**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV-2007-404-003463**

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| IN THE MATTER OF | of section 34 of the Receiverships Act 1993 |
| AND IN THE MATTER OF | of EXPL LIMITED (formerly named CHEQUER PACKAGING LIMITED) (IN RECEIVERSHIP) |
| BETWEEN | MICHAEL PETER STIASSNY AND BRENDON JAMES GIBSON, CHARTERED ACCOUNTANTS, AS RECEIVERS OF CHEQUER PACKAGING LIMITED (IN RECEIVERSHIP)<br>Applicants |
| AND | DUNEDIN CITY COUNCIL, A LOCAL AUTHORITY UNDER THE LOCAL GOVERNMENT ACT 2002<br>Respondent |

Hearing: 1 November 2007

Appearances: Laura O'Gorman for Applicants
Antony Holmes for Respondent

Judgment: 30 May 2008 at 10 am

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## JUDGMENT OF WINKELMANN J

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*This judgment was delivered by me on 30 May 2008 at, 10 am pursuant to Rule540(4) of the High Court Rules.*

*Registrar/ Deputy Registrar*

Solicitors:
Buddle Findlay (Auckland) for Applicants
Wilson Harle (Auckland) for Respondent

[1] The receivers of Chequer Packaging Limited (In Receivership) apply for directions in respect of a dispute that has arisen with the Dunedin City Council (the Council). Prior to 2007, Chequer Packaging operated a plastic extruding and manufacturing business at two major sites, one in Auckland and one in Christchurch. It manufactured and sold, amongst other things, Council-approved plastic rubbish bags.

[2] In January 2007 the applicants were appointed as receivers of Chequer Packaging. They now seek directions as to whether the Council has a proprietary interest in proceeds of sale paid or yet to be paid to Chequer Packaging in respect of Chequer Packaging's sale to retailers of Council-approved rubbish bags. If such a proprietary interest is found to exist, the receivers seek directions as to whether that proprietary interest takes priority over the perfected security interest of the ANZ National Bank. This last issue arises because the Council did not register a financing statement under the Personal Property Securities Act 1999 (the Act) in respect of its claimed interest.

**Background facts**

[3] During 2002, the Council proposed introducing a kerbside refuse collection service funded by user charges. It called for tenders for the supply and distribution of official refuse bags. Chequer Packaging was the successful tenderer, and the Council and Chequer Packaging entered into a written agreement. The one page agreement expressly incorporated into its terms the Conditions of Tendering, the Contractor's Tender, the Notification of Acceptance of Tender and the General Conditions of Contract.

[4] Some commercial context to the transaction is provided by the preamble of the "Specification" section of the tender documents incorporated into the contract which narrates:

> The Council are committed to introducing a kerbside recycling collection on 3 March 2003 and a refuse collection service funded by user charges from 1 July 2003.

> By 1 June 2003 the bag supplier must have supplied all supermarkets, Dunedin City Council Service Centres, 4 Squares, Dairy's and the like (retail outlets) within the Dunedin City environs, the Official Dunedin City Council Refuse Bag. They are also to ensure that these "retail outlets" have the bags available for sale following that date.
>
> The bags supplier will sell bags to the retailers at a cost that covers the bag cost, distribution, collection and disposal.
>
> The Council will recover the collection and disposal costs from the bag supplier.

[5] "Specification Part 2" of the tender documents sets out the services to be provided by Chequer Packaging. These included:

(a) Manufacturing, supplying, warehousing, marketing and distributing the refuse bags to resellers and retailers servicing Dunedin City

(b) Accounting to Council for all refuse bags manufactured, supplied, warehoused, marketed and distributed.

(c) Marketing the sale of the bags and negotiating with retailers appropriate shelf or checkout space for that purpose.

[6] Clause (k) of the initial tender documents stipulated that the successful tenderer would also be responsible for:

> Accounting for and paying all monies due to the Council by the due date.

[7] Clause (l) provided that the successful tenderer would be responsible for:

> Maintaining and making available to the Council such records as made be requested by the Council from time to time to enable the Council to fully audit the manufacture, distribution and stock control systems operated by the contractor.

