IN THE COURT OF APPEAL OF NEW ZEALAND

CA617/2010
[2011] NZCA 212

BETWEEN	RABOBANK NEW ZEALAND LIMITED Appellant
AND	ROBERT MCANULTY, SIR PATRICK HOGAN, RICHARD CHUNG YEE HUI, PETER HAK YUNG YIP, PETER EGAN, JAMES LIM, CARL HOLT (COLLECTIVELY THE "FEBRUARY SYNDICATE") First Respondent
AND	RON TAYLOR Second Respondent

Hearing: 10 March 2011

Court: O'Regan P, Chambers and Harrison JJ

Counsel: S A Barker, P J Niven and E M Ritchie for Appellant
S I Perese for Respondents

Judgment: 23 May 2011 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay to the respondents costs for a standard appeal on a Band A basis and usual disbursements.

REASONS OF THE COURT

(Given by O'Regan P)

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Issue on appeal

[1] The first respondent constitutes a syndicate known as the February Syndicate which owns a stallion, St Reims. St Reims was nearing the end of his racing career. In 2006, the Syndicate decided to realise St Reims' value by standing him at a commercial stud. The Syndicate entered into a standing agreement with Stoney Bridge Limited (SBL) which operates a stud farm, to stable, care for and arrange service nominations for St Reims. An aspect of this agreement was that SBL became a bailee of St Reims.

[2] Rabobank provided finance to SBL and SBL entered into a general security agreement with Rabobank. Rabobank perfected this by registering a financing statement under the Personal Property Securities Act 1999 (PPSA). The Syndicate

has not registered any financial statement. SBL defaulted and Rabobank appointed receivers.

[3] Rabobank claims that it has a secured interest in St Reims which is perfected, and that this has priority over the interest in St Reims of the Syndicate. Rabobank's claim is that the Syndicate's interest as bailor of St Reims is a security interest to which the PPSA applies that has not been perfected. The Syndicate says its interest is not a security interest and the priority rules of the PPSA do not apply to it. The answer to this dispute turns on a question of interpretation of the definition of the term "lease for a term of more than 1 year" in s 16(1)(i) of the PPSA. Rabobank commenced proceedings in the High Court for conversion and detinue on the basis that it had a perfected security interest in St Reims. The second respondent, Mr Taylor, is the current bailee of St Reims after the Syndicate removed the stallion from SBL's care after SBL went into receivership.

Background to the appeal

[4] The appeal comes to us as an appeal against a refusal by Associate Judge Gendall to grant summary judgment in favour of Rabobank.[1] Associate Judge Gendall considered the authorities dealing with s 17 and s 40 of the PPSA, in order to determine whether Rabobank's security interest attached to the stallion. He considered that the question was not clearly resolved by those authorities and that it would be beneficial to hear full argument on the role of s 40(3) of the PPSA before determining the issue. In light of that conclusion he determined that Rabobank had not been able to show that there was no real doubt or uncertainty that the Syndicate members had no defence to Rabobank's claims and therefore refused summary judgment. He did, however, go on to consider other issues, including the issue as to whether there was a "lease for a term of more than 1 year". He considered the Canadian authorities on that issue and again concluded that there would be benefit in hearing full argument.

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1 *Rabobank New Zealand Lid v McAnulty* HC Wellington CIV-2010-485-647, 23 August 2010.

Preliminary issue: is this a case suitable for summary judgment?

[5] A preliminary issue arises to whether this case is suitable for summary judgment. As noted, Associate Judge Gendall thought it was not. The approach we take to the substantive issues makes it unnecessary to reach a concluded view on that topic, but we have some doubts that the issues on which the parties focussed in the appeal (which were not exactly on all fours with the issues that were at the forefront of the argument in the High Court) are such that they could not be resolved at the summary judgment stage. In short, we do not see what would be gained by hearing further evidence on the factual underpinning of each party's case. There was no application for defendant summary judgment so we do not need to determine the point and we say no more about it.

The agreement

[6] For present purposes, the key element of the standing agreement was that SBL was appointed as stud-master/manager of St Reims by its owners, the Syndicate. SBL was charged with the task of managing the servicing of mares by St Reims and the collection of servicing fees, as well as providing his day-to-day stabling needs and general care.

