KeyBank National Association v The Ship "Blaze"

High Court Auckland CIV 2006-404-2266
3 October 2006; 9 February 2007
Baragwanath J

Admiralty – Mortgage over ship – Yacht registered in foreign country – Yacht subject to mortgage registered in foreign country – Sale of yacht in New Zealand – Purchaser registering financing statement on register of personal securities – Whether purchaser or mortgagee having priority – Whether PPSA applying to vessel under 24 m in length – Personal Property Securities Act 1999, ss 23(e)(xi), 25(1), 26, 52 and 90 – Ship Registration Act 1992, s 70.

Commercial law – Personal property securities – Yacht registered in foreign country – Yacht subject to mortgage registered in foreign country – Sale of yacht in New Zealand – Purchaser registering financing statement on register of personal securities – Whether purchaser or mortgagee having priority – Whether PPSA applying to vessel under 24 m in length – Personal Property Securities Act 1999, ss 23(e)(xi), 25(1), 26, 52 and 90 – Ship Registration Act 1992, s 70.

Blaze, an ocean-going yacht under 24 m in length, was registered on the United States Coast Guard ship register. Mr Bishop (then the owner) registered a mortgage of *Blaze* to KeyBank National Association which, under United States federal law, took title rather than a mere charge over the vessel. In New Zealand, Mr Bishop sold the vessel to Mr Walters, who then sold it to his company. However, KeyBank arrested the vessel as Mr Bishop still owed money to KeyBank under the mortgage. Mr Walters then registered a financing statement on the Personal Property Securities Register and, two days later, KeyBank registered its own financing statement. Mr Walters argued that his claim had priority under the Personal Property Securities Act 1999 (the PPSA), which provided that a buyer took personal property free of a security interest unless the interest had been perfected by registration of a financing statement (s 52); that the Act applied to collateral situated in New Zealand (s 26); that the PPSA only excluded a transfer, assignment, mortgage or assignment of a mortgage (within the Ship Registration Act 1992) of a ship exceeding 24 m register length (s 23(e)(xi)); and that, if KeyBank had priority, such priority was lost because Mr Bishop transferred his interest in *Blaze* with KeyBank's knowledge or acquiescence (s 90). KeyBank argued that it had priority under s 70 of the Ship Registration Act, which provided that duly registered instruments creating securities and charges in respect of a ship registered under the law of a foreign country had the same effect and priority as a mortgage registered under the 1992 Act.

Held: 1 The PPSA did not apply to securities falling directly or (via s 70) indirectly within the Ship Registration Act and the mortgagee's security was protected by the 1992 Act in conformity with New Zealand's international obligations. The rights and duties under the PPSA were to be applied according to reasonable standards of commercial practice (s 25(1) of the PPSA); and, if possible, a meaning avoided that was in conflict with deep-seated principles of law or international norms, such as the protection conferred by the state of a ship's flag which, in principle, extended to property rights created under the law of the flag state. Mr Walters' construction would invalidate securities over a large number of ships under the Ship Registration Act and mean that owners and mortgagees of foreign-registered yachts under 24 m had to file financing statements under the PPSA on entering New Zealand waters. Section 23(e)(xi) of the PPSA went some way to excluding the maxim that a general Act did not override an earlier more specific Act, but it was inconceivable that Parliament intended these results without expressing itself specifically (see paras [63], [66], [68], [69], [72], [73], [80], [81], [82]).

Emmens v Pottle (1885) 16 QBD 354 referred to.

Progressive Meats Ltd v Ministry of Health (2006) 7 NZELC 98,487 referred to.

Sellers v Maritime Safety Inspector [1999] 2 NZLR 44 (CA) referred to.

The Ship "Betty Ott" v General Bills Ltd [1992] 1 NZLR 655 (CA) distinguished.

2 It followed that KeyBank's knowledge and acquiescence did not provide a defence under s 90 of the PPSA. However, this defence was arguable on the basis that equity followed the law. KeyBank was therefore not entitled to summary judgment (see paras [85], [86]).

Result: Applications for summary judgment dismissed.

Other cases mentioned in judgment

Air New Zealand Ltd v Director of Civil Aviation [2002] 3 NZLR 796.

Bankers Trust International Ltd v Todd Shipyards Corporation (The "Halcyon Isle") [1981] AC 221; [1980] 3 All ER 197 (PC).

"Betty Ott" (The Ship) v General Bills Ltd [1990] 3 NZLR 715 (HC).

Calvin's Case (1609) 7 Co Rep 1a; 77 ER 377.

Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] 3 WLR 689; [2006] 3 All ER 829 (PC).

Equilease Corporation v MV Samson 793 F 2d 598 (5th Cir 1986).

Hoffman-La Roche (F) Ltd v Empagran SA 542 US 155 (2004).

Khyentse v Hope [2005] 3 NZLR 501.

Kuwait Airways Corporation v Iraq Airways Corporation (No 4 and 5) [2002] 2 AC 883; [2002] 2 WLR 1353.

Liverpool Borough Bank v Turner (1860) 29 LJ Ch 827; 70 ER 73.

New Zealand Bloodstock Ltd v Waller [2006] 3 NZLR 629 (CA).

Piedmont & Georges Creek Coal Co v Seaboard Fisheries Co 254 US 1; 41 S Ct 1 (1920).

Ross Bindon Ltd v PB & CS Properties Ltd (in liq) (High Court, Auckland, CIV 2006-404-442, 14 December 2006, Baragwanath J).

Son v Ko (2006) 5 NZ ConvC 194,354; 7 NZCPR 649.

