IN THE DISTRICT COURT
AT WHANGAREI

PPN: 1539845787

IN THE MATTER OF	THE SUMMARY PROCEEDINGS ACT 1957
BETWEEN	ASSET FINANCE LIMITED Claimant
AND	KAYLA VULETICH Fine Defaulter
AND	MINISTRY OF JUSTICE COLLECTIONS UNIT Respondent

Hearing: 26 November 2009

Appearances: Mr George Director of Asset Finance in Person
No Appearance by Fine Defaulter
Mr C Crawford Collections Manager Northland for the Respondent

Judgment: 25 May 2010

JUDGMENT OF JUDGE D J McDONALD

Background

[1] On 15 August 2008 a warrant to seize property was issued against Ms Vuletich for outstanding traffic infringements imposed on her in 2007 and 2008. They were, in the main, incurred by her for driving unaccompanied as a learner driver, failing to wear a seatbelt, and using a motor vehicle that was neither registered nor had a current warrant of fitness. As at 20 October 2008, fines of $4,340, together with enforcement fees of $1,300, totalling $5,640, were outstanding.

[2] On 25 September 2008 the Whangarei Collections unit ("Collections") learned that a 2001 Subaru Legacy ("the Subaru"), registration EPT912 registered to Ms Vuletich had been impounded by the Dargaville Police for 28 days. Although not detailed in the information before me, I infer that it was impounded as it was being driven in contravention of the traffic laws.

[3] On 20 October 2008 Collections checked the Personal Property Securities Act 1999 ("PPSA") and found that there were no securities registered against the Subaru.

[4] On 23 October the vehicle was seized by Collections. It was transported to Turner's Car Auction for storage and sale. Ms Vuletich was sent the relevant notices.

[5] On 24 October 2008 Ms Vuletich called at the Collections unit in Whangarei to ask about her seized Subaru. She was advised that her car had been seized. When she sought to come to an arrangement for the payment of the outstanding fines so as to get her vehicle back, she was told by the Collections that they would accept half the amount of outstanding fines, the balance to be paid at the rate of $50 per week. Ms Vuletich advised Collections that the ASB Bank had a security over the Subaru. Despite enquiries with the bank, that could not be confirmed.

[6] On 10 November 2008 Ms Vuletich completed a loan application with Asset Finance Limited ("Asset Finance") at its Glenfield branch. She sought $5,000. The reason for the loan as stated in the application was for "household items and funds for new coarse" (sic). She offered the Subaru as security. In the application she said that the Subaru was not subject to any security. A document which, on the face of it, appears to have been completed by a vehicle evaluator, states that the vehicle is in excellent condition. It is dated 10 November 2008 and is in the name of Samuel de-Arth (de-Arth Automotive) with a signature, contact number and facsimile number. That document must be false. At the date of the evaluation the vehicle had already been seized by Collections and was in storage at Turner's.

[7] The loan was approved for $4,000 on 11 November 2008 and the funds paid into Ms Vuletich's bank account that day.

[8] Although the fixed interest term loan agreement between the parties is dated 11 October 2008 no issue was taken with that by Collections. Asset Finance in all their submissions, and in their file which has been provided to me, makes it clear that the loan was signed on 11 November 2008 and the funds advanced that day. On the same day, 11 November 2008, Asset Finance registered a PPS over the Subaru.

[9] Ms Vuletich did not settle her fines, despite phoning Collections on 11 November advising that she would pay her fines off in full that day. Two weeks passed with no payment or further contact from Ms Vuletich despite attempts by Collections to contact her.

[10] On 27 November 2008 Turner's Auctions sold the vehicle on behalf of Collections for the sum of $5,400. The following day, 28 November 2008, Turner's contacted Collections and informed them that they had checked the PPS and discovered that Asset Finance had registered a security over the Subaru. Asset Finance were advised by Collections the same day of the sale.

[11] On 20 November 2009 Asset Finance filed a claim seeking the proceeds of the sale of the seized vehicle. On 26 November 2009 I heard argument. The hearing was adjourned to enable Asset Finance to file further documents and, in particular, what steps if any, they took to physically sight the vehicle before advancing the money to Ms Vuletich.

The issue

[12] Is Asset Finance entitled to the proceeds of sale as a secure party, or are Collections in that they acted in good faith and in accordance with the relevant provisions of the Act in seizing and selling the Subaru.

Discussion

[13] Section 94A of the Summary Proceedings Act 1957 ("the Act") requires the PPSR to be checked the day after a vehicle is seized. Here, the registry was checked on Monday 20 October 2008. The Subaru was seized on Thursday 23 October. The register should have been checked therefore on 24 October. Section 94A(1) has not been complied with. Little turns on that. There was no security registered on 24 October. The security of Asset Finance was registered on 11 November 2008.

