Stiassny v North Shore City Council

High Court Auckland CIV 2007-404-2047
13 September; 29 November 2007
Harrison J

Contract – Agency – Whether relationship of principal and agent existed.

Commercial law – Personal property securities – Whether beneficial interest in trust fund incompatible with security interest – When beneficial interest in trust fund might be security interest – Observation – Personal Property Securities Act 1999, ss 17, 36 and 40(1)(a).

North Shore City Council operated a user-pays weekly refuse collection. The Council called for tenders to manufacture and supply official council refuse bags and to distribute the bags to retail outlets. The Council accepted a tender from Chequer Packaging Ltd (CPL). At the time that CPL's tender was accepted, CPL was a party to a general security deed executed with ANZ Bank Group (NZ) Ltd. The retail price of the bags included fees charged by the Council for collection and disposal. Under the contract between the Council and CPL, CPL sold the bags to retailers for the retail price plus a distribution and merchandising margin and the Council invoiced CPL for the fees. CPL performed its contractual obligations until ANZ National Bank appointed receivers, including Mr Stiassny.

The receivers applied to the High Court for directions as to whether the Council had a proprietary interest in the fees part of the proceeds of the sale of the bags sold by CPL to retailers for use by the public. Two issues arose for the Court to determine. First, whether the Council and CPL were in the relationship of principal and agent whereby the latter assumed a duty to the former to account for the fees that it received and held; and secondly, if so, whether the Council's interest in the fees constituted a security interest for the purposes of the Personal Property Securities Act 1999 (the PPSA).

Held: Typical features of an agency were the existence of contractual obligations to perform duties of an essentially fiduciary nature, such as to use due diligence on behalf of and for the benefit of another and to act with loyalty, confidence and fidelity. The existence of a duty to hold funds in a separate account and not to mix receipts and use money in a general or running account was another important characteristic of a fiduciary relationship. Where there was no obligation to hold the funds separately the relationship was of a creditor and debtor, not trustee, although such a presumption could be displaced by consideration of all the surrounding circumstances. The Council had assigned its right or interest in the fees to CPL, for which it received monthly payment on invoice. CPL was not acting on the Council's behalf when it collected the fees from retailers but for its own benefit as principal. There was no room in

this framework for a relationship of principal and agent between the Council and CPL (see paras [28], [29], [32], [38], [39], [40], [43]).

Westpac Banking Corporation v Savin [1985] 2 NZLR 41 (CA) distinguished.

Result: Directions given.

Observation: The existence of a beneficial interest in funds does not prevent that interest from being a security interest as defined in the PPSA. Whether a security interest under the PPSA exists depends upon whether a trust interest is in substance a security interest, securing payment or performance of an obligation, which depends upon the purpose of the transaction, the role and relationship of the parties, the practical and commercial reality and the parties' intentions. A security interest acquired without notice of a prior equitable interest should take priority (see paras [52], [57], [58]).

Re Skybridge Holidays Inc (1999) 11 CBR (4th) 130 considered.

Graff v Bitz (1991) 10 CBR (3d) 126 considered.

Other cases mentioned in judgment

Ararimu Holdings Ltd, Re [1989] 3 NZLR 487.

Garnac Grain Co Inc v H M F Faure & Fairclough Ltd [1968] AC 1130n; [1967] 2 All ER 353.

Henry v Hammond [1913] 2 KB 515.

King v Hutton [1900] 2 QB 504 (CA).

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

R v Portus, ex p Federated Clerks Union of Australia (1949) 79 CLR 428; 23 ALJR 621.

Application

This was an application by Michael Peter Stiassny and Brendon James Gibson as receivers of Chequer Packaging Ltd (in receivership) (CPL), appointed by ANZ Banking Group Ltd, for directions as to whether the North Shore City Council, the respondent, had a proprietary interest in part of the proceeds of sale of its official refuse bags, sold by CPL to retailers for use by the public.

B Stewart QC and *L O'Gorman* for the receivers.