Applications

These were applications for summary judgment by KeyBank National Association, and Mr Barry Walters, intervener, in respect of their competing claims to priority in respect of the ship *Blaze*.

A Tetley and *J A Browne* for KeyBank.
P Barratt and *R J Hart* for Mr Walters.

Cur adv vult

BARAGWANATH J.

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Overview

[1] The primary issue on these competing claims for summary judgment is that of priority of the plaintiff's and the intervener's respective securities. It concerns the construction and interrelation of two New Zealand statutes – the Ship Registration Act 1992 (the SRA) and the Personal Property Securities Act 1999 (the PPSA) – in the context of a dispute about the priority of securities over an ocean-going yacht. While the language of the two statutes is capable of a range of meanings, a feature of the case is the presumption that New Zealand domestic law will conform with the international obligation of legislatures and Courts to contribute to a just and seamless system of private international law.

[2] The claims concern a 63-ft sloop, *Blaze*, which was designed and built in New Zealand. The plaintiff, KeyBank National Association, holds a secured mortgage over it registered on the United States Coast Guard ship register under Title 46 "Shipping" of the United States Code as number 907485, and KeyBank claims that such interest should receive priority under s 70 of the SRA. The intervener, Mr Walters, has registered a security interest over the vessel on the New Zealand register of personal property securities under the PPSA and he, too, seeks priority. The major question for consideration is which contention is correct.

[3] The vessel was formerly owned by a Mr Bishop who first, in the United States, borrowed money from KeyBank on the security of the United States-secured mortgage and later, in New Zealand, sold the vessel to Mr Walters, who on-sold it to a company, Barrington Charters Ltd, of which Mr Walters is the sole director.

[4] Mr Walters and Barrington registered financing statements under the PPSA, two days before KeyBank filed a financing statement of its own. Mr Walters says that his and Barrington's claims are given priority over the claims of KeyBank by s 52 of the PPSA and that s 70 of the SRA has no application; alternatively, s 70 subordinates KeyBank's claim to those of Mr Walters and Barrington.

[5] For the reasons that follow KeyBank's security is entitled to priority.

[6] There remains a further issue between KeyBank and Mr Walters, who pleads that KeyBank is estopped from claiming by acquiescence on the part of KeyBank. That requires evidence and further submissions.

[7] It follows that both KeyBank's and Mr Walter's claims against the other for summary judgment fail.

Factual setting

[8] *Blaze* was built in 1985 by Torr Holdings Ltd of Tauranga to an Alan Warwick design. It is less than 24 m in register length as that term is defined in the SRA and used in the PPSA. It was initially registered under the Shipping and Seamen Act 1952 on the New Zealand register number 875095.

[9] The United States Coast Guard's website contains a page on carving and marking registration numbers:

> "**How do I mark my vessel?**
> The official number assigned to documented vessels, preceded [by] the abbreviation 'NO', must be marked in block-type Arabic numerals at least three inches high on some clearly visible interior structural part of the hull. The number must be permanently affixed so that alteration, removal, or replacement would be obvious and cause some scarring or damage to the surrounding hull area." (http://www.uscg.mil/hg/g-m/vdoc/faq.htm#15)

The requirement appears to be one of practice rather than of law.

[10] On 4 October, Torr Holdings executed a bill of sale in favour of James L Bartlett III and that transaction was registered on the United States Coast Guard ship register. The vessel itself was registered under number 907485. Since neither New Zealand nor United States law permits dual registration, I infer that the original New Zealand registration was withdrawn.

[11] As is seen from the following photograph the United States Coast Guard ship register number for *Blaze* has been carved deeply and indelibly in large characters into a structural beam of the vessel. [Editorial note: The photograph is omitted from this report.]

[12] From the presence of an anchor and a packed sail-bag, I think it probable that the number lies under or close to the forward hatch so as to be readily visible on inspection.

[13] On 10 July 2000, the National Vessel Documentation Center registered the preferred mortgage from Mr Bishop as registered owner in favour of KeyBank, which, under United States Federal law, took title to the vessel rather than a mere charge over it as security for a loan to Mr Bishop made under a separate loan agreement.

[14] On 2 July 2002, *Blaze* arrived in New Zealand. Mr Bishop declared as owner that his purpose was for a temporary visit of up to 12 months.

[15] In January 2003, when Mr Bishop's payments to KeyBank were in arrears, KeyBank learned that the vessel was moored at the Westhaven marina in Auckland and was being offered for sale. KeyBank took no effective steps to follow up that information.

[16] In July 2003, Mr Bishop sold *Blaze* to Mr Walters on behalf of Tirohonga Trust Auckland.

[17] Over two years later, on 1 September 2005, Mr Bishop made his final repayment under the mortgage and soon afterwards filed in bankruptcy under Chapter 11 of the United States Federal Bankruptcy Code. On 10 February 2006, KeyBank was granted relief from the Chapter 11 stay to enforce its mortgage over *Blaze*. Counsel agree that for the purposes of the present case there is no issue as to the validity of the mortgage under United States law or as to the fact that the debt it secures remains due to KeyBank from Mr Bishop.

[18] On 28 April 2006, *Blaze* was arrested by the Registrar of this Court on the application of KeyBank.

[19] On 23 May 2006, Mr Walters and Barrington registered financing statements on the personal property securities register in respect of *Blaze*. KeyBank's financing statement was registered on the personal property securities register on 26 May 2006.