[14] The vehicle was sold under the provisions of s 95. That states:

> **95 Sale of property seized**
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> Any property seized under a warrant to seize property may, after the expiration of 7 days from the date of seizure, if the fine remains unpaid and no claim has been made by a person other than the defendant in respect of the property, be sold at public auction **[[**or in such other manner as may be directed by **]]** a District Court Judge or the Registrar, and the purchaser of any property so sold shall, by virtue of this section, obtain good title to the property notwithstanding the interests of the owner or any other person in the property prior to the sale.**]**

[15] Sections 96 and 97 set out the procedure to be followed where a claim is made to the seized property.

[16] Section 97(2) is a relevant provision for the purposes of this decision and it states:

> (2) Where any property is sold under section 95 of this Act and a claim of the kind referred to in subsection (1) of this section is made before the proceeds of the sale are fully applied or distributed, a District Court Judge may direct the application of the proceeds of the sale in such manner and on such terms as the Judge thinks fit where the Judge is satisfied that it would have been appropriate to have made an order under subsection (1) of this section before the sale.

[17] In *Delta Transport (1995) Ltd & Anor v The Bailiff, Palmerston North District Court & Ors*[1] McGechan J discussed the discretion conferred by s 96 of the Act. At para [13] His Honour said:

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[1] (HC Palmerston North, M85/98, 7 March 2001)

> "Section 96(4) requires the District Court Judge to "adjudicate upon the claim". The Judge is to decide it. *I do not think the added words directing the Judge to make such order "as the Judge thinks fit" enlarge that authority into some wider palm tree jurisdiction. There is not an express power based on "equity and good conscience" or the like. The object of s96 (and indeed s97) is to enable persons who have a legally recognised interest in property seized under warrants to obtain protection for that interest.* It is particularly necessary given the s93(1) power to seize property "apparently" that of the fine defaulter defendant. Obviously items not truly belonging to the defaulter could get caught up.
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> (Emphasis added)

[18] In *Otago Finance Ltd v District Court*[2] Panckhurst J agreed with and adopted McGechan J's observations in *Delta Transport* (supra). Panckhurst J also determined that out of the two conflicting approaches in the District Court, the approach applied by Judge Willy in *Motor Trade Finances Ltd v Venkteshwar*[3] and Judge Hubble in *Custom Credit Advances Ltd v District Court*[4] should be preferred. At para [37] Panckhurst J held:

> "The pivotal provisions, ss 96 and 97, must be read against this background [the statutory scheme of the Act]. Once they are it is apparent that they envisage a District Court Judge adjudicating on the ownership claim, or the secured interest claim, and implementing it. It is implicit in the sections that the very function of the Judge is to determine the intervener's claim in order to deal with the property (or its proceeds) as required by law. Where the intervener or claimant establishes that they are the true owner the Judge must recognise as much. *Equally where the claim is based upon a security interest, it is likewise to be recognised and given effect to.*"
>
> (Emphasis added)

His Honour continued at para [38]:

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

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[2] 2003] 1 NZLR 336
[3] [1992] DCR 64
[4] [1999] DCR 32

[19] What distinguishes this case from the ones that I referred to is that Asset Finance's security interest did not arise until *after* the vehicle was seized. Does that alter the position? On the facts of this case I consider it does not.

[20] I accept that Collections acted in good faith throughout. They seized and subsequently sold the vehicle through Turner's Auctions blissfully unaware that Ms Vuletich had put the Subaru up as security for a loan that was approved, not only after her vehicle had been seized, but after she had been in discussion with Collections as to how she could get the vehicle back. The fact that Collections did not follow strictly the provisions of s 94A(1) does not alter that finding.

[21] Asset Finance, on the face of it, also acted in good faith. There is no suggestion that there was any collusion or fraud of some sort between Ms Vuletich and them to defeat the claim of Collections, or that there was a close relationship between the fine defaulter and Asset Finance. This was an arm's length transaction between Asset Finance and Ms Vuletich. Nothing to the contrary has been submitted by Collections. Although Asset Finance could have done more by physically sighting the vehicle prior to approving the loan, which would have been impossible unless they were directed to Turner's Auction, I do not consider that that is conduct of such a nature which should defeat their registered interest.

[22] Asset Finance were deceived by Ms Vuletich on a number of levels, the most obvious being her failure to inform Asset Finance that the vehicle had been seized for unpaid fines. While her loan application may be correct on a strict interpretation that there was no money owing on the vehicle, a wide and liberal interpretation of the phrase 'money owing' would include the vehicle being seized for non payment of fines. She has also provided a forged and false vehicle evaluation.

[23] As was said in *Custom Credit Advances* (supra) the holder of a registered security should be entitled to the protection of their true legal interest except where that interest is a sham.

Result

[24] Asset Finance's registered security should not be defeated. I direct that the proceeds of sale be paid to the claimant.

[25] I am unaware as to how often what occurred here happens. If it is occurring regularly, that is that Collections are being defeated by dishonest fines defaulters encumbering their assets after the assets have been seized, then Collections should look to have either the Summary Proceedings Act or the Personal Property Securities Act amended so that, on seizure, Collections are able to register their interest in the property. If any further advances are made on the security of the item seized, then Collections take priority following registration.

D J McDonald
District Court Judge