C Carruthers QC and *A Holmes* for the Council.

Cur adv vult

HARRISON J. [1] The receivers of Chequer Packaging Ltd (CPL) have applied for directions arising from a dispute with the North Shore City Council (NSCC or the Council). The primary question is whether the Council has a proprietary interest in part of the proceeds of sale of official NSCC refuse bags sold by CPL to retailers for use by the general public. The material part represents the Council's collection and disposal fees, which is the user charge component of the bag price (the fees), totalling about $1.35m.

[2] This question raises two issues for determination. First, were NSCC and CPL in the relationship of principal and agent whereby the latter assumed a duty to the former to account for fees which it received and held? Secondly, if so, does NSCC's interest in the fees constitute a security interest for the purposes of the Personal Property Securities Act 1999 (the PPSA)? If it is a security interest, ANZ National Bank's registered interest takes priority.

Background

[3] The relevant background circumstances are not in dispute.

[4] NSCC operates a user-pays weekly refuse collection in North Shore City. Originally residents had a choice of purchasing official refuse bags or using their own bags on which an official sticker was placed. CPL, a plastics extruder and manufacturer in Auckland and Christchurch, supplied the bags under contract to the Council. NSCC then sold the bags to another contractor for delivery and merchandising at retail outlets throughout the North Shore and in Auckland. Refuse stickers or coupons were also available from the same source and could be placed on any rubbish bag.

[5] The prepaid NSCC refuse bag was a 50-litre plastic container bearing a large NSCC logo. The container acted as both a ticket for the service and as a bag, and was an automatic guarantee of collection. The retail price for an NSCC refuse bag was and still remains more than that of a generic bag – about the same price as a NSCC refuse coupon and bag combined.

[6] The Council decided to change this arrangement in early 2006. Its plan was to engage a dedicated supplier to perform both roles – to manufacture and supply the refuse bags for the Council and to distribute them to retail outlets. NSCC called for tenders in accordance with its conditions and specifications including a specimen agreement for the supply and distribution of refuse bags.

[7] CPL was by then a party to a general security deed executed with ANZ Banking Group (NZ) Ltd on 24 December 2003. It submitted an offer which differed from the invoicing and payment system set out in the tender documents. The Council accepted the company's tender on or about 30 March 2006. CPL continued to perform its contractual obligations until the ANZ National Bank appointed Messrs Michael Stiassny and Brendon Gibson as receivers on 23 January 2007.

(1) Proprietary interest

(a) Contract

[8] Mr Colin Carruthers QC for NSCC submits that CPL manufactured, distributed and sold NSCC refuse bags to retailers on the Council's behalf. Accordingly, he says, the company holds the fees which it has received or will receive on trust for the Council. The threshold question then is whether or not CPL collected and held the fees in the capacity of NSCC's agent.

[9] The contract is central to this inquiry. Both counsel agree that its contents are not limited to the single formal agreement included as part of the tender and signed by the parties. After resolving to accept CPL's tender, NSCC collated two copies of a bundle of contractual documents – comprising the formal agreement, the relevant tender documents and subsequent correspondence, including CPL's invoicing proposal. Both copies were sent to the company for execution. However, CPL's directors only signed the formal agreement and returned both copies of the composite documents to NSCC, whose chief executive officer signed the same pages as CPL. I shall proceed on the basis assumed by the parties that CPL's invoicing proposal forms part of the contract. Its relevance will become apparent later.

[10] The formal contractual document included a standard form provision, cl 24, as follows:

"This Agreement constitutes the entire understanding and Agreement of the parties concerning its subject matter and all previous negotiations, representations, warranties, arrangements and statements are hereby cancelled and excluded."

The signed part also contains this standard form provision, cl 26:

"No amendment to this Agreement will be effective unless in writing and signed by all the parties."

[11] I agree with Mr Carruthers. Clause 24 extends to the contract as a whole, and is not limited to the pages actually signed by the parties. Thus there is no amendment and cl 26 does not apply.