United States law

[20] The obligation of this Court is to give effect to the domestic law of New Zealand. That includes New Zealand's conflict of laws rules, which have been created and are still being developed for the purpose of dealing with transactions with an international dimension. The fact that this case concerns an issue of the conflict of laws between United States Federal law (ch 313 of 46 United States Code, "Commercial Instruments and Maritime Liens") and the PPSA provides an important backdrop to the true interpretation of both the PPSA and the SRA. While New Zealand law treats United States law as an issue of fact rather than of law, there is no dispute as to its nature.

[21] Barbara Locke, a partner with the law firm of Holland and Knight LLP of Miami, Florida, of some two decades' experience in all areas of maritime law, has been accepted by United States State and Federal Courts as an expert. She discloses that she is United States counsel for KeyBank, but has read and agrees to comply with the New Zealand High Court Code of Conduct for experts.

[22] She advises that the requirements for filing perfection and priority of maritime liens and preferred mortgages are stated in ch 313 of 46 United States Code. A mortgage or other instrument that is filed in substantial compliance with statutory requirements is presumed valid. Under para 31321(a)(ii):

> "Each bill of sale, conveyance, mortgage, assignment, or related instrument that is filed in substantial compliance with the section is valid against any person from the time it is filed . . ."

[23] To be filed the instrument must, under para (b):

(i) identify the vessel;
(ii) state the name and address of each party to the instrument;

(iii) state, if a mortgage, the amount of the direct or contingent obligations that are or may become secured by the mortgage excluding interest, expenses, and fees;
(iv) state the interest of the grantor, mortgagor, or assignor in the vessel;
(v) state the interest sold, conveyed, mortgaged, or assigned; and
(vi) be signed and acknowledged.

[24] Ms Locke records that these requirements were fully complied with and the KeyBank mortgage is therefore a valid preferred mortgage under United States law defined at para 31322.

[25] She further deposes that the mortgage was duly recorded with the United States Coast Guard National Vessel Documentation Center on 10 July 2000. She produced a copy of the official General Index for Abstract of Title which has the effect, under para 31343, of perfecting KeyBank's mortgage lien over the vessel as against third parties.

[26] She advises that the ship register maintained by the United States Coast Guard is a central federal register which holds ownership and mortgage details of all United States-registered vessels and which can readily be searched over the internet.

[27] Ms Locke deposes that at American common law maritime liens, including "mortgage liens" such as those at issue in these proceedings, attach to the vessel and unless extinguished through payment are valid even against good faith purchasers (*Piedmont & Georges Creek Coal Co v Seaboard Fisheries Co* 254 US 1 (1920); and *Equilease Corporation v MV Sampson* 793 F 2d 598 (5th Cir 1986)). She advises that United States Courts respect and recognise foreign ship mortgages which are considered "preferred mortgages" for enforcement purposes, save in relation to liens for necessaries arising in the United States. In all other respects both types of mortgages are accorded equal validity and priority.

[28] At para 31301 (Definitions), "Preferred Mortgage" is defined as including, in paras 31325 and 31326 of the title, a mortgage security on a *foreign* vessel if the security was executed under the laws of the foreign country under whose laws the ownership of the vessel is documented and has been registered under those laws in a public register. Ms Locke advises that it therefore follows that in a United States Court a foreign-registered ship mortgage would be treated as valid and give priority over a good faith innocent purchaser were the foreign vessel sold in the United States.

Ship Registration Act 1992

[29] KeyBank contends, and Mr Walters denies, that the enforceability of KeyBank's mortgage is governed by the provisions of the SRA and in particular s 70 (see para [45] below). Section 70 was a reaction to the Court of Appeal decision in *The Ship "Betty Ott" v General Bills Ltd* [1992] 1 NZLR 655, which counsel for KeyBank submit insufficiently recognised a foreign-registered mortgage.

Ship mortgages

[30] The history of ship mortgages dates back even at least to Roman times, when loans financing maritime commerce were made on the security of a ship and its cargo (Bowtle and McGuinness, *The Law of Ship Mortgages* (2001), para 1.3). Historically, a mortgage of a ship was created by the transfer of title in the ship to the mortgagee. This was achieved by the delivery of a bill of sale with the mortgagee having to register as the owner of the ship. Later, the

Merchant Shipping Act 1854 (UK) introduced a form of statutory mortgage which consisted of a statutory charge on the ship rather than a transfer of title (*The Law of Ship Mortgages*, para 1.9). The Shipping and Seamen Act 1952 and the SRA (s 48) follow this approach. The United States, it seems, still follows the traditional practice of transferring title in the mortgaged ship to the mortgagee.

History of ship registration

[31] The history of ship registration dates back almost 350 years to the Navigation Act 1660 (UK) (*The Law of Ship Mortgages*, para 2.8). The public policy considerations behind registration were stated by Wood VC in *Liverpool Borough Bank v Turner* (1860) 29 LJ Ch 827 at pp 830 – 831:

> "There are two points of public policy which may be suggested in these acts relating to shipping: the one policy regarding the interests of the national at large, relating to the question who should be entitled to the privileges of the British flag . . . the other policy being similar to that which gave rise to the acts of registration of titles of land – the object being to determine what should be a proper evidence of title in those who deal with the property in question."

[32] The Merchant Shipping Act 1894 (UK) introduced a detailed registration system for the United Kingdom, its dominions and colonies (*The Law of Ship Mortgages*, para 2.9). In New Zealand, the Merchant Shipping Act was replaced by the Shipping and Seamen Act 1952, which was in turn repealed and replaced by the Maritime Transport Act 1994 and (of matters of ship registration) by the SRA.

