

**IN THE DISTRICT COURT
AT WHANGAREI**

PPN 1538718129

IN THE MATTER OF the Summary Proceedings Act 1957

BETWEEN GOUGH FINANCE LIMITED
 Claimant

AND PL ADAMS LIMITED
 Defendant

AND MINISTRY OF JUSTICE,
 COLLECTIONS UNIT
 Respondent

Hearing: 27 June 2008

Counsel: Mr M Arthur for the Claimant
 Ms J Pitman , Team Leader, Collections Unit, Whangarei

Judgment: 23 July 2008

JUDGMENT OF JUDGE D J McDONALD

Background

[1] On 13 November 2007, the Whangarei Collections Unit seized a 2001 ERF ECX truck (“the truck”), registration AMU587, the property of PL Adams Limited (“Adams”) pursuant to a warrant to seize property by unpaid fines dated 12 November 2007.

[2] PL Adams Limited had unpaid fines amounting to \$15,828.23.

[3] Following seizure of the truck, it has remained in the custody of Collections.

[4] Gough Finance Limited (“Gough”) seeks that the truck be delivered to it, as it claims it has a better entitlement to the vehicle than the District Court. It seeks costs on this application.

Chronology

31 January 2007	Gough loans \$615,150.00 to Adams secured, in part, over the truck
1 February 2007	Gough’s register statement under the Personal Property Securities Act
31 March 2007	Default on loan by Adams
5 September 2007 to 29 October 2007	Fines imposed on Adams
13 November 2007	Truck seized
15 November 2007	Collections advise Gough of seizure
29 April 2008	Gough informs Collections of secured party claim
17 June 2008	Summons issued to Gough
27 June 2008	Hearing

Statutory framework

[5] A warrant to seize any property of Adams for unpaid fines was issued by Mr M.R. Beehre, Registrar, on 12 November 2007 under s 87(1)(a) of the Summary Proceedings Act 1957 (“the Act”). The fines had not been paid within 28 days after the date on which they were imposed; s 80. No arrangement was entered into to pay over time, s 86, nor were any steps taken by the Registrar under s 88.

[6] The truck having been seized, it must be dealt with in accordance with s 94. Section 94(4) requires the bailiff to deliver forthwith to the defendant, Adams, or leave for the defendant in a conspicuous place at the premises from which the property was seized, a notice in the prescribed form listing all the property seized and directing that defendant to notify the registrar within seven days if some other person has an interest in the property seized.

[7] Section 94(5) directs:

... property seized under a warrant to seize property shall be delivered by the bailiff or constable to the Registrar ... until the fine is paid, or the property is sold, or a District Court Judge determines otherwise upon the hearing of a claim in respect of the property.

[8] The fine has not been paid. The property has not been sold. The registrar therefore could not release the truck to Gough without a determination of a District Court Judge.

[9] Section 94A states:

Personal property securities register to be checked

(1) If a motor vehicle is seized under a warrant to seize property, the Registrar must, on the day after the vehicle is seized, check whether a financing statement has been registered in respect of the vehicle on the personal property securities register kept under the Personal Property Securities Act 1999.

(2) If a financing statement has been registered, the Registrar must forthwith notify the person named as the secured party in the financing statement—

(a) that the Registrar may, under section 95, sell the vehicle after the expiration of 7 days from the date of seizure, if the fine remains unpaid and no claim has been made by a person other than the defendant in respect of the property:

(b) of that person's rights under sections 96 and 97.

[10] I accept that Ms Pitman, Team Leader Collections unit, Whangarei, checked whether a financing statement had been registered. On finding that one had, she telephoned Mr John Blu at Gough, he being the contact person named in the personal properties security register. It is unclear if she spoke to him that day, or to some other employee of Gough. She dealt with a number of Gough's personnel in relation to this claim, in the main with Mr Frayle. Ms Pitman says she advised Gough that the truck had been seized under warrant for unpaid fines. She submitted to me that Gough were made aware of its rights under ss 96 and 97; in particular the right to make a secured party claim within seven days. Ms Pitman advised me that at that time and until recently, all that the Collections unit in Whangarei did and, to her knowledge, all Collections do nation wide was to telephone a secured party.

[11] Mr Arthur submitted that something more than a telephone call from the registry was required under s 94A(2) to ensure that a secured party was made properly aware of why the property had been seized and what the secured party's legal rights were. While no prescribed form of notification was required by the Act, Regulation 3 of the Summary Proceedings Regulations 1958 allows the forms in the First Schedules, or forms of like effect, to be used when giving notification under the Act. He submitted a modification of Form 32 setting out the property seized, when it was seized, the amount of fines and other outstanding charges, as well as a brief description of the secured party's rights under ss 96 and 97 would meet what was required under s 94A(2).

