IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1922
[2017] NZHC 2782

IN THE MATTER	of section 167 of the Personal Property Securities Act 1999
BETWEEN	PIONEER FINANCE LIMITED First Applicant
	PERSONAL FINANCE LIMITED Second Applicant
AND	GREEN CARS LIMITED Respondent

Hearing: 10 November 2017

Appearances: K McDonald for the Applicants
Y Lee for the Respondent

Judgment: 14 November 2017

JUDGMENT OF GORDON J

This judgment was delivered by me
on 14 November 2017 at 2.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Kevin McDonald & Associates, Takapuna
Y Lee, Auckland

Introduction

[1] Pioneer Finance Ltd holds a security interest in a 2011 Toyota Prius (registration HEA369) pursuant to a registered financing statement. The named debtor is Mr Vicente Lopez. On 9 August 2017, Green Cars Ltd gave notice under s 162(c) of the Personal Property Securities Act 1999 (PPSA) seeking discharge of the financing statement as it relates to the Prius on the basis that Green Cars, not Mr Lopez, is and has at all material times been the owner of the Prius.

[2] Pioneer Finance has now filed an originating application in the High Court under s 167 of the PPSA seeking an order that the financing statement (registration F8527HROP90924M) be maintained. The second applicant, Personal Finance Ltd, was the original holder of the security interest but assigned its interest to Pioneer Finance on 16 May 2017. However, the financing statement remains in the name of Personal Finance. On 28 August 2017 this Court made an interim order maintaining registration pending the outcome of this hearing.

[3] Green Cars opposes the application.

[4] The primary issue for the Court to determine is whether the Prius is collateral under the security agreement between Personal Finance and the borrowers.

Factual background

[5] In early 2015 Mr Lopez and two of his companies (the borrowers), Galaxy Private Transport Ltd and MARS.XXX Ltd, approached Personal Finance through a broker and sought to refinance an existing loan.

[6] In consequence of that approach on 1 March 2015, the borrowers entered into a loan agreement with Personal Finance. Under the agreement, the borrowers refinanced an existing debt of $27,216.17 and borrowed a further $17,000.00 from Personal Finance. The total credit advanced to the borrowers (including a loan establishment fee, security and registration costs and a brokerage fee) was $46,488.51.

[7] As security for the loan, the borrowers granted Personal Finance a security interest in three cars that were owned by them, signed an agreement to mortgage in respect of a property owned by Mr Lopez in Tokoroa and granted a security interest over all present and after acquired assets in property belonging to any of the borrowers. As a result of these arrangements, Personal Finance registered a caveat against the title to the Tokoroa property.

[8] In April 2015, Mr Lopez sought to sell the Tokoroa property. Following discussions, it was agreed that Personal Finance would release its caveat over the Tokoroa Property on the basis that Mr Lopez would repay $25,000.00 of the outstanding debt and would also grant a security interest over two additional vehicles, including the Prius (the variation). Personal Finance registered its security interest in the Prius on 4 May 2015.

[9] At the time of entering into the variation, Mr Lopez was the registered owner of the Prius, and had been since 18 July 2014. The applicants accept that this registration by Mr Lopez was fraudulent and that Green Cars was the true owner of the Prius.

[10] The evidence for the applicants is that in May 2016, Personal Finance discovered that Mr Lopez had sold the vehicles over which he had granted a security interest, including the Prius. On making further inquiries, it transpired that the registration of the Prius had been transferred from Mr Lopez's name into that of Green Cars on 15 September 2015. When asked about the transfer, Mr Lopez denied that he had sold the vehicles and stated that they had instead been leased to third parties, but he failed to provide any further information.

[11] As a result of these discoveries, Personal Finance considered that its security was "at risk" pursuant to the terms of the loan agreement and sought to repossess the cars, including the Prius. Mr Lopez disputed the right to repossess the cars and made a formal complaint to Financial Services Complaints Ltd, which was rejected. Personal Finance then instructed an agent to locate and repossess the Prius.

[12] On 14 December 2016, the agent visited the car yard used by Green Cars and identified the Prius. However, Green Cars refused to release the vehicle. A few hours after the agent visited the car yard, Green Cars registered a financing statement over the Prius.

[13] In a letter dated 24 January 2017, Personal Finance made demand for the return of the Prius.