[33] The SRA divides the register into two parts: A and B. Registration in either part confers nationality on the ship registered. Mortgages can only be registered on vessels that are registered on Part A of a New Zealand Register of Ships (ss 34 and 39 of the SRA).

[34] A ship may only have one nationality and fly only one flag. Foreign-registered ships are not entitled to be registered on the New Zealand Register of Ships (s 9(1) of the SRA). In accordance with the United Nations Convention on the Law of the Sea (UNCLOS) (para [73] below) steps must be taken to close the registration on the foreign registry before a vessel can be registered on the New Zealand Register.[1]

[35] In general, registration under Part B is voluntary. Registration is compulsory for New Zealand-owned pleasure vessels or New Zealand-owned ships that do not exceed 24 m register length and which proceed on an overseas voyage (s 6(2) of the SRA). In such cases the vessels may be registered in Part B or Part A.

[36] For New Zealand-owned ships of registered length of 24 m or more registration in Part A is compulsory, save in the cases of: (a) pleasure vessels; (b) ships engaged solely in New Zealand inland waters; and (c) barges used solely for voyages on coastal waters (s 6(1) of the SRA).

[37] The Transport and Communication Select Committee paper "Submissions on the Ship [sic] Registration Bill" states at para 6.4:

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1 The international regime is similar to that in respect of aircraft considered in *Air New Zealand Ltd v Director of Civil Aviation* [2002] 3 NZLR 796.

> "6.4 The Bill draws a basic distinction between vessels 'exceeding 24 metres length', which, subject to certain exceptions, must be registered in Part A of the Register; and other ships. This distinction appears to be based on a seemingly identical distinction in the relevant English and Australian legislation. The small ships register established under the Merchant Shipping Act 1988 (UK) applies to 'ships of less than 24 metres in length'. The Shipping Registration Act 1981 (Cth) similarly exempts from registration ships of less than 24 metres in length. It should be noted, however, that these references to length in the English and Australia statutes are to 'tonnage length' rather than to 'register" or 'overall length'."

[38] The earliest reference found by counsel to "ships less than 24 metres (79 feet) in length" is in the International Convention on Tonnage Measurement of Ships 1969, by which the contracting governments sought:

> . . . to establish uniform principles and rules with respect to the determination of tonnage of ships engaged in international voyages . . .

Vessels less than 24 m in length and those solely navigating certain inland waters were expressly excluded.

[39] By s 8(a) of the SRA, registration in Part A is voluntary for: (a) New Zealand-owned ships that are pleasure vessels; (b) ships on demise charter to New Zealand-based operators (other than pleasure vessels and New Zealand-owned ships); (c) New Zealand-owned ships not exceeding 24 m register length; (d) New Zealand-owned ships that are engaged solely on inland waters in New Zealand; and (e) New Zealand-owned ships that are barges and do not proceed on voyages beyond coastal waters.

[40] In summary:

Part A	**<24 m-register length**	**>24 m-register length**
Required to be registered	New Zealand-owned ships (including pleasure vessels) of any size which proceed on an overseas voyage. Can be registered in Part B, rather than Part A, at owner's option.	All New Zealand-owned ships except pleasure vessels, ships engaged solely on New Zealand inland waters, barges used solely for voyages on coastal waters.
Permitted to be registered	New Zealand-owned ships and other ships on demise charters to New Zealand-based operators.	Pleasure vessels, ships engaged solely on New Zealand inland waters, barges used solely for voyages on coastal waters.

[41] Parliament, following the lead in other spheres, appears to have adopted a pragmatic distinction between what might be crudely termed "real ships and others". Hence the exclusion of some exceeding 24 m: large pleasure vessels; those navigating on inland waters; and coastal barges. As will be seen, similar formulation has been carried into the PPSA.

The Betty Ott

[42] The legal effect of validly registered mortgages on foreign flagged ships was considered in *The Betty Ott*. That case was decided in the context of the Shipping and Seamen Act 1952. It involved two competing security interests in an Australian-registered vessel. The first interest was an Australian-registered

ship's mortgage and the competing interest was a New Zealand-registered debenture. The High Court held that the registered mortgage took priority to the earlier debenture ([1990] 3 NZLR 715). The debenture holder's appeal succeeded.

[43] The judgment of the Court of Appeal was delivered by McKay J. Following the opinion of the majority in *Bankers Trust International Ltd v Todd Shipyards Corporation (The Halcyon Isle)* [1981] AC 221 (PC), the Court of Appeal held that priority of the competing interests was governed by New Zealand domestic law as the lex fori and that the Australian-registered mortgage was to be treated under New Zealand law as an unregistered mortgage, as it had not been entered in the New Zealand register. Accordingly, the later New Zealand debenture took priority over the earlier Australian-registered mortgage (treated as unregistered and hence equitable).

[44] The decision in *The Betty Ott* received universal criticism. The leading maritime law text, D C Jackson, *The Enforcement of Maritime Claims* (4th ed, 2005), para 23.89, states:

> "23.89 In 1992 in *The Betty Ott* the New Zealand Court of Appeal reached the startling and narrow conclusion on provisions similar to those of English law that foreign registration was irrelevant to priority under New Zealand law. As apart from the registration the interest was an equitable charge it was subject to an earlier unregistered charge. The conclusion followed from a simple but blunt application of the law of the forum but, as pointed out in a strong critique of the decision, its consequences for ship financing are extreme. Such an approach means either that registration operates to preserve and govern priority only in respect of the state of registration so, if permitted, a mortgagee must register whenever possible. *The Betty Ott* in effect applied provisions of forum law clearly geared to ships connected with the forum so as to have a contrary effect on ships not so connected. The approach looks at the language of the state without considering its scope, its purpose or its maritime context. Its effect in New Zealand has been corrected by legislation and its principle should not be followed."