[12] If such written notice had been given in this case then the "misunderstanding" that Gough, initially with their lawyers had, that the truck had been seized for outstanding road user charges, would have been avoided. I have read Mr Frayle's affidavit filed in support of Gough's claim. In it he details his dealings with Ms Pitman and how he gained the impression from her that the vehicle had been impounded for unpaid road user charges. His affidavit is somewhat at odds to Ms Pitman's written submissions and oral submissions to me.

[13] In my view, notification under s 94A can be made by telephone. The section does not require it to be done in writing. Having found that, it would in my view be prudent, at the very least, to confirm in writing by email or otherwise, that the secured party had been notified by way of telephone, that the registrar may sell the vehicle under s 95 at the expiration of seven days if the fine remained unpaid, and that a clear description of the secured party's rights under ss 96 and 97 were explained to them. That would leave no doubt as to when the telephone call was made and what was said in it. I would have thought that some standard form of email could be developed by Collections to ensure that what is required under s 94A is notified to the secured party.

[14] If that had been done in this case, then there would have been no confusion. It is not necessary for me to apportion any blame for how this confusion came about. Mr Arthur accepted that it was not deliberate on the part of Ms Pitman, nor would one expect that any member of this registry would deliberately misinform any

member of the public. In this case it has arisen because of the way Ms Pitman conveyed the information and the number of persons at Gough's she spoke to.

[15] If a secured party does not bring a claim within seven days from the date seizure, then the vehicle may be sold, s 95. The claim in this case was filed on 29 April 2008 by way of a letter from Gough's solicitors. This does not preclude Gough from bringing a claim. There is no requirement in s 95, 96 or 97 that the claim be filed within seven days. Section 97 allows for a claim to be made after the property is sold but before the proceeds of sale are fully applied or distributed. If Parliament had required a claim to be filed within seven days of seizure or seven days of notification then, in my view, the Summary Proceedings Act would contain a provision to that effect. It does not.

[16] The claim, having been made, the Registrar was therefore obliged to issue a summons calling the claimant before a District Court Judge, s 96(3).

[17] Section 96(4) then sets out how the Judge shall deal with the claim. It states:

On the hearing of the summons, the District Court Judge shall adjudicate upon the claim and shall make such order in respect of the claim and the costs of the proceedings as the Judge thinks fit.

[18] This is not an unfettered discretion. Sections 96 and 97 have been considered by the High Court in *Delta Transport (1995) Ltd v Bailiff of the Palmerston North District Court*¹ and *Otago Finance Ltd v District Court*².

[19] *Otago Finance Ltd* involved the seizure and sale of a Harley Davidson motor cycle. The issue before Panckhurst J was whether the proceeds of sale:

“... should be used to satisfy outstanding fines, or be first applied towards the satisfaction of a debt security ...” (para [1])

[20] At paragraph [37] His Honour said:

... it is apparent that [ss 96 address 97] envisage a District Court Judge adjudicating on the ownership claim, or the secured interest claim, and implementing it. It is implicit in the sections that the very function of the

¹ (HC Palmerston North, M 85/98, 7 March 2001, McGechan J)

² [2003] 1NZLR 336, Panckhurst J

Judge is to determine the intervener's claim in order to deal with the property (or its proceeds) as required by law. Where the intervener or claimant establishes that they are the true owner the Judge must recognise as much. Equally where the claim is based upon a security interest, it is likewise to be recognised and given effect to.

(emphasis added)

Further at paragraph [38]:

[38] Words which confer a broad discretion as to the form of the order to be made upon determination of the intervener's claim may not be utilised to overreach general property and security rights. To do that is to wrongly elevate a machinery power designed to enable implementation of the property/security finding over the clear substantive intent of the statutory scheme.

[21] In this case, the security interest was entered into and registered prior to the fines being imposed upon Adams. From Mr Frayle's affidavit Gough has a first rating security interest in the truck. Gough will not be able to recover the total debt from the sale of the truck. If the truck is sold at about its reserve of \$100,000.00 (and if all other secured collateral is sold) Gough will still be owed around \$400,000.00.

[22] Gough's secured interest takes priority over the payment of fines. It is abundantly apparent that there will be nothing left on sale of the truck to meet any of the fines.