(i) Manufacturing and supply

[12] The contract fell into two parts, consistent with the distinct functions to be performed by CPL. The first part was CPL's agreement to manufacture and sell NSCC refuse bags to the Council. Quality and material standards, and design and manufacturing specifications, were fixed. Retailer demand was to determine the quantity of bags required. The agreed procedure was as follows:

(1) CPL was to supply and the Council was to purchase bags at the prices and on the terms set by the Council (cls 4.1 – 4.2). NSCC was to give CPL indicative monthly volumes of bags required without a warranty that bags required would meet those levels (C3.2 Schedule 1).

(2) The Council was to purchase NSCC refuse bags ordered by retailers during the preceding month. Orders were to be made directly by retailers to CPL. The company was then to provide the Council with a monthly claim for bags ordered (C2.20).

(3) In accordance with this requirement, CPL was bound to deliver bags ordered directly to retailers, and on that event risk and title to the bags ordered was to pass to NSCC (cl 11). CPL was to issue a monthly claim or invoice to the Council for its price, showing the number of bags ordered in the preceding month, and NSCC was bound to pay on the twentieth day of the month following (cls 9.4 and C2.20). In reverse, CPL was to pay the Council the amounts received from retailers from the sale of bags, less what was known as the merchandising margin (cl 9.5).

[13] The process was explained more fully as follows in D1.6.2:

"Based on a report provided by [CPL] . . . Council shall issue an invoice to [CPL] due from [CPL] for the sale of refuse bags to the Retailers. This invoice will be the means in which the Council collects the margin of profit made from the sale of refuse bags. The invoice shall be for the sums due to Council from [CPL] for the sale of refuse bags (as ordered by Retailers) to Retailers at the prices set by Council, excluding the merchandising/distribution margin. The margin of profit enables Council to pay for the collection and disposal of household waste for North Shore residents. [CPL] shall pay Council the full invoice amount by the 15th day of the month following the issue of the invoice by Council."

(ii) Distribution and merchandising

[14] The second part of the contract covered the provision of services, being the distribution, merchandising and sale of the bags. The general provision was C3.2:

"[CPL] will call on every Retailer that could retail the Refuse Bags . . .

[CPL] will ensure delivery of the Refuse Bags to the above detailed outlets.

[CPL] *will on behalf of the Council* sell the Refuse Bags to Retailers for sale to the public . . .

[CPL] will be responsible for invoicing Retailers . . .

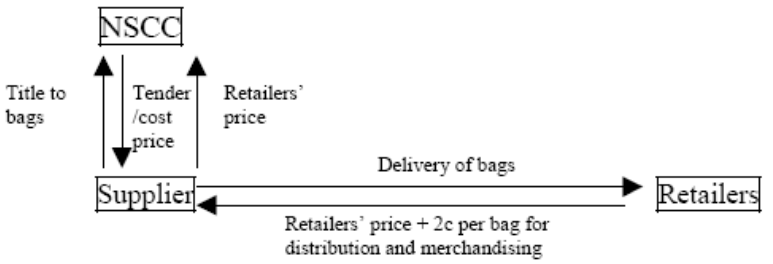
[CPL] shall be solely responsible for recovering any moneys owed for the supply of Refuse Bags to Retailers by [CPL]. The trading conditions and terms of credit between [CPL] and the Retailer are not the concern or responsibility of the Council. Council does not warrant the ability of the Retailers to pay [CPL] . . .

Council will pay [CPL] for the supply of Refuse Bags needed each month, this amount will depend on the quantity ordered by the Retailers (which ultimately will depend on the demand from Retailers). Payment will be made in accordance with Schedule 3.

[CPL] will then pay the Council for Refuse Bags sold each month at the price set by Council less the retailer's and Merchandising/Distribution Margins (prices inclusive of GST). Payment will be made in accordance with Schedule 3. Failure to make this payment will be considered a breach of contract and may lead to the termination of this contract." (Emphasis added.)