[7] The standing agreement is also the syndicate agreement and accordingly many of the clauses are irrelevant to the relationship between SBL and the Syndicate. For example, the agreement detailed the rights of syndicate members, the structure and rules governing the management committee, how often St Reims could be nominated (that is, how often he could be rented out to service mares) and how his fees should be charged and split.

[8] The agreement effectively bailed St Reims to SBL, imposing an obligation on SBL to provide proper care and management of St Reims. The agreement provided that SBL had to stable and feed St Reims, provide all his gear and necessary veterinary services and make sure he was kept securely. While the "sole management" of St Reims was stated as being vested in SBL, it was clear from the agreement that this was operational management only. SBL was responsible for

caring for him and organising his nominations. But St Reims' career was closely supervised by the Management Committee. The Syndicate did not receive any rent from SBL for St Reims. On the contrary, a portion of the service fees he earned were paid to SBL. Under the agreement, SBL was entitled to fifteen nominations per season, as well as 10 per cent of the service fee on each further service nomination. For the 2006-7 season, the service fee was set at $8,000 excluding goods and services tax.

[9] The agreement was stated to be for a term of three years. It was not dated nor signed by any of the parties. Nor was a schedule referred to in the first paragraph drawn up or attached. Mr McAnulty, a member of the Syndicate, filed an affidavit where he said that the parties proceeded on the basis that the agreement was largely operative, despite not being signed. He understood that it would operate on a season to season basis. For the purposes of s 16 it is clear that it was an agreement for a term of more than one year, since it was not disputed that St Reims was in fact bailed for a period of more than one year.

The basis of Rabobank's case

[10] Counsel for Rabobank, Mr Barker, helpfully summarised Rabobank's position in his written submissions in these terms:

> Rabobank submits that the Judge erred in declining to grant summary judgment because:
>
> (a) Rabobank has priority to St Reims under the Act.
>
> (i) the Syndicate bailed St Reims to SBL, continuously from 2006 to late 2009;
>
> (ii) the bailment of St Reims was a *lease for a term of more than 1 year* as defined in s 16 of the Act;
>
> (iii) as a consequence the Syndicate was deemed to have a security interest in St Reims (s 17(1)(b) of the Act) and was a secured party under the Act. At no time did the Syndicate perfect its security interest;
>
> (iv) the consequence of the Syndicate being a secured party holding a security interest in St Reims was that any contest for priority to St Reims under the Act between the Syndicate and another secured party with a security interest in

St Reims was to be determined by the priority rules in the Act;

(v) Rabobank and SBL entered into a General Security Agreement (the "GSA") on 12 March 2007 that granted Rabobank a security over all of SBL's present and after acquired property. That security agreement was enforceable against third parties under s 36 of the Act;

(vi) on 14 March 2007 Rabobank perfected its security interest by the registration of a financing statement;

(vii) on 14 March 2007, or in the alternative, at the time when St Reims had been bailed to SBL for a term in excess of one year, Rabobank's security interest attached to SBL's rights in St Reims under s 40 of the Act:

(1) value was given by Rabobank to SBL on or about the time that they entered into the security agreement;

(2) SBL had possessory rights to St Reims sufficient for attachment of Rabobank's security interest under the Act from the time that SBL gained possession of St Reims as bailee; and

(3) Rabobank's security agreement was enforceable against the Syndicate (Rabobank repeats paragraph 1.6(a) above).

(viii) Rabobank's perfected security interest over St Reims has priority over the Syndicate's unperfected security interest (s 66(a) of the Act) and the fact that title to St Reims is in the Syndicate does not affect the application of the Act (s 24 of the Act); and

(b) the respondents do not have an arguable defence to Rabobank's claim.

Lease for a term of more than 1 year

[11] We proceed on the basis that Rabobank's case will fail if the arrangement between the Syndicate and SBL was not a "lease for a term of more than 1 year". If the arrangement is not a lease for a term of more than 1 year, then the Syndicate does not have a security interest in St Reims that is capable of being perfected and there is no priority dispute in PPSA terms between the Syndicate and Rabobank. We say that because it was accepted that the arrangement did not in substance secure payment or performance of an obligation, so it could not be a security interest unless it was a lease for a term of more than 1 year. If, the Syndicate does not have a security

interest in St Reims, it is a third party holding title to St Reims, and Rabobank's security does not attach to St Reims, but only to the rights held by SBL in St Reims which are the rights of a bailee only under the terms of the agreement.

