

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

CIV-2010-404-3869

BETWEEN NICHIBO TRADING COMPANY NEW
 ZEALAND LIMITED
 Applicant

AND ADAM LEN LUCICH AND ELIZABETH
 ANNE MINTER
 Respondents

Hearing: 19 May 2011

Counsel: RB Hucker and D Lan Siu for the Applicant
 RS Pidgeon for the Respondents

Judgment: 15 July 2011

JUDGMENT OF TOOGOOD J

*This judgment was delivered by me on 15 July 2011 at 4:00 pm
Pursuant to Rule 11.5 High Court Rules*

Registrar/Deputy Registrar

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Introduction

[1] Nichibo Trading Company New Zealand Limited (“Nichibo”) has applied for an order that a financing statement registered on the Personal Property Securities Register in respect of a 2002 Mitsubishi Pajero motor vehicle, registered number ALQ489 (“the Pajero”), should be maintained. It says that it has a valid security interest in the Pajero, as a consequence of financing arrangements made under a vehicle supply and security agreement or “floor plan” with a licensed motor vehicle dealer, Baja Limited (“Baja”).

[2] This is a proceeding to determine whether Nichibo’s financing statement should be maintained on the register. It is not a proceeding to adjudicate over any breaches of Baja's obligations to Nichibo.

Background facts

[3] Baja traded as “Cheap Cars” from 355 Great North Road in Grey Lynn. Nichibo is a member of an organisation in Japan which has the right to purchase motor vehicles at various car auctions in Japan and then to ship the vehicles to New Zealand for resale by dealers such as Baja. Under a Vehicle Supply and Security Agreement dated 9 May 2008 (“the VSSA”), payment for any vehicle purchased by Nichibo in Japan and resold to Baja was to be made by Baja within 180 days of the bill of lading date or, if earlier, within three days of the sale or other disposition of the vehicle. Under the floor plan arrangement, vehicles supplied by Nichibo were to be the property of Nichibo until payment in full was made of all moneys lawfully due to Nichibo by Baja.

[4] The agreement created in the supplied vehicles a security interest, within the meaning of the Personal Property Securities Act 1999 (“the PPS Act”), entitling Nichibo to register such interest on the Personal Property Securities Register. Clause 6.2 of the agreement also expressly entitled Nichibo to register financing statements against “all present and after acquired property” of Baja, including motor vehicles

which were the proceeds of any vehicle sold or supplied directly or indirectly to Baja by Nichibo.

[5] One of the respondents, Adam Lucich, worked for Baja as a car salesman. The respondents say that Mr Lucich's mother, Elizabeth Minter, purchased the Pajero from Baja for value and that they became the registered owners of the Pajero on 18 December 2009.

[6] Nichibo re-possessed the Pajero in April 2010, after Baja got into serious financial difficulties. Mrs Minter wants the car back. When and how she acquired it is at the heart of this case.

[7] On 2 December 2009, Baja sold a 2004 VW Golf, which the purchaser paid for in part by trading in the Pajero. When the VW Golf was in Baja's yard, it was subject to a Purchase Money Security Interest ("PMSI") under the PPS Act.¹ By operation of the PPS Act, the PMSI applied also to the proceeds of the disposition of the vehicle, the term "proceeds" including any vehicle which might be traded-in at the time of payment of the purchase price for the secured vehicle.² In this case, therefore, the security interest held by Nichibo in the VW Golf was transferred to the Pajero by operation of law. Nichibo was required to register a separate financing statement in respect of the Pajero within 10 working days of the sale of the VW Golf, and there is no dispute that it did so in this case.³ The security interest remains registered at present.

[8] In about March 2010, Baja closed down leaving serious debts. The total indebtedness of Baja to Nichibo, at the time of the hearing, was in excess of \$600,000.00, in respect of which Nichibo was holding vehicles as security to a total estimated value of some \$325,000.00, including the Pajero. Since the Pajero was seized by Nichibo in April 2010 the vehicle has remained in its possession.

¹ Personal Property Securities Act 1999, ss 16 and 73.

² See PPS Act, ss 16, 17 and 45(1)(b).

³ See PPS Act, s 73.

[9] It is not disputed that, on the sale of the Pajero by Baja, Nichibo was entitled to payment under its trading arrangements with Baja before it was obliged to relinquish the protection of the security interest which it had registered in December 2009. It is important to note, however, that the Pajero was not a vehicle supplied by Nichibo under the VSSA. While Nichibo had a security interest in that vehicle, it was never Nichibo's property.