However prior to formation of the contract it was agreed that clause (k) would be amended so that the obligation Chequer Packaging assumed under the contract was:

> Accounting for, hold on trust in a separate bank account for the Dunedin City Council and paying all moneys due to the Council by the due date.

[8] The price that Chequer Packaging could charge for its bags was regulated by the written contract between the parties. Clause 4 of the tender document provided that at the commencement of the contract, the price was to be calculated so that 25% of the charge represented raw materials, and 75% all other costs. This could then be reviewed at six monthly intervals.

[9] Clause 5 of the agreement provided that the fees (refuse fees) payable to the Council under the contract were:

a) 70¢ for every 65 litre refuse bag sold;

b) 50¢ for every 40 litre refuse bag sold.

[10] Clause 5.1 allowed that the Council Engineer might amend the gross price payable to the Council for the refuse bags supplied by Chequer Packaging to any resellers, or retailers, but was required to serve no less than two months notice in writing on Chequer Packaging.

[11] Clause 6 described the invoicing and payment regime. On the fifth working day of each month, Chequer Packaging was to provide the Engineer with a schedule detailing the number of refuse bags distributed by Chequer Packaging in the immediately preceding month and to whom those refuse bags were distributed. That schedule was not an invoice, but would include calculations outlining the amounts owed by Chequer Packaging to the Council for the refuse bags distributed. On receipt of that schedule, the Engineer would prepare a tax invoice detailing the amounts to be paid to the Council by Chequer Packaging for those refuse bags. The invoice was to be sent to Chequer Packaging within 10 working days of the receipt of the schedule. Payment of the invoiced amount was to be made by the 15th day of the month following the date of issue of the invoice.

[12] Clause 6.2 provided that Chequer Packaging was responsible for collecting all money owed to it by the retailers and resellers or any other person to whom the refuse bags had been supplied. The Council was not liable to Chequer Packaging for any amount not recoverable from the resellers or retailers. No delay in payment or

non-payment by any reseller or retailer would entitle Chequer Packaging to withhold or delay payment of any sum due by it to the Council in terms of the agreement.

[13] Clause 6.3 further provided that Chequer Packaging was obliged to pay for all refuse bags for which it was unable to account to the reasonable satisfaction of the Council, as if the refuse bags had been delivered to a reseller or retailer in the normal way.

[14] At the date of the appointment of the applicants the Council was owed a substantial amount of money by Chequer Packaging. The ability of the Council to recover the amount due to it depends largely, if not completely, upon its right to assert a proprietary claim to funds held or to be held by Chequer Packaging.

**Council's argument**

[15] The Council claims that it is a term of the contract that Chequer Packaging will hold the refuse collection charge payable to the Council on trust for the Council. That obligation contained in clause (k), extends not only to money already received by Chequer Packaging, but also to money due but not yet paid to Chequer Packaging in respect of its supply of rubbish bags. Alternatively the Council argues that the relationship between it and Chequer Packaging was that of principal and agent. By reason of that relationship Chequer Packaging holds that portion of the proceeds of sale that relate to the refuse collection fee on trust for the Council. On either basis the Council also argues that the interest that it has in the money does not fall within the definition of a security interest for the purposes of the Act. Therefore, the priority scheme in the Act does not apply: the Council did not have to register a financing statement to preserve the priority of its interest in the money over the interest of ANZ.

[16] Alternatively the Council argues that even if its interest in the money is a security interest, because Chequer Packaging holds the funds as trustee by reason of clause (k), or because it holds them as the Council's agent, it has no beneficial proprietary interest in the money. If Chequer Packaging has no beneficial interest in

the money, it follows that neither can ANZ. Therefore the Council's claim defeats that of ANZ's.

## Issues Arising

[17] There are three key issues for resolution. The first is whether the Council has a proprietary interest in funds held by Chequer Packaging. If it does, the second issue arises for determination: is that interest a security interest for the purposes of the Act. Finally, if it is a security interest, does it defeat or take priority over the security interest of ANZ?