[15] In summary, these last two paragraphs provided a regime of separate payments between the same parties. First, the Council would pay CPL for supplying refuse bags needed each month. Secondly, CPL would pay the Council for refuse bags sold each month, less its merchandising/distribution margins. CPL's right of deduction or set-off was to constitute NSCC's payment for the company's provision of its services, separately from the physical supply of bags.

[16] This cumbersome two-stage process, whereby NSCC was to buy and then sell the bags back to CPL, was depicted by Mr Bruce Stewart QC for CPL in this way:



(iii) CPL's invoicing system

[17] NSCC's tender documents contained a proposed invoicing system (Schedule 3). However, CPL's tender proposed differently as follows in Appendix 2:

"The invoicing system
Works in the following sequence.

Month 1: The goods are delivered and invoiced to the retailer. This invoice includes manufacture, distribution, collection and disposal costs.

Month 2: By the 5th working day of the month Chequer Packaging prepare a report for the Council, listing all sales of the official refuse bag for the previous month. The Council then in turn invoices Chequer Packaging for the disposal and collection fees.

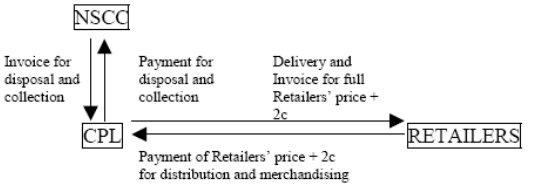
Month 3: The last of the payments are made to Chequer Packaging from the retailers at the end of the 2nd month and by the 20th of the 3rd month payment is made by Chequer Packaging Ltd to the Council for the disposal and collection fees."

[18] NSCC accepted this proposal. CPL wrote to NSCC on 29 June 2006 as follows:

"Please find below confirmation of our verbal agreement on the rebate that [CPL] will pay to [NSCC] – this being the dump, collection and admin fee incurred by NSCC (in essence the [CPL] sell price to the retailer less our costs and overheads)."

[19] In summary, as Mr Stewart submits, the agreed invoicing system provided for delivery and invoicing on this staged basis: (1) CPL delivered the goods and invoiced the retailer for the full price including manufacture, distribution, collection and disposal costs; (2) by the fifth working day of each month, CPL provided to NSCC a report of orders and sales for the previous month; (3) NSCC in turn issued invoices to CPL, based on the order and sales reports, for disposal and collection fees; and (4) CPL paid NSCC's invoice by the twentieth day of the month following issuing the invoices for disposal and collection fees (CPL expected to receive the last of the payments from retailers at the end of the previous month; that is, 20 days earlier).

[20] I adopt Mr Stewart's depiction of the agreed invoicing arrangements as follows:



[21] The agreement expressly provided in cl 32:

"Nothing in this Agreement shall create a partnership or agency between the parties unless expressly provided."

[22] Finally, NSCC was entitled to audit CPL's accounts to ensure compliance with the requirements of the agreement (cl 34).

(iv) Subsequent events

[23] Both sides accept that during the term of the contract CPL provided monthly reports to the Council on the sale of refuse bags delivered to retailers. The Council then invoiced CPL for the fees, which it paid accordingly until its receivership. While I accept Mr Carruthers' submission that the Council's acceptance of CPL's invoicing system did not change the nature of the services to be provided by the company as proposed by the tender documents, it significantly altered the contractual arrangements for sale and purchase of the bags.

[24] A specimen GST invoice was produced for the period ending 5 December 2006. NSCC invoiced CPL for the refuse bag return for November 2006 for $248,159 together with a GST component of $31,019, a total of $279,178.

[25] At receivership on 23 January 2007 CPL had collected from retailers but not yet paid to the Council the total amount of NSCC's price of $695,127. By April 2007 the receivers had collected an additional $665,645, together with a further $52,604 outstanding. The total amount of the funds collected by CPL or receivers is $1,350,772. The receivers are holding the moneys in a separate account pending this decision.