Relevant statutory provisions

[10] On one or more of five specified grounds, a person claiming an interest in personal property which is subject to a registered security under the PPS Act is entitled to make a change demand requiring the secured party to register a financing change statement which discharges the registration.⁴ A secured party faced with a change demand under s 162 has 15 working days from the date of the demand to give the person making the demand an order of the Court maintaining the registration.⁵

[11] After the re-possession, Mrs Minter served a change demand on Nichibo, which responded by making the present application for an order maintaining registration of the financing statement over the Pajero. Court orders have extended the maintenance of the financing statement on the register on an interim basis, pending the hearing and final determination of the application.

[12] In order for the applicant to succeed in maintaining the registration of its security interest under s 167, the Court must be satisfied that none of the grounds for making a demand under s 162 exist.⁶ It is not disputed that none of the grounds in ss 162(a), (b), (c), and (e) exist. The ground for the change demand advanced by Mrs Minter is that there is no security agreement between "the parties."⁷

[13] It is correct that there is no security agreement between Nichibo and the respondents, the parties to this proceeding. But the term "the parties" in s 162(d) is

⁴ PPS Act, ss 162(d) and 163(a).

⁵ PPS Act, s 165(1).

⁶ PPS Act, s 167.

⁷ PPS Act, s162(d).

not used in that sense. The section is not concerned with proceedings but with the giving of a demand, by a debtor or any person with a qualifying interest in property, to a secured party. The reference to "the parties" in s 162(d) must mean the parties to any security agreement related to the registered financing statement at issue; in other words, any two or more of the parties referred to in the section.

The applicant's evidence

[14] The records produced by Nichibo show that the VW Golf arrived in Baja's yard on 19 November 2009. The wholesale cost of the vehicle to Baja was \$14,523.87. Mr Geoff Sinclair, the operations manager of Nichibo, produced in evidence a properly completed VOSA establishing the details of the sale of the VW Golf. It showed that the buyer met the purchase price of \$18,200.00 by paying a cash deposit of \$1,000.00, making a further cash payment of \$5,200.00, and providing the Pajero as a trade-in at a net value of \$12,000.00. The agreement was signed on behalf of Baja on 29 November 2009, and by the purchaser on 2 December 2009.

[15] Nichibo invoiced Baja on 7 December 2009 for a balance due in respect of the Pajero of \$9,323.87, being the wholesale price of \$14,523.87 less the \$5,200.00 cash payment which had been paid in to Nichibo's bank account. In accordance with the scheme of the PPS Act and the trading arrangements between Nichibo and Baja, a financing statement in respect of the traded-in Pajero was registered by Nichibo under the PPS Act on 14 December 2009.

[16] It is common ground that the outstanding balance of \$9,323.87 was never paid by Baja, so that the security over the Pajero was never discharged. In terms of its arrangements with Baja, Nichibo would have been entitled to expect that it would be paid the balance owing at the time of the sale of the Pajero.

The respondents' evidence

[17] Mr Lucich did not give evidence.

[18] Mrs Minter swore and filed an affidavit in support of the respondents' opposition to the maintenance of the security interest and was cross-examined on it. She said that she purchased a Toyota Windom motor vehicle from Baja in "late 2009" for \$13,000, her son acting as the salesman. She said that Mr Lucich provided his own 7-Series BMW vehicle as a trade-in for \$6,000 and that she was given permission to drive the Toyota away and pay off the balance. Mrs Minter said that a further \$2,000 was paid to Baja as part of the agreement, but that she returned the Toyota Windom after the Pajero came in around two months later and that Baja allowed her to transfer the remaining payments to the purchase of the Pajero. She said that Mr Lucich and she arranged with Baja to swap the Toyota for the Pajero and that she "drove the Pajero (from mid-October 2009) and with Mr Lucich ... began paying the purchase price for the Pajero." She said that the \$6,000 trade-in value for the BMW (transferred as a trade-in from the Toyota Windom) represented the deposit.

[19] The respondents did not produce any documents relating to the sale of the Toyota Windom to Mrs Minter. No document proving the trade-in, or even the existence, of the 7-Series BMW was produced.

[20] Mrs Minter said that on 7 December 2009 she entered into a vehicle offer and sale agreement ("VOSA") with Baja Limited, a copy of which she produced. It is dated 4 December 2009. Mrs Minter said that the purchase price for the Pajero of \$13,000 was paid in the following way:

- (a) \$6,000 trade-in of the 7-Series BMW (transferred from the Toyota Windom);
- (b) \$6,000 in cash from Mr Lucich's paternal grandmother, Linda Lucich, of which \$2,000 was transferred from the transaction with the Toyota Windom; and
- (c) \$1,000 in cash which she paid to Baja.