## Did the Council have a proprietary interest in funds held, or to be held by Chequer Packaging?

*Proprietary interest arising by reason of clause (k)*

[18] Before a trust will be found to exist the party contending for a trust must satisfy the Court that there was an intention to create a trust and that there is certainty as to the intended beneficiary or beneficiaries of the trust and the intended subject matter of the trust: *Knight v Knight* (1803) 3 BEAR 148.

[19] Here there can be no doubt that the parties intended to create a trust. The obligation to hold the money on trust for the Council and to keep it apart from the other funds of Chequer Packaging are compelling indicia of an intention to create a trust. The intended beneficiary of the trust is also clear: the Council. However, the subject matter of the trust is more difficult to ascertain. Clause (k) is poorly drafted. It suffers the defects typical of clauses grafted late onto detailed documents, in that it fails to relate in a coherent way to existing provisions. Clause (k) envisages that "all moneys due to the Council" will be held in a separate bank account for the benefit of the Council. The evidence was that Chequer Packaging had initially placed money into a separate bank account and that it operated this account from September 2003 until September 2004. Thereafter, presumably in breach of contract, Chequer Packaging stopped using a separate bank account for money due to the Council. I infer that there are no longer funds in the separate account.

[20] The Council argues that the trust is enforceable without the operation of the separate trust account and that the subject matter of the trust is sufficiently certain. It relies on *Re Kayford Limited (In Liquidation)* [1975] 1All ER 604. In that case a company in financial difficulties wished to continue to receive money from customers on account of goods to be supplied, but wanted those customers to be protected in the event of liquidation. The company initially intended to open a separate bank account to be styled "Customers Trust Deposit Account". But after discussions with its bank it decided to use an existing dormant account rather than creating a new account expressly for the purpose. When received, customers' money was paid into that account. Megarry J held that the subject matter to be held on trust was clear.

[21] In reliance upon this authority, the Council submits that the failure to set aside the funds in the separate account is not fatal to its proprietary claim and clause (k) was effective to create a trust in its favour, in respect of the following property:

(i) the refuse fee portion of sale proceeds received by Chequer Packaging for the sale of Council approved bags, and

(ii) the refuse fee portion of money due to Chequer Packaging for its sale of Council approved bags.

[22] This case is plainly distinguishable from *re Kayford.* In *Kayford* the company received customers' money on the basis that it held the money for the customers until such time as the goods were supplied. Although not held in accordance with the precise arrangements the company had initialled settled upon, the customers' money was held apart from the rest of the assets of the company in an account. The money in that account was readily identified as the subject matter of the trust.

[23] Here the intended subject matter of the trust, the amount due to the Council, is otherwise the property of Chequer Packaging, but Chequer Packaging may not have any money that is clearly referable to its obligation to pay the Council. Under the contract, the amount due to the Council was the invoiced amount. The Council

was entitled to invoice Chequer Packaging for all bags sold, even when retailers had not paid Chequer Packaging for those bags. As a consequence payment to the Council could well have been made in advance of receipt. The Council was also entitled to invoice Chequer Packaging for bags that had not been sold by Chequer Packaging, but for which it could not account to the satisfaction of the Council. It is not then possible to say that Chequer Packaging held the refuse fee proportion of each receipt on trust for the Council. The contractual payment arrangements were more complex than that. There could be amounts due to the Council although Chequer Packaging had received no money that could be linked to that debt. In the absence of a fund set aside in compliance with the terms of clause (k) there was then no clearly ascertainable subject matter of the trust.

[24] It is evident that little or no thought was given as to how the clause (k) account was to operate, given the particular invoicing regime. The parties do not seem to have turned their minds to what was to happen if Chequer Packaging did not comply with the requirements of clause (k). I consider that the trust obligation was only intended to attach to the funds in the special account, and that Chequer Packaging had a contractual obligation to pay the amount due (in accordance with the invoice) into the trust account. If it failed to do so, the Council was simply left with its contractual rights in respect of that breach.

[25] I conclude that the Council did not have a proprietary interest arising under an express trust, as there was no certainty as to subject matter.

