security interest would take priority, it having been perfected earlier on 9 August 2007.

[36] Mr Radich argues to the contrary, relying upon s 66(b). He submits by that provision where competing claims have been perfected, the claim of the party which registered earlier, has priority.

[37] I do not think it is as clear as that, even if there was clear agreement about the nature of the security interest albeit such had not been reduced to writing. Rather I favour the view that s 66(b) reinforces the general rule that the greatest priority is

given to a security interest holder who perfects first. Section 66(b) makes it clear that where a security interest has been perfected in two different ways, the date of perfection for the purpose of section 66(a) is the date that the security interest was first registered. Further I think it clear from section 67 that the purpose of section 66 ensures that a continuously perfected security interest is at all times to be treated as perfected by the original method of perfection.

[38] Therefore unless HH's security interest was perfected before 17 August 2007 then it does not have priority over the security claim of RIGA.

[39] It is clear from the evidence there was no agreement as at 20 January 2006. Discussions about the form the security should take were just that, discussions. A term of a loan had not been agreed nor repayment obligations fixed. The final form of security had not been settled.

[40] A reasonable inference from Ms James' examination is that the earliest date the securities could have attached was 31 August 2007. Section 66 does not change this because this is how the substantive provisions of sections 36, 40 and 41 operate to determine how security is perfected.

[41] Plainly the date of 31 August 2007 is an arbitrary date. Ms James' report explains there is no way of determining with certainty when the security agreements were executed. The question is whether the Court can properly infer that the security agreements were executed before LBD was placed into liquidation, or after.

[42] Mr Radich is correct when he submits that Ms James does not state that the documents were executed after liquidation. As earlier noted, if the security agreements have been executed post liquidation then they are invalid. In that outcome HH has become an unsecured creditor.

Whether applicant's security agreements were signed before or after debtor company place into liquidation

[43] The assessment depends upon reasonable inferences drawn from available affidavit evidence.

[44] It is plain from the evidence of Ms James that the agreements were all most likely backdated when signed. Of itself this is a matter the Court should consider as being of serious concern.

[45] As Ms Wong submits this concern, coupled with:

- HH's failure to rebut the findings of the report;
- HH's failure to make any attempt to clarify the dating inconsistencies, including the actual dates of execution or the reasons for backdating the agreements; and
- Its attempt to enforce the security agreements without admitting or attempting to recognise the inherent unreliability of the security agreements;

can only be viewed with suspicion.

[46] The notice of opposition of the first respondents has long since heralded the competing claim of another general security holder. Also HH has had a copy of Ms James initial report since at least late 2009.

[47] Also, I take the view that the claims of Mr Healy and Ms Prujean earlier referred to [paras 8 and 9 herein] are of little assistance to them. He said that some loans were documented subsequent to the advance of funds - but no further particulars are provided. She said it was agreed the loans would be secured by financing statements and that those security agreements would be documented. Again no particulars are provided to suggest that before the agreements were documented, the terms of same were agreed at any prior time.

[48] In a facsimile dated 27 January 2005 Mr Healy wrote to Mr Cull:

> The structure [the lawyers] have proposed it's not what we discussed? This appears to be a conventional term loan secured by the property ..., the equipment and [Ms Prujean's] guarantee. Your proposal of 13 January was on HP basis.
>
> However, let's not let the legal mumbo jumbo get in the way of our deal – if you and I have agreed the arrangement, but not the legalise, and you need the money, I will release it.
>
> I have registered with the PPSR.

[49] By email the following date, Mr Healy wrote to Mr Cull:

> ...
>
> The following is my understanding of the arrangement.
>
> ...
>
> As I said at the beginning, this is my current understanding so please correct me if I have got anything wrong.

[50] By email from Mr Cull to Mr Healy on 1 June 2006 he wrote:

> ...
>
> Can you please terminate the first two loan facilities and wrap them up into one facility in the name of [LBD].

[51] Later that same day Mr Cull again emailed Mr Healy:

> ...
>
> no I think we should be running separate facilities ... That way we can ensure if things get tight at least some get paid ...
>
> does this work for you?

[52] It is clear that at least five months beyond the date of registration a considerable degree of uncertainty remains regarding the parties' contractual arrangements.

[53] And then there is the unchallenged evidenced of Mr Grant of the first respondents'. By his affidavit dated 12 August 2009 he deposed:

- He first met Ms Prujean and Mr Cull on 15 April 2008. He met them again on 17 April 2008 (upon the appointment of he and Mr Khov as liquidators).

- He recalls a conversation with Mr Cull in the days after the liquidation where the issue of securities held by Mr Healy were discussed. Mr Cull advised him he believed there were signed securities, but he was not certain of this.

- At the same meeting Ms Prujean advised Mr Grant that Mr Healy was a family friend and that she was anxious he was "looked after". She was also uncertain if the security documentation existed.

- That in a conversation with Mr Healy at the end of May 2008 Mr Healy advised he was waiting for copies of the security documents to be faxed back from Australia where Mr Cull and Ms Prujean were living at the time. When he asked Mr Healy why the documents needed to be faxed from Australia, no answer was given.

[54] The Court is curious why when LBD is in liquidation, the original copies of security documents are reported to be held by LBD's former director, now living in Australia. Yet, when at the time of liquidation she met with Mr Grant, she expressed a concern to assist Mr Healy but was also uncertain about the existence of the security documentation.

Conclusions

[55] In the absence of clarification from Mr Healy, Ms Prujean or Mr Cull and because of the dating inconsistencies in the documents the Court concludes it was reasonable for the first respondents to have concerns about the validity of the security agreements and whether or not they existed at the date of liquidation.

[56] In my assessment it is more probable than not that the documents in question were not completed before the date of liquidation.

[57] Accordingly the application is dismissed.

Costs

[58] This is not, I think, a proper case for costs to be awarded on an indemnity basis, notwithstanding the nature of the Court's finding. In September 2009 Associate Judge Robinson recorded that the liquidators had agreed to concede the validity of HH's security interest claims. The learned Judge made no orders in that respect but it follows that the argument concerning the validity of those interests has come rather late. Also it has only been in the last week that the second respondents have pressed a competing claim.

[59] I am inclined to the view that an award of costs on a 2B basis together with a one-third uplift is appropriate in the circumstances and I direct accordingly.

[60] Hearing time is fixed at a half day.

[61] I will make directions for the filing of memoranda in the event counsel cannot agree upon the quantum of costs.

Associate Judge Christiansen