The cash for the payments was said to have been given to Mr Lucich to pass on to Baja. Mrs Minter said that the total purchase price had been paid to Baja for the Pajero by 7 December 2009, the date she signed the vehicle offer and sale agreement.

[21] In a letter dated 29 April 2010 addressed to Nichibo, Mrs Minter also said that “the car in question [i.e., the Pajero] was a trade-in vehicle at Cheap Cars (C.C.) and was traded in early October 2009 when ... [she] entered into an arrangement with the owner of C.C. which allowed ... [her] to pay installments up to the full purchase price agreed as shown on the V.O.S.A & the C.I.N on the 7/12/2009 when the car was paid for in full.”

[22] The respondents also rely on an affidavit sworn by Mr Lucich’s paternal grandmother, Linda Lucich, in which she deposes as to the accuracy of an undated letter in which she said that Mrs Minter and Mr Lucich had an arrangement with her for a loan of \$6,000 to buy a car. She said that she gave money to the amount of \$2,000 towards the purchase of the Toyota Windom, but that it was later decided on a more suitable choice of vehicle, the Mitsubishi Pajero. Mrs Lucich said that she gave a further \$4,000 in numerous amounts over a period of time until the Pajero was paid in full and the vehicle picked up.

[23] This was direct sworn testimony but, in terms of the weight to be given to it, it suffers from the disadvantage that Mrs Lucich was not available, for medical reasons, to be cross-examined. For that reason, I put it to one side for the moment. The respondents rely also on letters purportedly signed by Mr Paul Nelson, a director and shareholder of Baja, and Mr Henrik Henk, the business manager of Baja. They are hearsay and not admissible under any relevant provision of the Evidence Act 2006. In any event, taken at face value, they do not add to the evidence on the contested issues, and I disregard them.

[24] Mr Sinclair said in evidence that, on the day after the Pajero was repossessed, he was visited by Adam Lucich and Mr Henk and given a document purporting to be a receipt issued by Baja Limited on 4 December 2009 to Mrs Minter showing payments in respect of the Pajero totalling \$10,950 as follows:

Payments Received

| | | | |
|----------|--------------------|------|------------|
| 1/10/200 | Non Refundable dep | Cash | \$6,000.00 |
| 18/10/20 | Additional Payment | Cash | \$1,000.00 |
| 20/10/20 | Additional Payment | Cash | \$1,250.00 |
| 24/10/20 | Additional Payment | Cash | \$700.00 |
| 14/11/20 | Additional Payment | Cash | \$400.00 |
| 20/11/20 | Additional Payment | Cash | \$600.00 |
| 3/12/200 | Additional Payment | Cash | \$1,000.00 |

\$10,950.00

[25] Despite several requests, Mr Sinclair was not given a copy of the VOSA relating to the sale of the Pajero to Mrs Minter. Apparently, he did not see the document purporting to be the agreement for the sale of the Pajero to Mrs Minter until it was produced as an attachment to her affidavit in this proceeding. The respondents have not produced any records relating to the acquisition of the Toyota Windom or the trade-in of the BMW in respect of that alleged purchase, and Mr Sinclair said Nichibo had received nothing from Baja related to those vehicles.

[26] It is the respondents' case that Mrs Minter alone was the buyer of the Pajero; she is named as such on the VOSA. The fact that her son became a registered owner is explained, she said, by his contribution of \$6,000 towards the purchase price and the need to recognise his interest. There is no evidence to contradict her assertion that the vehicle was purchased for her use.

Is there a security agreement between Nichibo and Baja?

[27] Plainly, there is no security agreement between the respondents and either Baja or Nichibo. The registered financing statement at issue exists by reason of the VSSA between Nichibo and Baja.⁸ The evidence firmly establishes Nichibo's

⁸ Clause 6.2, as discussed at [6].

agreement with Baja; the trading-in of the Pajero; the statutory transfer of the security interest to the Pajero; and the perfecting of the interest by the timely registration of it on 14 December 2009. It is common ground that Baja has never paid Nichibo for the balance owing after the trade-in of the Pajero. I am satisfied that Nichibo is entitled under s 167 to maintain the security interest on the register, by reason of its security agreement with Baja.

The respondents' claims under ss 53 and 58 Personal Property Securities Act 1999

[28] In opposing Nichibo's application, however, the respondents also argue that an order should be made removing Nichibo's security interest from the register because, by virtue of either s 53 or s 58 of the PPS Act, they have acquired the Pajero free of any security interest.