[14] On or about 16 May 2017, Personal Finance entered into a deed of assignment of debt with Pioneer Finance. Under that deed, Personal Finance assigned to Pioneer Finance all debts and securities that it held in relation to the loan agreement with the borrowers. A letter was sent to Mr Lopez advising him of the assignment.

Green Cars – further background

[15] Green Cars owns a fleet of hybrid cars which it offers for fixed-term hire. It is not a car dealer. It does not dispute the applicants' evidence regarding the existence of the loan agreement. However, it says that the Prius has been the property of Green Cars since 21 January 2012.

[16] Mr David Phan, the manager of Green Cars, says that Mr Lopez hired the Prius from Green Cars for the period from 21 July 2014 to 21 January 2015 and again from 22 January 2015 to 21 January 2016. However, from 26 June 2015, Mr Lopez failed to make the necessary payments under the hire agreement and accordingly Green Cars recovered the Prius on 10 September 2015.

[17] Shortly thereafter, Mr Phan says, he discovered that Mr Lopez had changed the registration of the Prius into his name. On 15 September 2015 the registration was changed back to Green Cars Ltd.

[18] Mr David Phan says he was not aware that the Prius had been given as security for the loan agreement with Personal Finance until 14 December 2015, when the agent attempted to repossess the vehicle. Green Cars refused to release the

Prius to the agent and, as noted above, then registered a financing statement in respect of the Prius.

Relevant law

[19] Sections 162 and 167 of the PPSA relevantly provide as follows:

> **162 When debtor, etc, may demand registration of financing change statement**
>
> The debtor or any person with an interest in property that falls within the collateral description included in a registered financing statement may give a written demand to the secured party if—
>
> ...
>
> (c) the collateral described in the collateral description included in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor:
>
> ...
>
> ...
>
> **167 Secured party may obtain court order in cases not involving security trust deed**
>
> (1) At any time before the financing change statement referred to in section 163 is registered, the court may, on application by the secured party, and if the court is satisfied that none of the grounds for making a demand under section 162 exist, order that the registration—
>
> (a) be maintained on any condition, and subject to sections 153 and 154, for any period of time; or
>
> (b) be discharged or amended.
>
> ...

[20] Green Cars has lodged a financing change statement relying on the ground in s 162(c) above. The primary issue, therefore, is whether the Court is "satisfied" that Prius is collateral under the security agreement between Personal Finance and the borrowers. The Court of Appeal has previously held in the criminal context that the term "satisfied":[1]

---

[1] *R v White* [1988] 1 NZLR 264 (CA) at 268, affirmed more recently in *R v A* [2009] NZCA 380 at [9]-[12].

> ... means simply "makes up its mind" and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied"[.]

[21] In a relatively recent High Court decision, Gendall J applied the same approach to the determination of an application under s 167.[2] I see no reason to adopt a different approach in the present case.

[22] "Collateral" is defined in s 16 of the PPSA to mean "personal property that is subject to a security interest". "Personal property" in turn is defined in s 16 as follows:

> **Personal property** includes chattel paper, documents of title, goods, intangibles, investment securities, money and negotiable instruments.

[23] "Security interest", has the meaning set out in s 17:[3]

> **17 Meaning of security interest**
>
> (1) In this Act, unless the context otherwise requires, the term **security interest**—
>
> (a) means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
>
> (i) the form of the transaction; and
>
> (ii) the identity of the person who has title to the collateral; and
>
> (b) includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
>
> ...

[24] Section 40 of the PPSA sets out the circumstances in which a security interest attaches to collateral:

> **40 Attachment of security interests generally**
>
> (1) A security interest attaches to collateral when—

---

2 *Working Capital Solutions Holding Ltd v Pezaro* [2014] NZHC 1020.

3 Personal Property Securities Act 1999 [PPSA], s 16, definition of "security interest".

(a) value is given by the secured party; and

(b) the debtor has rights in the collateral; and

(c) except for the purpose of enforcing rights between the parties to the security agreement, the security agreement is enforceable against third parties within the meaning of section 36.

...

(3) For the purposes of subsection (1)(b), a debtor has rights in goods that are leased to the debtor, consigned to the debtor, or sold to the debtor under a conditional sale agreement (including an agreement to sell subject to retention of title) no later than when the debtor obtains possession of the goods.

...