[12] On the view we take of the case, the dispute between Rabobank and the Syndicate is resolved by determining whether the agreement constitutes a lease for a term of more than 1 year of St Reims.

[13] Because we conclude, for reasons which we will set out below, that the arrangement is not a lease for a term of more than 1 year, it is not necessary for us to address the issues that would arise if the arrangement was a lease for a term of more than 1 year. In particular we do not need to address the arguments about s 40(3) of the PPSA which were in issue in the High Court decision. However, we observe that those issues also appear to be amenable to summary judgment and that the authorities appear to strongly favour the position of Rabobank in the event that the case reduces to a priority dispute between holders of security interests, where one is perfected and one is not.

Relevant legislation

[14] Section 16 of the PPSA contains the definition of "lease for a term of more than 1 year". Section 17(1)(b) then deems a lease for a term of more than 1 year to be a security interest, even if it is not a lease which would otherwise meet the requirements of the definition of "security interest" in s 17(1)(a), ie it does not in substance secure the payment of money or the performance of an obligation.

[15] The definition of "lease for a term of more than 1 year" in s 16(1)(i) of the PPSA is as follows:

> **Lease for a term of more than 1 year**—
>
> (a) Means a lease or bailment of goods for a term of more than 1 year; and
>
> (b) Includes—
>
> (i) A lease for an indefinite term, including a lease for an indefinite term that is determinable by 1 or both of the

parties not later than 1 year after the date of its execution; and

(ii) A lease for a term of 1 year or less that is automatically renewable or that is renewable at the option of 1 of the parties for 1 or more terms, where the total of the terms, including the original term, may exceed 1 year; and

(iii) A lease for a term of 1 year or less where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period of more than 1 year after the day on which the lessee first acquired possession of them, but the lease does not become a lease for a term of more than 1 year until the lessee's possession extends for more than 1 year; but

(c) Does not include—

(i) A lease by a lessor who is not regularly engaged in the business of leasing goods...

[16] The concept of a "lease for a term of more than 1 year" also features in the Western Canadian PPSAs on which the New Zealand PPSA was modelled. For example, the equivalent provision in the Saskatchewan legislation is as follows:[2]

(y) **"lease for a term of more than one year"** includes:

(i) a lease for an indefinite term, including a lease for an indefinite term that is determinable by one or both of the parties not later than one year after the day of its execution;

(ii) a lease initially for a term of one year or less than one year, where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period of more than one year after the day on which the lessee, with the consent of the lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year; and

(iii) a lease for a term of one year or less where:

(A) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms; and

(B) the total of the terms, including the original term, may exceed one year;

but does not include:

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2 The Personal Property Security Act RSS 1993, c P-6.2, s 2(1)(y).

> (iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods;

[17] The reason for deeming all leases for a term of more than one year to be security interests is expressed as follows in the report of the New Zealand Law Commission that ultimately led to the passing of the PPSA:[3]

> In practical and legal effect, many commercial leases are indistinguishable from hire purchase agreements or conditional sale contracts. 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.
>
> ...
>
> On the other hand, short term and operating leases, such as those whereby a builder acquires equipment for use on a particular job, entail a far lesser degree of apparent ownership and certainly do not serve as substitutes for hire purchase or conditional sale agreements.
>
> ...
>
> In the interests of certainty, this definition establishes a category of leases which are automatically subject to the statute. Leases for more than one year generally serve as devices for financing acquisition of effective ownership of an asset.

[18] A similar reason is given for the equivalent Canadian provisions by Ziegel:[4]

> Given the functional equivalence between a purchase security interest and a finance lease covering the same goods, why should the one be regulated by the PPS legislation and the other not? There was another important reason that favoured the inclusion of one-year-plus leases. The distinction between a security and non-security lease is elusive and often depends on the eye of the beholder. The statutory provisions in those jurisdictions that maintain the distinction provide little guidance and there is much disagreement among judges about the applicable criteria.