[23] The question then arises as to who should sell the truck? I accept the submission made to me by Mr Arthur that Gough would be in a better position to "get the best price" for the truck. Ms Pitman does not challenge that.

[24] Given that position, I direct that the truck should be released to Gough on receipt by the Registrar of the appropriate documentation setting out that Gough's has exercised their rights under its security to seize the truck from Adams.

Storage

[25] As at 30 June 2008, \$3,943.13 had been incurred by Collections for storage of the truck. It is accruing from that date at \$15.00 per day.

[26] The Registrar argues that Gough should pay the cost of storage to the date on which the truck is returned to it. The bailiff legally executed a warrant to seize on the truck. All the parties, Adams and Gough, were notified of the seizure. The truck could only be returned to either Adams or to Gough if the fine was paid or a District Court Judge determined it should be. Until one of those prerequisites were met Collections had a statutory obligation to retain the property; s 94(4). The delay in bringing the matter to a hearing was caused by Gough's slow response in the filing of its claim. Until such time as a claim was notified there was no jurisdiction to issue a summons.

[27] Mr Arthur submitted that Collections could have discovered the existence of Gough's interest before seizing the truck. The financial statement was publicly available and that Gough would have provided any details on request as they were obliged to do (s 177 of the Personal Property Securities Act 1999). Had the Registrar made an inquiry they would have been told that there would be no monies available from the sale of the truck to meet fines and so that would have avoided the pointless seizure and consequent storage costs.

[28] He further submitted that there has been unfortunate confusion over the basis of the Court's seizure, compounded by the Court's failure to follow the statutory procedure required by s 94A as well as misleading comments and correspondence. This was not Gough's fault but had the effect of withholding Gough's asset from it and increasing the storage cost.

Costs

[29] Gough seeks costs against the District Court on this hearing. Mr Arthur drew an analogy with costs awarded in the District Court on civil actions and submitted that a cost of \$2,500.00 was reasonable. He advanced the same submissions as he did in relation to why Gough should not pay any of the storage costs. Further, that the Registrar accepted by way of memorandum dated 7 May 2008 that it had not properly advised Gough of its rights as required by s 94A(2). Mr Arthur further submitted that the Court "unlawfully" sought to get Gough to pay the fine when there was no statutory obligation on Gough to do so. He also referred to s21 of the

New Zealand Bill of Rights, which protects the citizens, such as Gough, against unreasonable seizure of property. He submitted that it was incumbent upon the Collections Unit to search the PPSR before seizing the vehicle. He submitted that costs follow the event.

[30] I consider that the Collections Unit did follow the correct procedure in seizing the truck. There is no obligation under the relevant provisions of the Summary Proceedings Act to search the Personal Properties Security Registrar prior to seizing a vehicle. Indeed, s 94A states that the registrar must on the day after the vehicle is seized check, not before. To impose an obligation on Collections to search prior, otherwise they may be liable to payment of storage and related charges together with costs is, in my view, not warranted.

[31] The Registrar did advise Gough forthwith but not in adequate terms, particularly in relation to Gough's rights under ss 96 and 97. Collections did rely on telephone advice which I have found is inherently dangerous. I have however some difficulty as to why Gough and initially their solicitors considered that the seizure was for unpaid road user charges. I could not find, nor could counsel, any statutory provision either under the Land Transport Act or the Summary Proceedings Act which allows for seizure of motor vehicles for non-payment of road user charges. I do not believe there is such a provision.

[32] Despite the confusion that then arose which, in my view, arose out of a desire by both Collections and Gough to try and find a way to resolve the issue and have the truck released to Gough was well meant.

[33] I do not consider that Collections ever attempted to unlawfully entice Gough to pay the fines. Section 21 of the New Zealand Bill of Rights is not applicable. This was not unreasonable seizure of property. It was seizure of the truck under the statutory provisions contained in the Summary Proceedings Act from the owner of the truck who owed outstanding fines.

[34] The usual provisions of costs that follow the event in my view have little place in the statutory regime contained in the Summary Proceedings Act for the collection of outstanding fines.

[35] At the end of the day, it comes down to a value judgement, balancing the interests of the Registrar in collecting unpaid fines against those of a secured party who has one of its secured assets seized because fines are not paid. There must be some commercial risk in lending to a trucking firm such as Adams and by securing the loan over trucks, that the firm may well incur commercial-type fines in use of their trucks.

[36] In my view, the interests of justice weighing those matters is that Collections should bear the cost of storage. For the same reasons I award no costs on this claim to Gough.

D J McDonald
District Court Judge

Solicitors: Chapman Tripp, Auckland, for Claimant