[25] Section 40(1) first requires that value is given by the secured party. "Value" is defined in s 16 of the PPSA to mean consideration that is sufficient to support a simple contract, and includes an antecedent debt or liability.

[26] The second requirement under s 40(1) is that the debtor has rights in the collateral. It is clear from s 40(3) that a debtor's interest in leased goods is sufficient to support the attachment of a security interest.[4]

[27] Lastly, the security agreement must be enforceable against third parties within the meaning of s 36. Section 36 of the PPSA provides:

36 Enforceability of security agreements against third parties

(1) A security agreement is enforceable against a third party in respect of particular collateral only if—

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed, or has assented to by letter, telegram, cable, telex message, facsimile, electronic mail, or other similar means of communication, a security agreement that contains—

(i) an adequate description of the collateral by item or kind that enables the collateral to be identified; or

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired property; or

---

4 See also *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 (HC).

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

(2) To avoid doubt, a security agreement may be enforceable against a third party in respect of particular collateral even though the security agreement is not enforceable against a third party in respect of other collateral to which the security agreement relates.

[28] The Prius in the present case is in the possession of Green Cars. Accordingly, the applicants will be required to demonstrate the existence of a written security agreement meeting at least one of the criteria in s 36(1)(b) in order to satisfy the requirements of s 40.

Submissions for the applicants

[29] The applicants submit that the ownership of the vehicle is irrelevant to the outcome of the application. That is because Mr Lopez had "rights in the collateral" namely the Prius under s 40(1) as it was leased to him.

[30] The applicants say it cannot be doubted that they provided value to Mr Lopez under the loan agreement and that the security agreement is enforceable against third parties.

[31] The submissions for the applicants also address the question whether the security interest in the Prius was perfected and the priority between any competing interests. It is not necessary to determine those issues in the context of the present application to maintain the registered financing statement.

Submissions for the respondent

[32] Mr Lee, who appeared for the respondent, made the following submissions:

(a) That there was no security interest created in terms of s 17, because the hire agreement for the Prius between Green Cars and Mr Lopez was not for a period of more than one year in terms of s 17(1)(b);

(b) That Mr Lopez, as the debtor, did not have rights in the Prius because the hire agreement between Green Cars and Mr Lopez was not a lease for the purposes of s 40(3);

(c) Any security interest that might have attached to the Prius expired at the conclusion of the lease on 10 September 2015 or at the latest on 22 January 2016;

(d) The evidence did not establish that the variation related to the Prius.

[33] I address each of those submissions in turn.

Does s 17(1)(b) operate to prevent the applicants from claiming a security interest?

[34] I set out s 17(1)(b) again for ease of reference:

> **17 Meaning of security interest**
>
> (1) In this Act, unless the context otherwise requires, the term **security interest**—
>
> ...
>
> (b) includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
>
> ...

[35] Mr Lee submits that Personal Finance did not have a security interest because the car hire agreement between Green Cars and Mr Lopez was for a term of less than one year.

[36] That submission cannot be sustained on the text of the provision. The effect of s 17(1)(b) is that the act of granting a lease for a term of more than one year automatically gives rise to a security interest in favour of the lessor. So, in the present case, s 17(1)(b) would give rise to a security interest over the Prius in favour of Green Cars as lessor (provided, of course, that the car hire agreement could be defined as a "lease for a term of more than 1 year").

[37] Section 17(1)(b) does not, however, affect the existence of a security interest between the lessee and a third party. That relationship is governed by ss 17(1)(a) and 40. There is nothing in those sections which limits the creation of a security interest in the way Mr Lee contends.

[38] A judgment of Rodney Hansen J in *Graham v Portacom New Zealand Ltd* provides assistance on this issue.[5] In that case Portacom had leased five portable buildings to NDG Pine Ltd (in receivership). NDG granted a debenture to a bank which was registered under the Act. Although the term of the lease in that case was for four years, the discussion in the judgment nevertheless indicated the Court's view that s 40(3) applied to any interest that Portacom, as lessor, might have (as opposed to the bank as debenture holder):