[19] The concept of a "lease for a term of more than 1 year" thus includes legal relationships that might not intuitively be thought of as creating a security interest. Rather than attempt to delineate between finance leases (that are by their nature security interests) and true leases (that are not), the legislation simply specifies a category of leases that are treated as security interests. This intentionally brings within the net of the PPSA some transactions that do not have the hallmark of a

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3 Law Commission *Reform of Personal Property Security Law* (NZLC R8, 1989) at 89–90.

4 Jacob S Ziegel "The New Provincial Chattel Security Law Regimes" (1991) 70 Can Bar Review 681 at 706.

security interest, in that they do not secure the payment of money or the performance of an obligation. By defining that category by reference to the term of the lease, the PPSA leaves outside the net true leases that are short term in nature.

Bailment and lease

[20] A quirk in the wording of the definition of "lease for a term of more than 1 year" in s 16(1)(i) of the PPSA is that paragraph (a) refers to "a lease or bailment" but in the remainder of the definition the references are only to a "lease". It is clear from the context that these subsequent references to "lease" are intended to cover only a lease *of goods*, but the omission of any mention of "bailment" other than in paragraph (a) is somewhat enigmatic. It is notable that the Saskatchewan definition (and those in other Canadian PPSAs) do not have any reference to "bailment".

[21] Bailment is a much broader concept than lease. This is illustrated by the definition of "bailment" in *Laws of New Zealand*:[5]

> A bailment, traditionally defined is a delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for or condition on which they were bailed shall have elapsed or been performed. Under modern law, a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The essential element in determining whether a bailment has been established is that of possession. The legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding. The element common to all types of bailment is the importation of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safekeeping of the goods. An action against a bailee can be regarded as an action on its own, sui generis, arising out of the possession had by the bailee of the goods.

[22] There is no explanation in the Law Commission Report for the inclusion of a reference to "bailment" in paragraph (a) of the definition. It is possible that the reference to "bailment" was simply a reflection of the use of that term in the legislation it replaced, the Chattels Transfer Act 1924. The 1924 Act had a defined term "instrument by way of bailment", which described what was in common

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5 *Laws of New Zealand* Bailment (online ed) at [1].

parlance a chattels lease. But there is nothing in the Law Commission Report confirming that possibility.

[23] Peter Eady and Adam Jackson presented a NZLS paper in 2006 where they commented on the reference to "bailment" in the introductory words of the definition but not later in the definition. They said:[6]

> One noteworthy thing about paragraphs (b) and (c) is that, in contrast to the basic definition in paragraph (a), they refer only to leases and not to bailments. This is probably a legislative oversight because there seems no reason to single out leases and not bailments.
>
> It is difficult to know how a court would approach the issue when faced with a bailment instead of a lease. It would probably be able to apply the rules in paragraph (b) on the basis that paragraph (b) was simply a guide for the interpretation of paragraph (a). However, applying paragraph (c) to bailments would be more difficult because, rather than clarifying paragraph (a), it sets out exceptions to paragraph (a).

[24] Although it was not at the core of his argument for Rabobank, Mr Barker took the point that the inclusion of "bailment" in paragraph (a) and its exclusion from the remainder of the definition was significant. He argued that it signified that all bailments of goods for more than one year were security interests, because paragraph (a) said so. And the inclusions in paragraph (b) and the exclusions in paragraph (c) did not apply to a "bailment of goods" unless it was also a "lease of goods". As the arrangement relating to St Reims was a bailment but not a lease, he argued that the arrangement was within paragraph (a) and not excluded by paragraph (c) and was therefore a "lease for a term of more than 1 year" as defined.

[25] That argument has the benefit of conforming with the literal meaning of the words used. But, as noted by Eady and Jackson, it seems unlikely that Parliament would have intended that paragraph (b), which is an aid to interpretation of paragraph (a), aids interpretation only in relation to leases but not bailments. We consider the references to "lease" in paragraph (b) have to be interpreted as shorthand references back to "lease or bailment of goods" in paragraph (a). Unless that is so, the references to "lease" in paragraph (b) could be seen to apply to all

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6 Peter Eady and Adam Jackson *PPSA – a review four years on* (NZLS Seminar, October 2006) at [9].

leases, not just leases *of goods*, and to exclude bailments. That would lead to oddities that cannot have been intended.