*Proprietary interest arising by reason of principal/agent relationship*

[26] The Council argues that even if no express trust was created, Chequer Packaging was the Council's agent, and held the funds as a fiduciary. The Council therefore had a proprietary claim to them.

[27] The true nature of the overall relationship between Chequer Packaging and the Council was that of debtor/creditor. The Council authorised, or licensed Chequer Packaging to sell bags to retailers and resellers with a right attached to those bags to have the bag collected by the Council. The underlying arrangement was the same as

existed in the very similar case of *Stiassny v North Shore City Council* [2008] 1 NZLR 825. In that case, when describing the relationship, Harrison J said:

> NSCC effectively authorised or licensed CPL to sell the bags directly to the retailers. Sales were on terms and conditions agreed between them. Council did not participate in those contractual arrangements and never acquired a proprietorial interest in the goods. To the extent that CPL acted on behalf of NSCC, it was for the limited purpose of selling to retailers the right of collection and disposal attaching to the bags for on-sale to the public, and not for the sale of bags which were the company's own property. NSCC was not a principal party to the contracts of sale, it never acquired title to the bags or the fees and it had no enforceable rights against the retailers.
>
> By virtue of the invoicing arrangements CPL agreed to underwrite the retailers payment of the fee to NSCC. It undertook to pay to Council by a fixed date an amount equal to the aggregated value of all outstanding fees, irrespective of whether or not it received payment from retailers. So, in accordance with the contractual structure, the retailer received the fee for CPL's benefit and paid accordingly.
>
> There were thus two distinct but interlocking relationships of debtor and creditor. One was between CPL and retailers by virtue of the contract of sale with associated rights of direct recovery. The other was between NSCC and CPL for payment of the fees.
>
> CPL assumed the full transactional risk. In law NSCC assigned or sold its right or interest in the fees to CPL, for which it received payment in the month following submission of invoices. The company was not acting on Council's behalf when collecting the fees from retailers but for its own benefit as principal. And CPL had no right to a commission on fees recovered; its remuneration lay in the marketing and distribution margin. There is no room within this framework of contracts of sale for a separate relationship of principal and agent between Council and CPL: see, generally, *Bowstead* at 1-032.

[28] These paragraphs also describe the relationship in the present case. It is true that the contract in *North Shore City* differed from the present contract. It expressly excluded the existence of an agency relationship and did not include a clause equivalent to clause (k). However in *North Shore City* it was the nature of the relationship that was determinative and not the disclaimer of an agency/principal relationship. I also do not consider that the inclusion of clause (k) altered the fundamental nature of the relationship between the Council and Chequer Packaging. It was an arrangement designed to provide security to the Council for payment of the invoiced amount, grafted on to a relationship which is fundamentally that of debtor/creditor.

**Was the Council's interest a security interest under the Act?**

[29] Although I have determined that the Council had no proprietary interest in the refuse fee portion of receipts and receivables, I propose to address the remaining two issues as they are equally determinative against the Council being able to claim priority over the Bank's security interest.

[30] Issues of priority, with which this application is fundamentally concerned, are now to be determined in accordance with the provisions of the Act. One of the fundamental changes that the Act has brought about is, with very limited exceptions, the jettisoning of rules relating to particular forms of security taken over personal property. The Act draws no distinction between what the law previously categorised as true security interests (for example, chattel mortgages) and "in substance" security interests (for example, pursuant to a Romalpa clause): *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 at [89]. In place of those rules, the Act has created the relatively simple concept of a "security interest".

[31] The issue is whether the Council must rely upon a security interest as defined in the Act to obtain payment of the "disputed money". Whether a transaction creates a security interest is to be determined now by reference to s 17 of the Act, which provides:

> 17(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
>
> (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).

[32] Section 17.3 provides:

> 17(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.

[33] Relevant also is s 23 which excludes certain types of transactions from the Act. The exclusion of a transaction means that the parties to the transaction do not have to comply with the registration provisions of the Act to maintain their priority. Section 23(b) provides:

> (b) A lien (except as provided in Part 8), charge, or other interest in personal property created by any other Act [(other than section 169 of the Tax Administration Act 1994 and sections 169 and 184 of the Child Support Act 1991)] or by operation of any rule of law.