> [19] The consequences of this to the lessor will differ according to the term of the lease. In the case of a lease for a term of more than one year, a security interest is deemed to be created by s 17(1)(b) regardless of the identity of the person who has title to the collateral. As Gedye, Cuming and Wood, *Personal Property Securities in New Zealand* (2002) at para 40.3.1 put it, the lease is treated as a security agreement and the lessee is treated as the owner of the leased goods for registration and priority purposes. If the lessor fails to register its interests, it loses priority to a perfected security interest over the leased goods: see also paras [15] and [16] above.
>
> [20] Canadian authority and scholarship confirm this analysis. The New Zealand Act was modelled on Canadian legislation and its counterpart in the United States, Article 9 of the Uniform Commercial Code. For a comparison of the New Zealand Act and the comparative North American regimes, see Zeigel, *Canadian Perspectives on the New Zealand Chattels Securities Act* (2001) 7 NZBQ 118. For the purpose of this case, the Canadian authorities have direct application to the New Zealand Act.
>
> [21] The leading case is *In re Giffen* (1998) 155 DLR (4th) 332. It concerned an automobile leased to Giffen. Under the applicable British Columbia Personal Properties Security Act, the lease was for a term of more than one year which, as in New Zealand, rendered the lessor's interest a security interest. The lessor had not perfected its interest when the lessee went bankrupt. The trustee in bankruptcy claimed to be entitled to the proceeds of sale under a provision of the British Columbia Act which provides that a security interest in collateral is not effective against the trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy.

---

5 *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 (HC).

[39] The length of the hire agreement for the Prius was therefore only relevant to any security interest Green Cars might have, not to the security interest of Personal Finance.

Did Mr Lopez have rights in the Prius?

[40] A security interest attaches when the debtor has rights in the collateral. Mr Lee does not suggest that Mr Lopez was not a debtor but he says s 40(3) does not apply because the hire arrangement for the Prius only gave Mr Lopez a licence to use the car. Mr Lopez did not obtain a contingent proprietary interest in the Prius. Mr Lee submits it cannot therefore be said that Mr Lopez had "... rights in the goods that [were] leased to [him] ...".

[41] This submission was unsupported by law or evidence and in any case, is plainly inconsistent with the terms of the PPSA. Section 40(3) provides simply that "a debtor has rights in goods that are leased to the debtor". The decision of Hansen J in *Graham v Portacom New Zealand Ltd* is again instructive:[6]

> [18] A lessee of goods may, by virtue of its possessory interest, grant a security interest in the goods. Section 40(3) (quoted in para [13] above) provides that a debtor has rights in goods leased to the debtor. A security interest can therefore attach to the lessee's interest in the goods: see also the discussion at para [14] above.
>
> ...
>
> [28] The rights of a lessee in leased goods referred to in s 40(3) of the Act are not therefore confined to the lessee's possessory rights. As against the lessee's secured creditors, the lessee has rights of ownership in the goods sufficient to permit a secured creditor to acquire rights in priority to those of the lessor. The conceptual basis for this is explained in an article by Bridge, Macdonald, Simmonds and Walsh, *Formalism, Functionalism and Understanding the Law of Secured Transactions* (1999) 44 McGill L.J. 567 at 602-3. The authors reject the thesis that for the purpose of Article 9 of the United States Uniform Commercial Code and the Canadian legislation, a creditor's interest in collateral attaches only to the debtor's possessory rights. They go on to say:
>
> > "The internal logic of the Article 9 and PPSA priority regime is premised on a rejection of derivative title theory in favour of registration as the principal mechanism for ranking priority both among secured creditors and as between the secured creditor and the debtor's general creditors including the trustee in bankruptcy.

---

6 *Graham v Portacom New Zealand Ltd*, above n 5 (footnotes omitted).

> To give effect to this intent, 'rights in the collateral' must be understood as requiring a mere bare right to possession or a power to convey a greater interest than has the debtor, a point confirmed in PPSA jurisprudence and expressly stated in some of the more recent PPSAs. On this interpretation, ostensible ownership – in the radical sense of bare possession or control of the collateral – has effectively replaced derivative title for the purposes of determining the scope of the secured debtor's estate at the priority level. Thus, by the very act of deeming a true lease to be a PPSA security interest, ownership in the leased assets is effectively vested in the lessee as against the lessee's secured creditors and trustee in bankruptcy."
>
> This reasoning applies with equal force to the New Zealand Act, the provisions of which are not relevantly distinguishable from North American law.
>
> ...
>
> [29] NDG has therefore both a possessory interest and a proprietary interest in the buildings. The latter arises by virtue of s 40(3) which confers on NDG rights in the goods which it leases. It could as a result grant a security interest in the buildings themselves, not just its leasehold interest in them. This is referred to in *International Harvester* (supra, para [23]) as the statutory or proprietary interest conferred upon a debtor and is to be distinguished from its contractual or possessory interest. ...