[26] If each reference to "lease" in paragraph (b) is to be interpreted as "lease or bailment of goods", it would be odd not to adopt the same approach to the interpretation of the references to "lease" in paragraph (c). A failure to do so would also lead to inconsistent outcomes that cannot have been intended. It would be strange if non-commercial leasing transactions were excluded from the definition but non-commercial bailment transactions were not. This would also require a keen focus on the legal nature of the transaction (whether it was a lease, a bailment or possibly both) when the philosophy of the PPSA is to address the substance of transactions rather than their legal form. The definition of "security interest" in s 17(1)(a) exemplifies that.

[27] In our view, when the definition is interpreted in light of its purpose as articulated in the Law Commission Report, the references to "lease" in paragraphs (b) and (c) must be read as shorthand references back to the phrase "lease or bailment of goods" in paragraph (a). That is the only way to avoid what would otherwise be absurd consequences.[7]

"Regularly engaged in the business of leasing goods"

[28] Having determined that the references to "lease" in paragraphs (b) and (c) of the definition are to be interpreted as "lease or bailment of goods", we must now determine whether the exception in paragraph (c)(i) applies to the bailment of St Reims by the Syndicate to SBL. This requires us to determine whether the bailment of St Reims was "a lease by a lessor who is not regularly engaged in the business of leasing goods".

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[7] On using absurdities to justify statutory interpretation, see Francis Bennion *Bennion on Statutory Interpretation* (5th ed, Lexis Nexis, London, 2008) at 969; *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209 at [116] and [117] per Lord Millet: "The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable the result, the less likely it is that Parliament intended it."

[29] Mr Perese argued on behalf of the Syndicate that this exception applied. He pointed out that the Syndicate had no business other than its ownership of St Reims. He said the agreement with SBL was the only agreement the Syndicate had entered into that provided for the bailment of goods. He said the effect of the agreement was that SBL as bailee received consideration from the Syndicate for the bailment, rather than vice versa. He argued that, in those circumstances, the Syndicate could not be said to be a lessor [bailor] engaged in the business of leasing [bailing] goods, let alone "regularly" so. He argued that for a person to be "regularly" engaged, it would need to have more than one lease or bailment. He said the term "regularly" means "recurring".

[30] Mr Barker argued that all that was required was that the Syndicate bailed St Reims and that this was a substantial element of its business. He relied on Canadian authority in support of that contention.

[31] There is no New Zealand case law on this point and the text books do not deal with the definition in sufficient detail to provide guidance on the issues arising in the present case.[8]

Relevant case law

[32] In the absence of any relevant New Zealand case law, counsel urged us to take guidance from Canadian case law on the equivalent definition in Canadian provincial statutes. We agree that it is sensible to look to those jurisdictions for guidance, given the Canadian origins of the New Zealand legislation. We have to say, however, that in this case we did not draw a lot of assistance from the Canadian cases. In part, this was because the lack of any reference to "bailment" in the Canadian provisions means the Canadian courts have not faced the issue we have to deal with in this case. In deference to the arguments of counsel, we will deal with the Canadian cases in some detail.

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[8] See Michael Gedye, Ronald C C Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at 84 and 59; Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, Lexis Nexis, Wellington, 2010) vol 2 at 400.

[33] In *David Morris Fine Cars Ltd v North Sky Trading Inc*, a car dealer was found to be regularly engaged in the business of leasing vehicles, even though this was not a frequent part of his business.[9] The lease was a "proper component" of the business. The Alberta Court of Appeal confirmed this result.[10] It noted however that the test found elsewhere in the PPSA of "in the ordinary course of business" was different, although similar factors might be considered under both tests. It also rejected the argument that "regularly" meant constant. The frequency of the leasing was not relevant as long as it was a proper component of the business.

[34] The Alberta Court of Appeal followed an earlier case, *Paccar Financial Services Ltd v Sinco Trucking Ltd,*[11] where the term "significant part" of the business had been employed on similar facts to find that the exception was not engaged. In that case, Noble J expressed the view that the exception was intended to exempt a person who occasionally leased goods but could not be described as making it his business. Yet subsequent judgments appear to give little or no effect to the meaning of "regularly" (and there is no real discussion of the point), focusing instead on the business aspect.