[29] Section 53(1) of the PPS Act reads:

53 Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests

- (1) A buyer of goods sold in the ordinary course of business of the seller, and a lessee of goods leased in the ordinary course of business of the lessor, takes the goods free of a security interest that is given by the seller or lessor or that arises under section 45, unless the buyer or lessee knows that the sale or the lease constitutes a breach of the security agreement under which the security interest was created.

....

[30] The effect of the provision is that, so long as the buyer of goods sold in the ordinary course of the business of the seller does not know that the sale of the goods constitutes a breach of the security agreement under which the security interest was created, the buyer acquires the goods free of the security interest.

[31] For the respondents to take advantage of s 53, it must be established that:

- (a) at least one of them was the buyer of the Pajero;

- (b) the Pajero was sold to the buyer “in the ordinary course of business” of the seller, Baja;
- (c) Baja granted the security interest; and
- (d) the buyer did not know that the sale constituted a breach of the security agreement under which the security interest was created.

[32] The applicant argues, first, that there was no genuine sale to Mr Lucich and Mrs Minter, with the result that they were not the buyers of the vehicle; and, alternatively, that if the vehicle was sold to them, it was not sold “in the ordinary course of business” of Baja.

[33] Section 58 of the PPS Act is a special provision relating to the sale and purchase of motor vehicles from a trader registered under the Motor Vehicle Sales Act 2003. It provides:

58 Buyer or lessee of motor vehicle acquired from registered trader takes motor vehicle free of security interest

A buyer or lessee of a motor vehicle who acquires the motor vehicle for value takes the motor vehicle free of any security interest in the motor vehicle if—

- (a) the buyer or lessee is a consumer who acquires the motor vehicle from a registered trader (whether or not the motor vehicle trader is acting as a principal or as an agent for the seller or lessor in the transaction under which the buyer or lessee, as the case may be, acquires the motor vehicle); and
- (b) the security interest was not created or provided for in a transaction to which the buyer or lessee is a party; and
- (c) before the transaction to which the buyer or lessee is a party is completed, the security interest was not,—
 - (i) in the case of a used motor vehicle, disclosed in accordance with sections 14 and 15 of the Motor Vehicle Sales Act 2003; or
 - (ii) in any other case, disclosed in writing to the buyer or lessee.

[34] For the respondents to take advantage of s 58, it must be established that:

- (a) the buyer was a “consumer”;⁹
- (b) the Pajero had been acquired from Baja for value;
- (c) the security interest was not created or provided for in a transaction to which the buyer was a party; and
- (d) the security interest was not disclosed to the buyer or buyers in accordance with ss 14 and 15 of the Motor Vehicle Sales Act 2003 before the sale of the Pajero was completed.

The burden and standard of proof

[35] Under ss 162 and 167, the person seeking to maintain the registration of the security interest has the onus of establishing a sufficient interest.¹⁰ Where s 162(d) is in issue, the test is whether the person seeking to maintain the registration can establish a seriously arguable case that a security agreement exists between the relevant parties.¹¹

[36] I have had no difficulty applying those principles in respect of Nichibo's application, but the question here is what onus and standard of proof should apply where a positive defence is asserted under s 53 or s 58.

[37] I recognise the force of the point made in *Toyota Finance New Zealand Limited v Christie*,¹² that the summary procedure for maintaining registration of a security interest is not usually suitable for the determination of disputed questions of fact. The other relevant issue, on a simple application of ss 162 and 167, is that maintaining the security on the register is not a final determination of the issue of

⁹ Or, if both were the buyers, that they were both consumers, as defined.

¹⁰ *Toyota Finance New Zealand Limited v Christie* HC Auckland CIV-2009-404-3797, 15 July 2009, at [18].

¹¹ *Toyota Finance New Zealand Limited v Christie* at [18].

¹² *Toyota Finance New Zealand Limited v Christie* at [17].

whether the party claiming an interest holds that interest free of the security. It would be open to a buyer, if the registration is maintained by a s 167 application, to apply for a declaration by this Court or a District Court as to the validity of the security interest.

[38] But in these proceedings, the respondents have effectively taken that step by calling ss 53 and 58 in aid of their opposition; the notice of opposition, in effect, is an originating application by the respondents. A determination that either s 53 or s 58 applies in favour of the respondents results cannot be expressed as an interim finding that they have acquired the Pajero free of the applicant's security interest; it is inherently a final determination. In those circumstances, it is necessary that the respondents should bear the onus of proving their claims, and that more than an arguable case should be made out.