[42] There is nothing in s 40(3), or in any other section of the PPSA, that requires a lessee to have a contingent proprietary interest in the goods vis-à-vis the lessor, in order for a security interest to attach.

[43] Nor do I accept Mr Lee's characterisation of the car hire agreement as a "licence" rather than a lease. Under the terms of the car hire agreement, Mr Lopez obtained possession of the vehicle for a specified period of time, in return for which he agreed to make regular payments to the hirer, Green Cars. This is a quintessential leasing arrangement.

[44] I am satisfied that Mr Lopez had rights in the Prius which were sufficient to meet the requirements of s 40(1) of the PPSA.

Did the security interest expire at the termination of the lease?

[45] I deal with this submission relatively briefly.

[46] There is nothing in the PPSA which supports Mr Lee's submission that the security interest expired at the conclusion of Mr Lopez's lease. Such an arrangement would undermine the purpose of the PPSA and in particular, would undermine the provision in s 40 that a security interest may attach to leased goods. There is nothing in this point.

Did the variation relate to the Prius?

[47] Mr Lee submits that the evidence does not establish that Mr Lopez granted Personal Finance a security interest over the Prius as part of the variation of the loan agreement. I do not agree.

[48] On 30 April 2015 Mr Lopez sent an email to Personal Finance which reads as follows:

> Hi, please add additional security to the loan by adding car plate number hea369 Toyota Prius 2011 under my name and Toyota Prius 2006 plate number dtu637 under galaxy private transport ltd.
>
> The caveat was put on the property for a loan of $25k.
>
> So personal finance needs to honour that and explain that $25k. Will be paid to them to release the caveat by adding the additional 2 cars thanks
>
> Kind regards
>
> Vicente

[49] Personal Finance sent a letter to Mr Lopez in response on the same day. Its heading contains a reference to the number of the original loan contract. It then contains the following:

> Deed by Way of Security dated 1st March 2015.
>
> We hereby disclose that Personal Finance Limited has agreed to the following changes to your Deed by Way of Security:
>
> 1. Persoanl [sic] Finance Limited agrees to release of the Caveat over 16 Harwick Street, Tokoroa in consideration of $25,000.
>
> 2. Additional security being 2011 Toyota Prius Hatchback registered plate number RPN HEA369 is added to the loan.
>
> ...

[50] Mr Lopez then returned a signed and dated copy of that letter also on 30 April 2015. It is clear that a signed copy of a letter or email may constitute a security agreement under the PPSA.[7]

[51] I am therefore satisfied that Mr Lopez granted Personal Finance a security interest over the Prius as part of the variation of the loan agreement.

Should the registered financing statement be maintained?

[52] All that the applicants need prove is that they gave value to the borrowers; that Mr Lopez had rights in the Prius; and that the security agreement is enforceable against third parties within the meaning of s 36 of the PPSA.[8] Each of these requirements is clearly satisfied on the evidence before the Court:

(a) The security over the Prius was granted in exchange for the release of a caveat over the Tokoroa property. In other words, Personal Finance agreed to relinquish its security interest in the Tokoroa property in exchange for the repayment of $25,000.00 and the granting of a further security interest over the Prius and another vehicle.

(b) The security interest over the Prius was granted in May 2015, at which point (on the evidence of Mr Phan) Mr Lopez was in possession of the Prius pursuant to a hire agreement with Green Cars.

(c) The security agreement between Personal Finance and the borrowers (in the form of a letter) states that additional security is granted "being 2011 Toyota Prius Hatchback Registered Plate Number HEA369". This is "an adequate description of the collateral that enables the collateral to be identified" as required under s 36(1)(b)(i) of the PPSA. Mr Lopez signed a copy of that letter.

[53] I am satisfied that the Prius is collateral under the security agreement between Personal Finance and the borrowers.

---

7 PPSA, s 36(1)(b).
8 PPSA, s 40(1).

[54] I am accordingly satisfied that Green Cars does not have grounds to make a demand under s 162(c) and order that the financing statement (registration F8527HROP90924M) should be maintained.

Costs

[55] I award costs to the applicants as the successful parties on a 2A basis.

Gordon J