(b) Agency

[26] Both counsel agree that the question of whether or not the parties were in the relationship of principal and agent is to be determined by the terms of the subject contract between them. That instrument is the formal expression of their common intention. The underlying commercial arrangement was not complicated. However, the tender documents were complex and convoluted. NSCC's acceptance of CPL's invoicing system, while consistent with commercial sense, introduced internal inconsistency. As a result, the contract does not deal adequately and succinctly with critical legal concepts and, as I shall explain, fails to provide NSCC with the protection it seeks in this proceeding.

(i) Legal principles

[27] In determining whether an agency is created care must be exercised in adopting general statements of principle because context is so important. Assistance is available, however, from the classical definition found in its most recent form in *Bowstead and Reynolds on Agency* (18th ed), para 1-001:

> "Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly manifests assent that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly manifests assent so as to act or so act pursuant to the manifestation. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party."

[28] The fiduciary concept which is central to the agency relationship derives from the agent's power to alter the principal's position. Typical features of an agency are the existence of contractual obligations to perform duties of an essentially fiduciary nature – such as to use due diligence on behalf of and for the benefit of another and to act with loyalty, confidence and fidelity (see, generally, *Bowstead*, para 1-023). The right of control can be an important characteristic (*Bowstead*, para 1-017).

[29] Another important characteristic relating to the existence of the fiduciary relationship is the absence or otherwise of a duty to hold funds in a separate account, or conversely a right to mix receipts and use the money in a general or running account. So if the contract provides that CPL receives money from retailers on terms obliging it to keep a separate account for NSCC's entitlement, then it is a trustee which must account accordingly. However, on the other hand, if CPL is not under such an obligation, but is entitled to mix the fees and hand over an equivalent sum of money in accordance with NSCC's invoices, it is not a trustee but a debtor (see *Bowstead*, para 6-040; *Henry v Hammond* [1913] 2 KB 515 at p 521 per Channell J). I add, though, that the latter is a general rule, not of universal application, which can be displaced by consideration of all the surrounding circumstances (*Westpac Banking Corporation v Savin* [1985] 2 NZLR 41 (CA) at p 50). In the absence of an express obligation to maintain a separate account, NSCC must rely on an implied term.

(ii) On behalf of

[30] The starting point is the parties' agreement that nothing in the contract "shall create a partnership or agency . . . unless expressly provided". Mr Carruthers acknowledges the force of this unequivocal provision. But, he says, a disclaimer is not necessarily determinative if what the parties have agreed to do amounts in law to a consensual relationship of agency (*Garnac Grain Co Inc v H M F Faure & Fairclough Ltd* [1967] 2 All ER 353 per Lord Pearson at p 358). Here, Mr Carruthers submits, the parties have "expressly provided" for a relationship of agency by CPL's undertaking "on behalf of the Council to sell the refuse bags to retailers for sale to the public" (C3.2). He says the words "on behalf of" denote an agency.

[31] In support Mr Carruthers relies upon *Savin's* case, where boat owners signed an authority to a company which operated a large boat yard in Christchurch. It sold pleasure boats from its own stock and separately on behalf of vendors. Two boat owners authorised the company to sell their boats. The Court of Appeal found that the contract provided expressly that the company was acting on the vendor's behalf and not on its own account. The whole structure of the agreement in *Savin's* case was to that effect. Apart from using the phrase "on [the owner's] behalf", the instrument provided for the net proceeds of sale after deduction of commission for remission back to the owner, with an authority to make deductions and other payments.

[32] The contractual and factual circumstances of *Savin's* case distinguish it from this case. There is no magic in the words "on behalf of". They derive their meaning from the relevant context. The phrase usually denotes the relationship of principal and agent, such as where one party authorises another to sign or act on its behalf. It may, though, have the wider meaning of being for the benefit and in the interests of another party (*R v Portus, ex p Federated Clerks Union of Australia* (1949) 79 CLR 428 per Dixon J at p 438).