[39] Consistently with the procedure which, it seems to me, should apply whenever s 53 or s 58 is relied upon in opposition to an application under s 167, I have had the benefit of receiving comprehensive written evidence, including copies of relevant documents, and of hearing Mr Sinclair and Mrs Minter under cross-examination. I have taken time to consider these matters carefully while the applicant's position has been given interim protection. The disadvantages which might usually attend the hearing of an application under s 167, where the Court considers only affidavit evidence, do not exist in the present case.

[40] For these reasons, I consider that I should not uphold the respondents' claims under either s 53 or s 58 unless satisfied on a balance of probabilities that the claims are properly made.

Analysis of the evidence of the transactions

[41] The VOSA dated 4 December 2009 and signed by Mrs Minter on 7 December 2009, which purports to record the purchase of the Pajero by Mrs Minter, does not contain information usually recorded about the purchaser's date of birth and driver's licence details.

[42] The retail price is shown in the vehicle offer and sale agreement as \$13,000. Under the “Payment Summary” section, the following entries are shown:

| Payment Summary | |
|--------------------------------------|------------|
| Deposit on signing – refer condition | \$6,000.00 |
| Additional payments | \$2,000.00 |
| Other payments | |
| Due on delivery | \$0.00 |
| Total Cash received | \$8,000.00 |
| Balance outstanding | \$5,000.00 |

That is inconsistent with the claim that the vehicle was paid for in full by 7 December 2009. It is consistent, however, with Mrs Minter's evidence that members of her family provided consideration for the Pajero on her behalf. I note also that the VOSA for the sale of the VW Golf also shows a balance outstanding with no reference to how that sum was to be paid or financed.

[43] There is no reference to any traded vehicle, whether the Toyota Windom or the BMW, but the claimed value of the BMW is reflected in the \$6,000 deposit shown in the payment summary.

[44] The amounts shown on the VOSA do not tally with the purported receipt dated 4 December 2009, but the additional cash payments of \$4,950 shown in the receipt are within \$50 of the “balance outstanding” figure in the vehicle offer and sale agreement.

[45] There is no reference in the receipt to the initial \$2,000 allegedly paid by the grandmother, Mrs Lucich. Nevertheless, when the \$2,000 said to have been paid by Mrs Lucich towards the acquisition of the Toyota Windom is added to the amounts in the receipt, the total is within \$50 of the purchase price shown in the vehicle offer and sale agreement for the Pajero, and there is a reference in the VOSA to additional payments equivalent to that \$2,000 sum.

[46] Mrs Minter claimed in her letter of 29 April 2010 that the Pajero “was traded in early October 2009” when she entered into an arrangement with the owner to

allow her to pay instalments up to 7 December 2009. Consistently with that claim, she said in her affidavit that she "drove the Pajero (from mid-October 2009) and with Mr Lucich ... began paying the purchase price for the Pajero."

[47] But the documents related to the sale of the VW Golf and the trade-in of the Pajero establish that that transaction did not begin until 27 November 2009. The purchaser of the Golf retained possession of the Pajero until 2 December 2009. On that basis, Mrs Minter could not have been driving the Pajero from mid-October; the vehicle offer and sale agreement was dated only 2 days after Baja took possession of the Pajero.

[48] Mrs Minter explained the inconsistency between her letter of 29 April 2010 and the other evidence by saying that the letter had been prepared for her by a friend who had plainly misunderstood the facts; she said that she did not properly read the letter before signing it. Under cross-examination, Mrs Minter said she had confused the Toyota Windom with the Pajero, and that it was the former she had driven for some weeks while the payments were made. I note that the letter was written some five months after it is said Mrs Minter bought the Pajero and that she does not appear to have had access to Baja's records to refresh her memory.

[49] It is puzzling that, although the purported receipt and the VOSA are dated 4 December 2009, and the VOSA was purportedly signed on 7 December 2009, the on-sale to Mrs Minter was not brought to the attention of Nichibo when the paperwork for the sale of the VW Golf was handed over on 7 December. And it is not explained why, if Baja had received some \$7,000 in cash from Mr Lucich or his family by 4 December 2009 as part of a genuine transaction, the applicant was not paid something towards the balance of \$9,323.87 recorded as owing in respect of the Pajero on 7 December 2009, following the sale of the VW Golf. Those are matters, however, over which the respondents have not been shown to have had any control. The defaults of Baja should not be imputed to the respondents.

[50] As to the absence of any records in relation to the initial purchase of the Toyota Windom and the trade-in of the BMW, the respondents point to difficulties arising from the collapse of Baja. The respondents do not explain why Baja's

assistance allowed them to produce the receipt and the vehicle offer and sale agreement for the Pajero but not other relevant business records.

