

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

**CIV-2014-404-2511
[2015] NZHC 242**

BETWEEN A J McKAY AND J J BOSLEY
 Applicants

AND C A JOHNSON
 First Respondent

 G M SMITH
 Second Respondent

Hearing: 23 February 2015

Counsel: R B Stewart QC for Applicants
 G Bogiatto and D Hayes for Respondents

Judgment: 23 February 2015

ORAL JUDGMENT OF FOGARTY J

Solicitors: Simpson Grierson, Auckland

[1] This is an application for directions by receivers. At the heart of the issue between the applicants and the respondents, who are also receivers, is a contest between Westpac, as the successor to Trust Bank, and the BNZ over priority of security interests over two companies, HB Garments and HAD Garments.

[2] The Westpac argument is that there was a general security agreement executed on 22 August 1995 whereby HB Garments granted Trust Bank at the time a general security over all of its assets. That was at that time a debenture deed. Over the lapse of time, Westpac is no longer able to find and produce that deed. The missing deed is the origin of the dispute ultimately between receivers acting in the interests of Westpac and the respondent receivers acting in the interests of the BNZ.

[3] The contest is sought to be resolved by Westpac on two bases, firstly, that although they cannot produce the original debenture deed, they can prove on the balance of probabilities that it was executed, starting particularly with the personal guarantees executed at the same time which refer to the deed. And, secondly, with the registration of the interest at the same time.

[4] I have read through that argument, collected in the applicant's synopsis of submissions. I have considered myself justified in assuming that the applicant's synopsis of submissions has reliably collected the relevant information which appears in the sworn affidavits, though I have not considered it necessary to go back to the affidavits. One of the reasons why I have felt confident in approaching it this way is that the respondents, although they do not consent to the orders, do not oppose. I am satisfied that there was the original deed in 1995 and that created a priority, certainly in favour of Westpac, the successor of Trust Bank, over HB Garments, particularly because of the evidence of the guarantee at the time, which refer to it and the subsequent registration,

[5] There is a separate security over HAD Garments in favour of Westpac but there is no challenge to that security by the respondents.

[6] Accordingly, for these reasons, I grant the orders sought in the notice of originating application dated 23 September 2014 in paras (a), (b), (c) and (d). As to (e), there will be an enquiry as between the applicants and the first and second respondents as to whether there is an obligation by them and/or BNZ to pay to the applicant receivers and/or Westpac funds recovered by them on the assumption that they had priority.

[7] In that regard, the parties have agreed a timetable. The timetable is included in the draft order for sealing and it is not necessary to set out the details in this oral judgment. Because of the view that I have taken, that the applicants have proved on the balance of probabilities the existence of the 1995 security, it is not necessary to address the alternative argument of the applicant which is based on s 41 of the Personal Property Securities Act and the decision of the Court of Appeal in *Healy Holmberg Trading Partnership v Grant*.¹

[8] I have not set out in this judgment the trail of interests between the original beneficiary of the 1995 trust deed which was Trust Bank and ultimate beneficiary, Westpac, and the application of a particular statute in Westpac's favour. I do not consider that necessary, there being no challenge, as I apprehend it, to the set of events by which the original interest of Trust Bank now vests in Westpac.

[9] So we are now left with two matters to be finalised before this litigation is settled. They are, as I have mentioned, the question of whether or not there is a need for the second respondents, on behalf of BNZ or BNZ direct, to refund or pay to the applicants' receivers and/or Westpac monies that they have recovered in mistake of law and fact, by reliance on the securities in their favour, and, second, there is the issue of costs. I am hopeful that both of those matters will be agreed by the parties. If not, I formally reserve both matters.

¹ *Healy Holmberg Trading Partnership v Grant* [2012] 3 NZLR 614.