[33] In my judgment the phrase "on behalf of" where used in C3.2 does not advance NSCC's case. While the words appear in the second part of the contract covering the provision of CPL's services, they must be read in context. They refer to the third of five express sequential obligations assumed by CPL: to call on every potential retailer; to ensure delivery of refuse bags; to sell the bags to retailers "on behalf of the Council" (the following words "for sale to the public" are merely descriptive of the purpose of sale); to invoice the retailer; and to recover any moneys.

[34] The words "on behalf of" where used in that context had limited, if any, legal effect. The tender documents contemplated an outright contract of sale of refuse bags by CPL to NSCC. The Council would not take physical possession of the goods but CPL would instead effect delivery directly to the retailers. On that event, risk and title would pass to NSCC, obliging it to pay the full amount of the retailer's price less CPL's merchandising and distribution margins. While CPL was authorised to on-sell NSCC's bags to retailers, that was the limit of its intermediary power to bind the Council; and this function was subsumed by the succeeding contract of sale from retailers to the public, creating the purchaser's right and NSCC's duty of collection of the bags.

[35] The agreed invoicing system materially changed that legal structure. NSCC effectively authorised or licensed CPL to sell the bags directly to the retailers. Sales were on terms and conditions agreed between them. The 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 (I agree with Mr Stewart that the agreed invoicing system rendered the title provision of the tender document inoperative) and it had no enforceable rights against the retailers.

[36] By virtue of the invoicing arrangements CPL agreed to underwrite the retailers' payment of the fee to NSCC. It undertook to pay to the 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.

[37] 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.

[38] 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 the 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 the Council and CPL (see, generally, *Bowstead*, para 1-032).

(iii) Other indicia

[39] All the other indicia are adverse to the Council. First, the parties' agreed disclaimer of the relationship of principal and agent must be given appropriate weight. It is a negation of the element of consent which is central to the relationship's existence (*Garnac* at p 358). There is nothing which "expressly provide[s]" otherwise. And the language of agency is conspicuously absent.

[40] Secondly, the contract did not impose any duties of a fiduciary nature on CPL. It was not, for example, bound to act with due diligence, loyalty or fidelity. This omission is no doubt attributable to CPL's assumption of the

financial risk of the retailers' payments of fees. And the parties expressly agreed that CPL's failures to pay fees to NSCC when due would be considered a breach of contract giving rise to a right of termination.

[41] In this respect I agree with Mr Stewart that the GST invoices issued by NSCC are inconsistent with a fiduciary relationship. Those invoices would have been for the full retailer's price, with an accounting to IRD accordingly, if the Council was in law supplying the bags as principal to the retailers.

[42] Thirdly, as Mr Carruthers acknowledges, the contract did not require CPL to hold the fees in a separate account. Nevertheless, he submits that the mixing of moneys does not necessarily destroy the duty to account and that the agreement when viewed as a whole shows the parties' intention that CPL should hold the moneys on trust for NSCC. He relies on the factors of CPL's collection of the total price from retailers; that most of NSCC's price was comprised of its user charge (the price for a single bag was $1.115); that NSCC did not authorise CPL to hold the funds in a running account; that CPL was required to make detailed monthly reports on the quantity of refuse bags sold and the Council's invoices were based on those reports; that CPL was required to account to NSCC for the entire price (although under the amended invoicing system the Council authorised CPL to deduct payment of its price when submitting its invoice for return of the difference); and that NSCC was entitled to audit CPL's accounts to ensure compliance with the contract.

[43] I disagree. CPL's collection of the price from retailers is actually consistent with its contractual status as seller of the bags and is antithetical to NSCC's argument. The fact that most of the bag price was comprised of the user charge is irrelevant. The absence of authority to hold the fees in a running account is also contrary to NSCC's case. The obligation to make detailed monthly reports, and NSCC's right to audit CPL's accounts, are consistent with a regime for determining the amount of the company's monthly liability as debtor to the Council. And CPL was not under a liability to account to the Council for the entire price; the parties' agreement was otherwise – the company's only obligation was to pay NSCC an amount equivalent to the fees.