[51] Nevertheless, the transfer of the ownership of the Pajero to Mr Lucich and Mrs Minter was registered on 18 December 2009. Despite the unsatisfactory aspects of the evidence to which I have referred, the registration leads to a strong inference that Mrs Minter was a genuine buyer of the vehicle. It is significant, in my view, that this occurred some months before Nichibo ceased to support Baja financially and began repossessing its vehicle stock.

[52] And while there are inconsistencies in the evidence as to how and when the purchase price of the Pajero was paid, there is acceptable evidence in the VOSA produced by Mrs Minter that at least some consideration had been paid for that vehicle by the time she signed the agreement on 7 December 2009.

[53] I turn to consider the disputed issues under ss 53 and 58. In summary, they are:

- (a) Was Mrs Minter the sole buyer of the Pajero, or did she buy it with her son? (Sections 53 and 58);
- (b) Was the Pajero sold in the ordinary course of Baja's business? (Section 53);
- (c) Did the buyer or buyers know that the sale constituted a breach of the VSSA? (Section 53);
- (d) Was Mr Lucich a "consumer" for the purposes of s 58?
- (e) Was the Pajero acquired from Baja for value? (Section 58); and
- (f) Was there disclosure in accordance with ss 14 and 15 of the Motor Vehicle Sales Act 2003? (Section 58).

Who bought the Pajero?

[54] It is necessary, under both s 53 and s 58, to establish the identity of the buyer or buyers of the Pajero from Baja. It was not disputed by Mr Hucker that Mrs Minter was a buyer; but he argued that Adam Lucich was also a buyer, pointing to the vehicle registration records which, he says show Mr Lucich as the primary owner.

[55] For the respondents, Mr Pidgeon argued that Mrs Minter alone was the buyer, as indicated on the vehicle offer and sale agreement. It is said on behalf of the respondents that Mr Lucich's name was shown on the vehicle registration documents only to reflect his contribution of the trade-in value of the BMW.

[56] The identity of the buyer or buyers is a question of fact. I am satisfied that, while the Toyota Windom and then the Pajero may have been intended for Mrs Minter's use, both Mrs Minter and Adam Lucich were the buyers of the Pajero. Sufficient proof is provided by the respective financial contributions to the purchase of the vehicle and the ownership details shown in the vehicle registration forms.

Was the Pajero sold in the ordinary course of Baja's business?

[57] Whether the sale took place in the ordinary course of business is a question of fact to be determined having regard to all of the circumstances.¹³ It should also be determined in light of the purpose of the section. In that regard, I note that the Court of Appeal in *Tubbs v Ruby 2005 Ltd*¹⁴ agreed with the comments of Linden J in *Fairline Boats Ltd v Leger* as to the purpose of the Ontario equivalent of s 53:¹⁵

The objective of this section, as I understand it, is to permit commerce to proceed expeditiously without the need for purchasers of goods to check into the titles of sellers in the ordinary course of their business. Purchasers are allowed by our law to rely on sellers using the proceeds of sales to repay any liens on the property sold. In these days inventory is almost invariably financed, and as a result is almost invariably subject to liens of one kind or another. To require searches and other measures *to protect lenders* in every transaction would stultify commercial dealings, and so the Legislature

¹³ *Tubbs v Ruby 2005 Ltd* [2010] NZCCLR 31 (HC)

¹⁴ *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353; [2011] NZCCLR 3 at [38]

¹⁵ *Fairline Boats Ltd v Leger* (1980) 1 PPSAC 218 (Ont HC) at [8]

exempts buyers in the ordinary course of business from these onerous provisions, even where they know that a lien is in existence. [Emphasis added]

[58] It is not in dispute that Baja's business was buying and selling used cars. As to whether the transaction was "in the ordinary course" of the business, I note that the adjective "ordinary" qualifies the noun "course", suggesting that the manner in which the transaction was conducted should be considered, as well its nature.

[59] I take into account the following factors:

- (a) The transaction involved the buying and selling of a used car;
- (b) The sale price of \$13,000 to the respondents represented a reasonable mark-up of only \$1,000 over the net trade-in price;
- (c) The purchase price is said to have been provided by a sequence of events involving the trading-in, initially, of a 7-Series BMW car, and the acquisition and subsequent return of a Toyota Windom, staggered payments for which are said to have been credited towards the purchase price. While that sequence may be unusual, the end result is that the purchase price was met by a trade-in of a used vehicle and the payment of cash, a common occurrence;
- (d) It is an unusual feature that one of the purchasers was an employee of Baja, who was apparently familiar with the financing arrangements between Baja and Nichibo and who, I am prepared to infer, would have been aware of the likelihood that Nichibo had a security interest in the Pajero;

[60] I am satisfied that Baja did not account to Nichibo for the proceeds of the sale, as it would have done "in the ordinary course of business"; but that relates to the disposition of the net proceeds of the sale and is not a relevant feature so far as the transaction between the purchasers and Baja is concerned.