[45] Associate Professor Paul Myburgh wrote a strong criticism: "Recognition and Priority of Foreign Ship Mortgages: *The Betty Ott*" [1992] LMCLQ 155. At p 159:

> "The decision in *The Betty Ott* has the astounding consequence that nothing short of registration under the lex fori will do. On this approach, no foreign-registered mortgage can ever be recognised as a legal charge by the forum, even if the procedures and legal consequences of the relevant foreign registration scheme coincide exactly with those of the lex fori."

And at pp 160 – 161:

> "The Court of Appeal's decision has far-reaching implications for ship financing and may give rise to serious inequities. The decision deprives holders of registered ship mortgages of adequate security in all jurisdictions save that in which the ship is registered. It may discourage such mortgagees from instituting an action in rem where there are competing equitable and legal charges, as in *The Betty Ott*, and where the vessel has been kept out of its jurisdiction of registration. It will certainly encourage holders of prior equitable interests to circumvent domestic rules

of priority and improve their claims' status, by the simple expedient of ensuring that their actions in rem are instituted in a foreign jurisdiction. In sum, the decision will promote forum shopping, exaggerate the current divergences in ranking of ship mortgages, undermine the policy considerations supporting registration of securities, and render fundamentally uncertain the security afforded by registered ship mortgages."

The Law of Ship Mortgages says the following, para 7.88:

> 7.88 If the ship in a British ship not registered in Part I or Part II (full registration) of the Register, then the first mortgage created will probably be a legal mortgage and rank in priority to all subsequent mortgages which will be equitable mortgages and rank in order of the date of creation. An unregistered mortgage on a ship registered in Part I or Part II (full registration) of the Register will rank after a registered mortgage irrespective of its date of creation. If the ship is not a British ship, the court will apply the law of the country of registration of the ship (the lex situs) to decide on the validity of the mortgage and will also apply the lex situs rather than its own law (the lex fori) to decide issues of priority among competing mortgages (this being a particular application of the rule that such mortgages are subject to the law of the jurisdiction of registration). This approach differs markedly from the approach taken with respect to competing interests other than mortgages, where an English court will apply the lex fori to determine questions of priority.
>
> The court will accord the same legal status to a mortgage on a foreign registered ship as it would if the mortgage had been registered on a ship under the Merchant Shipping Act 1995. It is doubtful that the Admiralty Court would follow the decision of the New Zealand Court of Appeal in *The Ship Betty Ott v General Bills Ltd*,[222] where it was held that a mortgage registered on a ship registered under the Australian Shipping Registration Act 1981 did not constitute a legal mortgage for the purposes of priorities because it was not, and indeed could not have been, registered under the New Zealand Shipping and Seamen Act 1952 and therefore the registered mortgage only ranked as an equitable mortgage.

[46] The consensus opinion, in short, is that the Court of Appeal erred in applying simply domestic law criteria and failing to apply the law of the state of registration as the operative (New Zealand) conflict of laws norm.

Section 70

[47] Parliament shared that opinion. Its response to *The Betty Ott* was s 70 of the SRA. Its purpose was to ensure that a foreign-registered mortgage is treated the same as a New Zealand-registered mortgage. The legislative history of the section is set out by Professor Myburgh in "The New Zealand Ship Registration Act 1992" [1993] LMCLQ 444, pp 449 – 450.

[48] Section 70 reads:

> **70. Priority of securities or charges in respect of foreign ships –** Where a question arises in New Zealand as to the priority of instruments creating securities or charges in respect of a ship registered under the law of a foreign country, instruments creating securities or charges in respect of the ship and duly registered in respect of the ship under that law shall –

(a) Have the same effect as a mortgage registered in respect of a ship under this Act; and
(b) Be accorded the priority that they would have been accorded if they had been registered under this Act.

[49] Counsel for Mr Walters submit that s 70 has no application. They argue that, in point of New Zealand domestic law, Mr Walters and Barrington became the owners of the vessel, their registration under the PPSA on 23 May 2006 perfecting their interest and shutting out the claim by KeyBank based on its United States title. They rely on *New Zealand Bloodstock Ltd v Waller* [2006] 3 NZLR 629 (CA), which decided that registration under the PPSA constitutes a new root of title. They submit that s 70 is irrelevant: it applies only:

> Where a question arises in New Zealand as to the priority of instruments creating securities or charges in respect of a ship registered under the law of a foreign country . . .

whereas here Mr Walters and Barrington each became the owner of *Blaze* under separate sale and purchase transactions and were bona fide purchasers for value. There is no competition between different securities. The only issue is whether the successive purchasers took the vessel subject to KeyBank's mortgage, and the answer to that question is No, because of the effect of s 52 of the SRA.

[50] I do not accept that submission. Section 33 of the Interpretation Act 1999 provides:

> **33. Numbers –** Words in the singular include the plural and words in the plural include the singular.

[51] In terms of s 70, we are here concerned with a question in New Zealand as to the priority of KeyBank's instrument creating a security or charge in respect of *Blaze* registered under the law of United States. That instrument, being duly registered, is to have the same effect as a mortgage registered in respect of a ship under the SRA and be accorded the priority it would have received had it been registered under that Act.

[52] The suggestion that the section is dealing only with disputes between two foreign securities does not reflect the facts of *The Betty Ott*, where a New Zealand mortgage was one of the competing securities; there is no principled reason to attribute such intention to Parliament.