[44] In my judgment the grounds relied on by Mr Carruthers, individually or collectively, do not satisfy the threshold of business efficacy or necessity sufficient to require implication of a term to the effect that CPL was bound to hold the fees in a separate account. The company's obligation was limited to paying the Council an amount of money equivalent to the fees following receipt of a monthly invoice. It was not bound to account on a transaction-by-transaction basis but simply to pay fixed sums periodically.

[45] In this case the absence of an express duty to hold the fees in a separate account is decisive against an agency (*King v Hutton* [1900] 2 QB 504 (CA) per A L Smith LJ at p 507; *Re Ararimu Holdings Ltd* [1989] 3 NZLR 487 at pp 494 – 496). All the relevant contractual provisions suggest that CPL was entitled to use the fees as part of its normal cash flow, confirming the relationship of debtor and creditor (*Bowstead*, para 6-040).

[46] It follows that NSCC's case must fail, given its inability to establish that CPL received and held the fees as agent on its behalf.

(2) Security interest

[47] It is thus, strictly speaking, unnecessary for me to consider the second or consequential question of whether or not NSCC has a security interest in the fees which is subject to the priority rules of the PPSA. However, I shall record

my views briefly, even though they will be obiter, should the case go further. I shall proceed on the assumption that, contrary to my first finding, NSCC has a proprietary interest.

[48] By way of brief introduction, the PPSA, as its long title confirms, was enacted among other things to provide for the creation and enforceability of security interests and the determination of priority between competing security interests. Title is irrelevant in determining priority. Instead the focus is on whether a security interest has attached and been perfected. A security interest is defined in s 17(1)(a) as:

> (a) . . . 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 . . .
>
> (b) . . . 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).

[49] For the avoidance of doubt, s 17(3) states:

> . . . 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.

[50] As Ms Laura O'Gorman, who argued this part of CPL's case, submits, the PPSA equates what the law previously regarded as true security interests, such as those created by a chattel mortgage, and in-substance security interests, for example conditional sale agreements with a reservation of title (*Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) per Williams Young J at para [89]).

[51] Mr Carruthers submits that the PPSA registration and priority rules do not apply if a person has an interest in property that is not a security interest. The person retains his interest in the property. When property is held on a trust for another's benefit, it will be excluded from the trustee's "property" for the purposes of the PPSA unless the trust in substance secures payment or performance of an obligation (ss 17(1)(a) and 23(b)).

[52] I accept Mr Carruthers' submission that an assessment of whether a trust interest is in substance a security interest, securing payment or performance of an obligation, will depend on the purpose of the transaction, the role and relationship of the parties, the practicality and commercial reality, and the parties' intentions (*Re Skybridge Holidays Inc* (1999) 11 CBR (4th) 130). Here, he says, NSCC does not have a beneficial interest in anything other than the fees themselves. CPL's obligation to pay the fees is created by its delivery of NSCC refuse bags to retailers and its invoicing. the Council's legal title is only obtained after CPL has effected delivery. NSCC does not have rights to take possession of CPL's property, and the situation does not fit into the ordinary meaning of a security.

[53] Mr Carruthers relies on two Canadian authorities: *Skybridge* and *Graff v Bitz* (1991) 10 CBR (3d) 126. In both the Official Assignee applied for a declaration that certain property held by a bankrupt was available to his creditors. In each the bankrupt received funds to be applied for a specific purpose, in situations where the relationship of principal and agent clearly existed.

[54] In *Graff* the principal gave the agent money to buy a defined type of motor vehicle in the United States; following acquisition title was registered in the agent's name. The Court held the elements of a resulting trust were established. There was no evidence of a loan or business relationship, and the agreement between the principal and the bankrupt agent was not a security interest. The legal foundation for this decision is analogous to a finding in New Zealand of an interest created by operation of rule of law, excluding it from the ambit of the PPSA (s 23(b)).