[61] Taking into account the purpose of the section, I consider on balance that the sale and purchase of the Pajero was in the ordinary course of Baja's business of buying and selling used cars. I have considered whether the fact that an employee of the vendor was one of the purchasers of the vehicle takes the transaction outside the ordinary course of Baja's business. In *369413 Alberta Limited v Pocklington*¹⁶ the Alberta Court of Appeal concluded, under a similar provision to s 53, that the transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation." The Court also noted in that case that a transaction between a company and a party with whom it is related should receive careful scrutiny. Here, however, the purchase price indicates that this was a normal commercial transaction; the fact that the purchasers were an employee and his mother does not, in my view, give rise to a "special or peculiar situation".

[62] The extent of Adam Lucich's knowledge as to whether there was a breach of Baja's obligations to Nichibo in the disposition of the proceeds of the transaction falls to be considered next.

Did the respondents know that the sale constituted a breach of the VSSA?

[63] For the respondents to take advantage of the protection provided by s 53, the Court must be satisfied that they did not know that the sale of the Pajero constituted a breach of the security agreement under which the security interest was created. The VSSA between Nichibo and Baja required Baja to account to Nichibo for the proceeds of the sale of the Pajero in satisfaction of the amount of \$9,523.87 which remained owing following the sale of the VW Golf.

[64] I accept the evidence of Mr Sinclair that Mr Lucich was generally aware of the financing arrangements between Baja and Nichibo, and I am prepared to infer that Mr Lucich would have known that Baja would be obliged to account to Nichibo for the proceeds of the sale of the Pajero. But there is no evidence that Mr Lucich had such a position in the company as would lead to a necessary inference that he

¹⁶ *369413 Alberta Limited v Pocklington* (2001) 194 DLR (4th) 109 at [21].

knew that Baja had not so accounted for the proceeds. In any event, it was not the sale but the failure to account which constituted the breach of Baja's obligations.

[65] Although I would be prepared to attribute the state of Mr Lucich's knowledge to both purchasers, the evidence satisfies me on a balance of probabilities that Mr Lucich and Mrs Minter did not know that the sale, so far as it involved a failure to account for the proceeds, amounted to a breach of the VSSA between Nichibo and Baja.

Finding as to application of s 53

[66] I am satisfied, therefore, that Mrs Minter and Mr Lucich purchased the Pajero in the ordinary course of business of Baja in circumstances which entitled them to take the Pajero free of the security interest which Nichibo had in the vehicle under s 45 of the Act.

[67] In case I am wrong in that conclusion, I turn to consider whether the respondents took the vehicle free of any security interest by reason of s 58.

Was Mr Lucich a 'consumer' for the purposes of s 58?

[68] In support of the applicant's position that Mr Lucich could not take advantage of s 58, because he was not a "consumer" for the purposes of that section, Mr Hucker referred to s 57 PPS Act which defines "consumer" as any person other than a manufacturer, wholesaler, registered trader, or a finance company. He said that, as a salesman involved on both sides of the transaction for the purchase of the Pajero, Mr Lucich should be regarded as a "registered trader" which, by virtue of s 57, means "a motor vehicle trader registered under the Motor Vehicle Sales Act 2003". He based this submission on a statement in one of the texts that, for the purposes of s 58, "a consumer will be any person who is not engaged in the motor

vehicle industry"¹⁷, but that is a very general statement which is not borne out by an analysis of the provisions of the Motor Vehicle Sales Act.

[69] Section 9(1)(a) of the Motor Vehicle Sales Act 2003 provides that a person "is not treated as carrying on the business of motor vehicle trading for the purposes of the Act only because that person is ... an employee or an agent of a motor vehicle trader". Mr Lucich would be excluded from the definition on that basis and, in any event, the definition of "consumer" in s 57 of the PPS Act excludes only motor vehicle traders who are registered under the Motor Vehicle Sales Act. While Baja is a registered trader, there is no evidence that Mr Lucich is so registered. Adam Lucich was a "consumer" for the purposes of s 58.

Was the Pajero acquired from Baja for value?

[70] Despite the unsatisfactory aspects of the evidence relating to the arrangements for payment of the purchase price for the Pajero, I have concluded, on balance, that consideration for the purchase was provided. In s 16 PPS Act, "value":

- (a) Means consideration that is sufficient to support a simple contract;
and
- (b) Includes an antecedent debt or liability.