[35] *Karkoulas v Farm Credit Canada* involved cattle leasing by a father to his son.[12] The Saskatchewan Court of the Queen's Bench placed emphasis on the fact that the leasing was the father's entire interest in the cow/calf operation carried out by his son, and therefore he was regularly engaged in the business of leasing. The emphasis of the case was on the business of the father. Since his only business was leasing, it was not necessary to consider the meaning of "regularly". Accordingly, Ball J said "it is not the number or frequency of the leases that determines the application of the PPSA; it is whether the lease involved a lessor who was regularly engaged in the leasing the goods."[13]

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9 *David Morris Fine Cars Ltd v North Sky Trading Inc* (1994) 8 PPSAC (2d) 112 (ABQB).

10 *David Morris Fine Cars Ltd v North Sky Trading Inc* [1996] 7 WWR 332 ("David Morris (ABCA)") at 336.

11 *Paccar Financial Services Ltd v Sinco Trucking Ltd* (1987) 7 PPSAC 176 (SKQB).

12 *Karkoulas v Farm Credit Canada* (2005) 8 PPSAC (3d) 249, additional reasons at (2005) 9 PPSAC (3d) 142 (SKQB).

13 At [20].

[36] On the other side of the ledger is *Planwest Consultants Ltd v Milltimber Holdings Ltd*.[14] That case concerned a mortgagee who became the owner of land after the mortgagor defaulted. Due to market conditions, the mortgagee in possession rented out the premises and the fixtures and chattels. The lessee went into liquidation and their creditors sought priority over the fixtures and chattels. The mortgagee had not registered a financing statement in respect of the fixtures and chattels. The Court found that the PPSA did not apply. The owner was not in the business of leasing real property; its business was the sale and financing of commercial properties. The business of leasing chattels was merely incidental to and not a regular part of the business of the lessor.

[37] The cases of *Planwest* and *Paccar* are not easily reconcilable. In *Paccar*, it was the first time that the business had ever leased trucks. It operated its business by selling the trucks or entering into lease to buy agreements. Presumably due to market conditions, it decided to lease the trucks. The facts of *Planwest* are analogous: the owner was in the business of buying and selling, and financing property transactions and the leasing of the property on this one occasion was an anomaly due to market conditions. Yet the Courts reached different results. The emphasis of the cases is different. In *Paccar* the emphasis was on the nature of the business: the owner was a "large financial institution regularly engaged in financing the purchase of Kenworth trucks".[15] In *Planwest* the emphasis was on the frequency of the business: the subject transaction was characterised as an anomaly. *Planwest* interprets the word "regularly" as meaning as a common or frequent part of the business. Not surprisingly, Mr Barker relied on *Paccar*; Mr Perese relied on *Planwest*.

Does the exception apply in this case?

[38] The exception raises two issues. First, what does it mean to be "engaged in the business" of leasing goods, and second, what does the word "regularly" add?

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[14] *Planwest Consultants Ltd v Milltimber Holdings Ltd* [1995] 10 WWR 334 (ABQB); aff'd in *Planwest Consultants Ltd v Milltimber Holdings Ltd* [1998] 3 WWR 214 (ABCA).

[15] At 496.

The Canadian cases do not address the first question in a context similar to the present case. But as the above discussion shows, they do address the second.

"Engaged in the business of leasing goods"

[39] We deal first with the question, did the Syndicate "engage in the business of [bailing] goods"? As noted earlier, the bailment was an incident of the agreement between the syndicate and SBL. SBL was providing a service to the Syndicate, and in order to provide that service it had possession of St Reims. Although the Syndicate was the bailor, it was the customer of the bailee rather than vice versa.

[40] In our view, the words "in the business of leasing goods" should be read as importing a requirement that the owner actually be intending to profit from the bailment or lease. This would exclude gratuitous bailments where the bailor was not receiving any payment for the use of the goods and bailments where the bailee is in the business of bailments, not the bailor. We see this as best reflecting the Parliamentary intention of treating some lease and bailment transactions as security interests, and requiring the bailor to perfect its interest in order to ensure its interest defeats that of any secured creditors of the bailee. The reason for the deeming provision is to ensure that lease/bailment transactions that are not easily distinguishable from finance leases are treated as if they are finance leases. Bailment transactions that could not possibly be confused for finance leases do not need to be drawn into that net, and there is nothing to indicate that Parliament intended that they should be.