[53] I do agree with the submission for Mr Walters that s 70 does not determine the question of ownership of the ship, which is a matter for the Court exercising its Admiralty jurisdiction, the principles of the common law and, I would add, the application of the PPSA if relevant.

[54] Counsel for KeyBank submit that, conceptually, the dispute between a person claiming an ownership or mortgagee's interest in a chattel (KeyBank) and a transferee (Mr Walters) is a priority dispute. They cite Professor Sir Roy Goode, *Commercial Law* (3rd ed, 2004) LexisNexis, pp 56 – 57:

> ". . . validity, like invalidity, is a relative concept. The question is . . . one of priority as between transferee and third parties."

[55] They submit that, there being no challenge to the validity of KeyBank's security, if it is entitled to priority to Mr Walters and Barrington's claims under the PPSA this Court may make a declaration to that effect.

[56] The effect of s 70 in relation to foreign mortgages and charges is to overrule the formulation in *The Betty Ott* of the common law rule. Such securities are no longer to be ignored but are to be viewed as of no less quality than a New Zealand equivalent. While mortgages registered in New Zealand do not have a legal effect of transferring ownership from the mortgagor to the mortgagee (s 47 of the SRA), it simply does not follow that the mortgagee's interest, which is by way of charge, is for that reason subordinated to a claim to title said to be later in time. Subject to the effect of the PPSA, the position is rather that whatever follows the mortgage is subject to it.[2]

The PPSA

[57] The principal remaining question is the construction and effect of the PPSA.

[58] Section 52 of the PPSA provides that the buyer of personal property, subject to a security interest, takes it free of that interest unless it has been perfected by registration of a financing statement. So it is contended by counsel for Mr Walters that, in the absence of any such registration prior to his, KeyBank's prior claims are superseded.

[59] They point to s 23, which excludes from the scope of the PPSA:

> (e) an interest created or provided for by any of the following transactions:
>
> . . .
>
> (xi) a transfer, assignment, mortgage, or assignment of a mortgage of a ship (within the meaning of the Ship Registration Act 1992) that exceeds 24 metres register length (within the meaning of that Act) . . .

[60] Such wording echoes the language of the SRA (paras [36] and following above) and was present in the Bill as introduced. It may be compared with the section proposed by the Law Commission (NZLC R8, "A Personal Property Securities Act for New Zealand"). The proposed cl 4(5) did not limit the exclusion of ship transactions to the case of vessels over 24 m:

> (5) For the purposes of this Act the expression "security interest" does not include:
>
> . . .
>
> (b) any interest created or provided for by any of the following transactions:
>
> . . .
>
> (viii) a transfer or assignment or mortgage or assignment of a mortgage of any ship or vessel or any share of any ship or vessel if at the time of the execution the ship or vessel is registered or required to be registered under the provisions of part B XII of the Shipping and Seamen Act 1952.

[61] Parliament has, to a certain extent, provided as to the conflict of laws (s 26 of the PPSA):

> **26. When New Zealand law applies –** (1) Except as otherwise provided in this Act, the validity, perfection, and the effect of perfection or non-perfection of a security interest in goods or a possessory security

2 Compare *Son v Ko* (2006) 5 NZ ConvC 194,354.

interest in chattel paper, an investment security, money, a negotiable document of title, or a negotiable instrument, is governed by the law of New Zealand if –

(a) At the time the security interest attaches to the collateral, the collateral is situated in New Zealand . . .

[62] So it is argued for Mr Walters:

(1) The exclusion of vessels exceeding 24-m in register length imports the inclusion of vessels of lesser length, such as *Blaze*. Accordingly the failure by KeyBank to register *Blaze* means that Mr Walters' title to the vessel has been perfected. In lawyers' language the argument is the familiar "expressio unius est exclusio alterius": the non-application of the PPSA to ships exceeding 24-m in register length means that all others are included.

(2) Since *Blaze* was in New Zealand at the time of perfection of his security, the case falls within the plain language of s 26.

[63] There is obvious verbal force in the argument. But s 5 of the Interpretation Act 1999 directs that the meaning of an enactment must be ascertained from its text and in the light of its purpose. It is necessary to reflect on both the text of the Act and its purpose.

[64] The specific exclusion is in relation to large vessels – what I have termed "real ships". The purpose of the specific exclusion in relation to all vessels over 24 m is plainly to prevent any application to them of the PPSA. It may well have been thought unreal to characterise such vessels as within the paradigm of chattel that falls within the PPSA. The PPSA does not state expressly that the SRA is excluded for security purposes in the case of vessels under 24 m. Given the continued existence of the SRA unamended that is by no means a necessary inference. An alternative construction is to treat the suggested implied inclusion as a default provision: to deal with the case of vessels not registered under the SRA. Such construction would import the presumed or implied continued application of the SRA to securities given to *registered* vessels under 24 m; so that such securities registered actually or notionally (via s 70) under the SRA are also excluded from the operation of the SRA. Such construction is inelegant. But its deficiencies are trivial when compared with the alternative.

The practical consequences

[65] The submission for Mr Walters, while available on a narrowly literal construction of the PPSA, would effect a virtual implied repeal of the SRA for security purposes in relation to vessels under 24 m, which Parliament has elected not to make expressly. The practical effect of such a result is recounted in the affidavit of the Registrar of Ships, who deposes that as at 9 August 2006 there were 1806 vessels registered in Part A. Of those, 1604 (89 per cent) were 24 m or less in register length; 1261 (70 per cent) were pleasure vessels and 343 commercial; and 348 (19 per cent of the 1806) were subject to registered mortgages.