[55] In *Skybridge* a travel agency filed for bankruptcy while holding funds received from travellers for travel services. The British Columbia Court of Appeal accepted that the fact that the travellers' interest in the moneys was in the nature of beneficial interest in a trust was not determinative, relying on the Canadian equivalent to s 17(1)(a) – where the trust interest is a security interest if the purpose is to secure payment or performance of an obligation (para [19]). The inquiry was to determine whether the relationship was analogous to that of debtor and creditor, giving rise to a security interest (para [24]). The principals were consumers and not lenders, and the company received the funds as agent to purchase travel services and not as party of a security transaction. Following an analysis of the purpose of the transactions, the role and relationship of the parties, the practicality and commercial reality and the parties' common intention, the Court concluded that the moneys were excluded from the reach of the Act.

[56] The Canadian authorities are distinguishable. In each case moneys were deposited by principals with an agent for a specific purpose, constituting what were in effect resulting trusts. The implication of a trust, whether of a resulting or constructive nature, arises by operation of law, as recognised by s 23(b). I infer that an implied trust falls outside the PPSA's scope because it is non-consensual. However, s 23(b) does not state that a beneficial interest in trust property, which is not in substance a security interest, will trump any perfected security interest in the same property. In my view the flaw in Mr Carruthers' argument is its assumption, just as in *Skybridge*, that the existence of a beneficial interest in funds is of itself determinative.

[57] What is required, as Mr Carruthers accepts, is an analysis of the substance of the transaction. I have separately rejected his argument that the Council took legal title to the bags. Assuming, though, that NSCC's interest in the fees was proprietorial, its nature and effect was in substance to secure payment or performance of an obligation by CPL to pay a defined component of the purchase price. A resulting trust is not created, unlike the Canadian cases, and Mr Carruthers does not suggest the existence of a constructive trust. His argument is for the existence of an express trust, which is no different in form or effect than a security trust deed, for example. As Ms O'Gorman submits, many trust relationships are in substance an attempt to create a charge in equity over assets to secure payment.

[58] This statutory analysis is consistent with the pre-existing common law, where a legal interest acquired without notice of a prior equitable interest took

priority. By parity of reasoning, a security interest acquired without notice of such a prior equitable interest should also take priority (Gedye, Cuming and Wood, *Personal Property Securities in New Zealand*, p 19). The application of this principle promotes an underlying purpose of the PPSA, namely commercial certainty.

[59] Here ANZ was a bona fide third party. Mr Carruthers does not suggest the bank knew of NSCC's beneficial interest in the collection fees, if it existed, when registering its security interest over CPL's present and after-acquired property. Its security interest would have attached to the proceeds and the accounts receivable, CPL having legal title in both. Value was given by CPL (s 40(1)(a)). Thus there was an enforceable security agreement (s 36).

[60] Thus, even if the NSCC had a beneficial interest in the fees, I am satisfied that it was a security interest and required registration if it was to defeat ANZ's interest.

Result

[61] Accordingly, I direct as follows under s 34 of the Receiverships Act 1993:

(1) NSCC does not have any proprietary interest in any proceeds of sale paid or yet to be paid by retailers to CPL for refuse bags supplied prior to 23 January 2007.

(2) Alternatively, if NSCC had such an interest, it would constitute a security interest for the purposes of the PPSA, with the result that ANZ's security interest has priority in such proceeds.

[62] Costs must follow the event. In my provisional view, an award according to category 2B for two counsel is appropriate together with reasonable disbursements. However, if either side wishes to advance a contrary argument, counsel for CPL should file a memorandum by 10 December and counsel for NSCC by 17 December 2007. Memoranda are not to exceed five pages in length. If necessary, I will convene a brief hearing.

[63] I wish to express my appreciation to counsel for both sides for the quality of submissions, both written and oral.

Directions given.

Solicitors for the receivers: *Buddle Findlay* (Auckland).
Solicitors for the Council: *Wilson Harle* (Auckland).

Reported by: Tania Richards, *Barrister*