[41] Applying this interpretation to the facts of this case, we consider that the Syndicate was not in the business of bailing goods, it was in the business of maintaining and profiting from its stallion. The cost of standing the horse was an incidental expense to that business, not the business itself. We conclude, therefore, that the exception applies to the Syndicate, and the bailment of St Reims was not a lease for a term of more than 1 year, as that term is defined in s 16(1)(i).

[42] The interpretation we favour has the practical effect of excluding from the definition of "lease for a term of more than 1 year" all bailments in respect of which

the bailor is not receiving (or intending to receive) consideration with a view to making a profit. Although it is not an aid to interpretation of the PPSA, it is interesting that the recently enacted Australian Personal Property Securities Act 2009 has express statutory language that yields that outcome.

[43] The Australian drafters have dealt explicitly with the issues arising from the inclusion in the New Zealand definition of "lease for a term of more than 1 year" of a bailment. The Australian PPSA expressly provides for bailments throughout its equivalent section, and does not rely on the words "lease" and "lessor" to convey the concept of bailment as well.

[44] The Australian PPSA does not exactly mirror the New Zealand concept of "lease for a term of more than 1 year", instead adopting the term "PPS lease".[16] A PPS lease is a security interest for the purposes of the Act even if it does not, in substance, secure a payment or performance of an obligation.[17] A PPS lease is defined to include a lease or bailment for a term of more than one year,[18] and some leases or bailments that are for a term of less than one year (such as where the lessee or bailee remains in possession of the goods past the lease date). Thus it has a similar but not identical definition to a "lease for a term of more than 1 year" in the New Zealand PPSA.

[45] A PPS lease excludes those leases by a lessor who is not regularly engaged in the business of leasing goods.[19] Importantly, the Act provides a separate exception for bailments where the bailor is not regularly engaged in the business of leasing goods.[20] There is a further restriction on the coverage of bailments. Section 13(3) provides: "This section only applies to a bailment for which the bailee provides value." For any other bailment it would be a question as to whether it was intended otherwise to operate as a security interest under s 12: is it "an interest in relation to personal property provided for by a transaction that, in substance, secures payment

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16 Personal Property Securities Act 2009 (Cth), s 10 says that "PPS lease" has the meaning given to it in s 13.
17 Section 12(3)(c).
18 Section 13(1).
19 Section 13(2)(a).
20 Section 13(2)(b).

or performance of an obligation (without regard to the form of the transaction or the identity of the person who has title to the property)"?

"Regularly"

[46] It is not strictly necessary for us to deal with the controversy about the meaning of "regularly" in s 16(1)(i)(c). The Canadian cases reflect their very unusual facts and we hesitate to draw from them any generic principle. Each case will depend on its facts. But we do consider that it requires some straining of the concept "regular" to say it includes a single, isolated transaction.

[47] We doubt that that is what Parliament intended. It is clear that a course of business involving a series of leasing transactions will involve regular engagement in the business of leasing. We think it is equally clear that a single transaction in circumstances where it can be established that the transaction was a one-off would not be "regular". Where a transaction was the first but has been followed by others, a good case can be made for the proposition that even the first was "regular" because it was the start of the regular engagement in the business. That will be a factual issue in the particular case.

[48] On the facts of this case, we would have found that the bailment of St Reims, which was the sole transaction of its kind entered into by the Syndicate and which the Syndicate intended to be its sole transaction of that kind, would not have involved a regular engagement in the business of leasing/bailing goods.

Result

[49] We conclude that the Associate Judge was right to refuse to enter summary judgment in favour of Rabobank, though our reasoning differs from his. There was no application for defendant summary judgment before the Associate Judge and it is not therefore necessary to consider whether the Syndicate is entitled to summary judgement in its favour.

Costs

[50] We award to the Syndicate costs for a standard appeal on a Band A basis and usual disbursements.

Solicitors:
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Ed Johnston & Co, Auckland for Respondents