[66] In *Emmens v Pottle* (1885) 16 QBD 354 at pp 357 – 358 Lord Esher expressed the opinion:

> ". . . any proposition the result of which would be to shew that the Common Law of England is wholly unreasonable and unjust, cannot be part of the Common Law of England."

The same is to be said of the common law of New Zealand. While Lord Esher expressly excluded statutes from his dictum, the law of construction of statutes is part of the common law. The Courts will not lightly impute to Parliament the purpose of bringing about an unreasonable result.

[67] The construction of the PPSA, including whether and when it is to apply, may indeed be informed by its own s 25(1):

> **25. Rights or duties that apply to be exercised in good faith and in accordance with reasonable standards of commercial practice –** (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.

[68] A construction that would invalidate the securities over nearly 20 per cent of the New Zealand register entries is difficult to reconcile with "reasonable standards of commercial practice" and, if there is a reasonable alternative, is not to be inferred lightly.

[69] The principles of construction of legislation where there is argument as to what inferences should be drawn have been discussed by Professor Burrows QC in his text *Statute Law in New Zealand* (3rd ed), pp 207 – 208 and 212 – 213, cited extensively in *Progressive Meats Ltd v Ministry of Health* (2006) 7 NZELC 98,487. That judgment concluded at para [28]:

> "**[28]** I accept that the judicial task includes responsibility to avoid if reasonably possible either absurdity or conflict with deep-seated policies of the law . . . very clear language is required if they are to be dislodged."

[70] The unlikelihood of a parliamentary policy of invalidating existing securities is a strong pointer in favour of the implication for which KeyBank contends. That result is put beyond doubt by the next consideration which I regard as conclusive.

International norms

[71] The Court is very reluctant to accept a construction that would infringe New Zealand's international obligations. In *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44 at pp 46 – 47 the Court of Appeal referred to:

> ". . . the principle of the freedom of the high seas. That freedom, including the freedom of navigation, is one of the longest and best-established principles of international law. An essential feature of the freedom is that the state of nationality of a ship (the flag state) has exclusive jurisdiction over the ship when it is on the high seas. That proposition, to be found in art 92 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) to which New Zealand is party and which in this respect is considered to be declaratory of customary international law, is subject only to 'exceptional cases expressly provided for in international treaties' (1982 Int Leg Mat 1261) . . . [As recognised] in art 87(2) . . . the freedoms of the high seas are to be exercised by all states with due regard for the interests of other states in their exercise of the freedoms."

[72] The protection conferred by the state of the ship's flag is a potent reason for registering a vessel. It is the very symbol of the state and is entitled to commensurate respect from other states.[3]

[73] That protection must in principle extend to property rights created under the law of the flag state. The principle of comity which underlies both UNCLOS and much else of public international law should apply no less to the development of private international law and extend to securities of the kind to which KeyBank is entitled. They are nothing less than items of property created by the laws of such states and in the context of the conflict of laws the ship's flag is a very potent connecting factor for determining what legal system should govern competing rights. That is the principle underlying the law stated at para 7.88 of *The Law of Ship Mortgages* (see para [45] above).

[74] Since the evidence of the flag state of *Blaze* was carved so unambiguously into its hull and no steps were taken to remove the vessel from the register of that state, there are powerful practical reasons for applying its law to the present issue.

[75] Here there are no public policy factors, as in *Kuwait Airways Corporation v Iraq Airways Corporation (No 4 and 5)* [2002] 2 AC 883, which might justify Mr Walters in seeking under New Zealand law to defeat KeyBank's property rights under United States law. On the contrary, the broad principle of avoiding interference with the authority of other legislatures, discussed in *F Hoffman-La Roche Ltd v Empagran SA* 542 US 155 (2004), tells in favour of KeyBank.

[76] While the principles of international shipping law are relatively well developed, the process of developing a just and seamless system of private international law is still under way. It is imperative that it continue in a principled manner. In *Khyentse v Hope* [2005] 3 NZLR 501 at paras [31] – [33] it was stated in another context:

> "**[31]** There is no existing principle of New Zealand domestic conflict of laws that is readily applicable to the present case which, concerning a tiny expanse of a massive canvas, must be dealt with in a manner compatible with the resolution of the major themes by others elsewhere. Guidance must be sought elsewhere.
>
> **[32]** The first step to resolving the apparent dilemma is . . . the need for domestic Courts to construe their own law as conformable with what is becoming a truly international system of conflict of laws principles.
>
> **[33]** Joseph Story employed the term 'jus gentium'. Its translation as general principles of private international law, not limited to English conflicts principles, has been employed by the House of Lords in two cases reported last year. Perhaps the best example in recent times of a search for an approach that will stand up better internationally than a narrow domestic rule has been the widespread adoption of the Scottish practice of considering convenience of forum: even if our Court does have

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3 It is equivalent to the citizen's right to state protection in constitutional law recognised by Coke CJ in *Calvin's Case* (1609) 7 Co Rep 1a. It was the reason for Busby's offer to Maori of a range of flags and their selection of the new Confederation flag. On 20 March 1834 it was accorded the 21-gun British naval salute due to a sovereign people following their recognition by three Imperial statutes: 57 Geo III, c 53; 4 Geo IV, c 96 sec 3; and 9 Geo IV, c 83, sec 4. They are cited in Sir Edgar Williams, *James Stephen and British Intervention in New Zealand 1838-40* (1941) XII (I) *Journal of Modern History* 19, p 22.

jurisdiction, should it refrain from exercising it? That allows a Court to take a broad and just view of how on the particular facts justice will best be achieved." (Footnotes omitted.)