[34] The Council advances two arguments in support of its basic contention that any interest the Council had was not a security interest for the purposes of the Act, and so did not require registration of a financing statement to obtain and maintain priority over other security interests.

*Section 23 arguments*

[35] The Council relies on s 23 of the Act and the British Columbian case of *Re SkyBridge Holdings Inc (1998)* 13 PPSAC (2d) 387, affirmed 15 PPSAC (2d) 24, as authority for the proposition that a trusts falls outside the Act because it arises by operation of a rule of law. Section 23 provides in material part that the Act does not apply to an interest created or provided by operation of any rule of law. In *SkyBridge*, a travel agency filed for bankruptcy while holding money received from travellers for travel services to be arranged by the agency. The Trustee in bankruptcy applied for directions as to the applicability of the British Colombian Personal Property Security Act to the funds so held. The judge was asked to assume that the money had been deposited pursuant to a term, express or implied, that the funds would be held in trust for the travellers until the tickets had been delivered. The trial judge held that the trust was not in substance a security interest. The judge at first instance, whose decision was affirmed on appeal, said:

> The travellers have become creditors of the bankrupt only incidentally, as a result of bankruptcy. They paid their money for tickets and other travel receipts which SkyBridge agreed to provide from carriers and others. I do not think either the travellers or SkyBridge would have considered their relationship to be one of creditor and debtor. The travellers are simply consumers of travel services. SkyBridge was the travellers' agent to arrange the travel services and provide the tickets and other documentation required.

Further on he said:

> The PPSA is explicit that a trust interest is a security interest if the purpose is to secure payment or performance of an obligation. The substantive nature of the trust is critical. The travellers in this case are consumers not lenders and they become creditors unintentionally as a result of unforeseen bankruptcy. SkyBridge received the funds as agent to purchase travel services and not as part of a security transaction.

[36] The *SkyBridge* case does not then stand for the proposition that such trusts arise by operation of a rule of law, and the reasoning did not turn upon the equivalent provision to s 23(b) in the British Columbian legislation. I must also respectfully disagree with the obiter comment of Harrison J in *Stiassny v North Shore City Council* that the reasoning in *SkyBridge* turned upon the finding of an implied or resulting trust. The decision could not have turned upon a finding of implied trust, since the Court assumed an implied *or* express trust. Rather, the outcome in *SkyBridge* turned upon the Court's finding that the substantive nature of the trust was not to secure payment or performance of an obligation.

[37] In this case it is plain that the Council had in mind that it would be the creditor of Chequer Packaging, and was concerned to obtain comfort that it would be paid. It stipulated for a trust, and there can be no doubt that if the contract creates a trust at all, clause (k) creates an express trust. An express trust does not operate by reason of a rule of law, but by reason of the parties' express intention. It is therefore created by and arising from the agreement.

[38] Although the issue does not arise for determination in this case, I comment that, with respect, the reasoning in *SkyBridge* seems strained as applied to an express trust. In the absence of the arrangement creating that trust, the customers would have been creditors until such time as they received title to the goods or services. Their status as creditors would have arisen by reason of the transaction, and not by reason of the bankruptcy as the first instance Judge in *SkyBridge* asserted. When

bankruptcy intervened they would have been unsecured creditors. In that context, it is difficult to imagine what purpose the trust had other than to secure the performance of the vendor's obligation.

[39] The amended clause (k) was included in the contract to provide security to the Council for Chequer Packaging's payment obligations. In terms of the contract, money could be due for payment to the Council before Chequer Packaging had received payment from the retailer. Chequer Packaging was to hold all money due to the Council in the account. Although there are issues as to the effect and operation of that clause, its formulation makes clear that the intent was to secure the Council's interest in the amount due to it until it was paid. Any proprietary interest the Council thereby acquired falls squarely within the s 17 definition of a security interest.