[77] Since then, in the context of insolvency, the Privy Council in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] 3 WLR 689 at paras 16 – 19 has contributed to the development of international principles of private international law:

> "**16** The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove . . .
>
> **17** . . . [u]niversality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view.
>
> **18** As Professor Fletcher points out (*Insolvency in Private International Law*, 1st ed (1999), p 93) the common law on cross-border insolvency has for some time been 'in a state of arrested development' . . .
>
> **19** The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out."

The Privy Council identified and applied at para 20 an "underlying principle of universality".

[78] To like effect are the arguments of Professor Campbell McLachlan in *International Litigation and the Reworking of the Conflict of Laws* (2006) 120 LQR 580. He cites with approval a passage in the Court of Appeal's judgment in *Kuwait Airways* at p 973, endorsing:

> ". . . the constant theme of the role of universal, or at least generally accepted, principles of both private and public international law."

[79] Similarly, in a perceptive essay "The Politics Of Law-Making: Are the Method and Character of Non-Creation Changing?" in Michael Byers (ed), *The Role of Law in International Politics* (2001), Professor Vaughan Lowe, Chichele Professor of International Law at Oxford University, addresses the sources of public international law and the methods of law creation. He argues at pp 224 – 226:

> "The techniques and principles of public international law are being borrowed most obviously and applied . . . in the internal legal orders of States. It is evident . . . in cases where national courts, even though under no national or international *obligation* to do so, construe States powers in the light of human rights law . . . International law is beginning a progress of migration into areas of 'private life' . . ."

[80] New Zealand is a mecca for visiting yachts, many of them under 24 m. Many, if not most, will sail under the flag of the state of their foreign registration and be subject actually or potentially to securities created under the law of that state. On the construction of the PPSA supported by KeyBank such securities are protected by s 70 and New Zealand is acting in conformity with its international obligations. On the argument for Mr Walters the opposite is the case. It would be bizarre if each of the owners and mortgagees of

foreign-registered vessels under 24 m in the fleet accompanying the America's Cup event in the Hauraki Gulf ought, to protect their position, to have filed a New Zealand PPSA financing statement immediately the vessel entered New Zealand waters. If such an approach were taken in other PPSA states such as Canada and the United States the result would be chaotic. Such a construction would be at odds with current initiatives to invite the United Nations Commission on International Trade Law to propose use of the PPSA concept internationally as a means to facilitate commerce.

[81] The Latin maxim "expressio unius" is here opposed by another – "generalia specialibus non derogant": statutes expressed in general language do not override earlier statutes dealing more specifically with the topic. While the allusion to the SRA in s 23(e)(xi) of the PPSA goes a short distance to exclude the latter maxim, I am quite satisfied that the SRA must be treated as remaining fully in force in relation to *registered* vessels under 24 m. It is in my view inconceivable that Parliament would have courted the consequences just described without expressing itself quite specifically.

[82] These reasons of policy satisfy me that the PPSA can have no application to securities that fall directly or (via s 70) indirectly within the SRA. Since KeyBank's security is protected by the PPSA, it succeeds on the first issue.

The second issue: acquiescence

[83] It was argued for Mr Walters that the case falls within s 90: that KeyBank had such knowledge of the prospect of a transfer of Mr Bishop's interest to a purchaser that its interest should be subordinated under the section to that of Mr Walters. Alternatively, KeyBank has acquiesced in such transfer and should lose its rights under principles of equity informed by the equity of of s 90.

[84] It is clear, as Mr Walters pleads, that in January 2003, when KeyBank's loan was in arrears, KeyBank was aware that *Blaze* was moored at Westhaven and being offered for sale. The steps taken by KeyBank were limited to desultory inquiry; it did not follow up the information and seek to enforce its rights against the vessel.

[85] My conclusion that the PPSA has no application carries with it the result that s 90 can have no direct application.

[86] But there remains the question of the formulation and application of the principles on which equity withholds relief, which were not debated fully in argument. I am not satisfied that it is not arguable that equity may follow the law and have regard to KeyBank's conduct in deciding whether and if so on what terms to grant what, at least in the eye of New Zealand domestic law, is discretionary relief to enforce a charge rather than simple declaration of entitlement to a chattel. The conduct of Mr Walters and his advisers in failing to explore the obvious significance of the United States number carved into the woodwork and the absence of any internet searches may also be relevant. It is possible that, as in *Ross Bindon Ltd v PB & CS Properties Ltd (in liq)* (High Court, Auckland, CIV 2006-404-442, 14 December 2006, Baragwanath J), there may be need for an examination of competing equities.

[87] It is quite possible in the light of the present judgment that Mr Walters will elect to pursue the pending proceeding against the broker who represented him on his purchase. It may indeed be that consolidation of the proceedings will require consideration.

Decision

[88] I accept KeyBank's argument as to the construction and application of the SRA and the PPSA. The applications by both parties for summary judgment are dismissed. The hearing is adjourned for consideration of Mr Walter's defence of acquiescence and the issue whether competing equities should be examined.

Directions

[89] I direct that the parties within 14 days file a joint memorandum or, if they cannot agree, separate memoranda as to what further directions should now be given.

[90] Costs are reserved and may be the subject of memoranda filed within the same period.

Applications for summary judgment dismissed.

Solicitors for KeyBank: *Wilson Harle* (Auckland).
Solicitors for Mr Walters: *Jones Fee* (Auckland).

Reported by: Stewart Benson, *Barrister*