[40] In oral submissions, the Council advanced an alternative argument in reliance on s 23; that Chequer Packaging was the agent of the Council and therefore held that portion of the proceeds of sale that related to the refuse collection fee on trust for the Council. That obligation arose by operation of a rule of law, and so is excluded from the operation of the Act. Clause (k) simply recorded that obligation.

[41] The issue whether Chequer Packaging was the Council's agent in selling the bags is irrelevant. Even if the relationship was that of principal and agent, there is no rule of law that an agent holds money received in the course of the agency, or any part of moneys received, on trust for the principal. The issue will usually turn upon the intention of the parties (6-040 Bowstead, *Walker and Ors v Corboy and Others* (1990) 19 NSWLR 382, 395). Even if these transactions did create the relationship of agent and principal between the parties, the only basis upon which it could be argued that the Council had a proprietary interest in the proceeds of sale is clause (k), and as I have already held, that clause creates a security interest for the purposes of the Act.

## Does the ANZ's security interest attach under the Act?

[42] The Council argues that even if its interest in the refuse fees and receivables is a security interest under the Act, its interest still defeats any claim ANZ may make to the same property. This is because Chequer Packaging only had a legal interest in the money and receivables and those were the only rights to which ANZ's security interest could attach. In particular they could not attach to the rights associated with the Council's beneficial interests or to the property itself. The Council relies on s 40(1) of the Act which 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.

The Council argues that the effect of this provision, and in particular s 40(1)(b), is that a debtor can only grant a security interest in the rights the debtor has.

[43] The Act does not define what rights will be sufficient for the purpose of s 40(1)(b). Section 40(3) gives some guidance as to when a debtor's rights in goods arise in certain circumstances. It provides:

> 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.

None of those circumstances apply in the present case. As the authors of *Personal Property Securities in New Zealand* say, in cases outside s 40(3) it is necessary to look to property law concepts in order to determine what constitutes rights in collateral.

[44] I have already determined that the Council did not have a proprietary beneficial interest in the refuse fees. But even if it did, that would not have prevented ANZ's security interest attaching to the refuse fees, since Chequer Packaging had at least legal title to the refuse fee portions of the payments it received from the retailers. The debtor therefore had rights in the collateral for the purposes of s 40(1)(b), and ANZ's security interest attached to the money and receivables.

[45] The Council's argument that ANZ's security interest could only attach to legal title cannot be sustained. It is inconsistent with the approach taken by the Court of Appeal in *Waller v New Zealand Bloodstock Ltd* to the effect of s 40 (see s 40(3)). In that case Glenmorgan, had acquired rights in the collateral, a stallion, under a lease of more than one year. It therefore had rights in the stallion even though the lessor retained ownership of the stallion. Under s 17(1)(b) a lease for a term of more than one year is deemed to create a security interest. Glenmorgan had also granted a security interest to SH Lock in all of its present and future assets. Although the lease created a security interest in the lessor's favour for the purposes of the Act, the lessor had not registered a financing statement. Lock, the competing creditor, had. The Court of Appeal held that since Glenmorgan's leasehold interest constituted rights in collateral, Lock's security interest attached to the stallion. The Court did not limit the extent to which that security interest attached to the stallion. It held that with respect to priority of competing security interests under the Act the *nemo dat* principle, that no one can give that which he or she does not have, did not apply: [74].

[46] The interpretation argued for by the Council would defeat the Act's purposes, which are to provide a unitary concept of security focused on the substance of the transaction and to establish priority rules that depend primarily on time of registration, without regard to the form the transaction takes or to who holds title (as to the purpose of the Act see *Waller v New Zealand Bloodstock Ltd* at [13]).

## Conclusion

[47] In short, the Council does not have any proprietary interest in any proceeds of sale paid or yet to be paid to Chequer Packaging for refuse bags supplied prior to receivership. If it did have a proprietary interest on the basis it contends for, that would have constituted a security interest for the purposes of the Act and the perfected security interest of the Bank would have had priority over it at all material times. Accordingly the applicants are at liberty to proceed with the receivership on the basis that the respondent has no valid proprietary claim in respect of the proceeds of sale.

Winkelmann J