[71] Having regard to the evidence of Mrs Minter as to the way in which Baja was paid the purchase price for the Pajero, corroborated to an extent by the VSSA, and the registration of the vehicle into the names of the respondents, I am satisfied that sufficient consideration was provided by the respondents for the contract. Accordingly, the Pajero was acquired for value in terms of s 58.

[72] It is not disputed that the security interest in the Pajero was not created or provided for in a transaction to which the respondents were parties, leaving the application of s 58 to be determined by whether the security interest was disclosed to

¹⁷ Michael Gedye, Ronald Cumming and Roderick Wood *Personal Property Securities in New Zealand*, (Brookers, Wellington, 2002) at 243-244.

the respondents in accordance with ss 14 and 15 of the Motor Vehicles Sales Act 2003, before the sale of the Pajero was completed.

Was there disclosure in accordance with ss 14 and 15 of the Motor Vehicle Sales Act 2003?

[73] It is not entirely clear when the sale of the Pajero “was completed” although I think, on balance, that must have been by 18 December 2009. It is highly unlikely, in my view, that the change of ownership into the names of the respondents could be registered without Baja having been provided with full consideration satisfactory to it, even if there was some arrangement that Mr Lucich’s family would pay off any outstanding cash balance over time.

[74] Mr Pidgeon argued that, for the purposes of the Act, the sale must be regarded as “completed” at the time at which the buyer or lessee entered into the transaction. He adopted the explanation given in *Personal Property Securities in New Zealand* that:¹⁸

It is inconceivable that it means the time when all obligations have been performed. This latter interpretation would mean that a buyer or lessee could be deprived of the s 58 protection after paying most of the purchase price or rental.

In my view, “completed” means the time at which a binding contract for the purchase or lease was formed, even if part of the consideration for the bargain is a promise to pay any outstanding balance of a purchase price, or continuing lease payments.

[75] On the facts of the present case, the precise date on which the transaction was “completed” may not matter. Whether that was on 7 December when Mrs Minter signed the VSSA, or on 18 December 2009 when the vehicle was registered in the respondents’ joint names, there is no evidence that the respondents were provided with any different information between the two dates.

¹⁸ *Personal Property Securities in New Zealand*, Gedye et alia at 245.

[76] I have been prepared to infer that Mr Lucich was probably aware that Nichibo would have had a security interest in the Pajero, and that the state of his knowledge should be imputed to his mother as co-purchaser. Nevertheless, what is necessary under s 58 is to establish that there was no disclosure of the security interest in accordance with ss 14 and 15 of the Motor Vehicle Sales Act 2003. Those sections provide:

14 Particulars about used motor vehicle must be displayed

- (1) A motor vehicle trader who offers or displays a used motor vehicle for sale, or causes or permits a used motor vehicle to be offered or displayed for sale, must ensure that a notice containing the particulars set out in section 15(1) is attached to the vehicle in a prominent position.
- (1A) If a motor vehicle is offered or displayed for sale by a motor vehicle trader through a car market operator's facility (as referred to in paragraph (a)(ii) of the definition of car market operator in section 6(1)), the motor vehicle trader complies with the obligation in subsection (1) if the notice is readily accessible (for instance, by a hyperlink) from—
 - (a) the place where the motor vehicle is offered or displayed for sale; and
 - (b) the place through which, or by means of which, the contract for sale may be completed.
- (2) A car market operator must take reasonable steps to ensure that a motor vehicle trader offering or displaying a used motor vehicle for sale through the car market operator complies with the motor vehicle trader's obligation in subsection (1).
- (3) Subsections (1) and (2) do not apply if a used motor vehicle is offered or displayed for sale—
 - (a) by a motor vehicle trader registered under this Act; and
 - (b) exclusively to other motor vehicle traders registered under this Act, or to licensed car wreckers, or to both.

15 Particulars (including statement about buyer taking motor vehicle free of security interests) that must be contained in notice attached to used motor vehicle

- (1) All of the following particulars must be contained in every notice that, in accordance with section 14(1), must be attached to a used motor vehicle:

- (a) a statement that sets out the effect of section 58 of the Personal Property Securities Act 1999. That section, as amended by section 145 of this Act, is as follows:

“58 Buyer or lessee of motor vehicle acquired from registered trader takes motor vehicle free of security interest“

A buyer or lessee of a motor vehicle who acquires the motor vehicle for value takes the motor vehicle free of any security interest in the motor vehicle if—

“(a) the buyer or lessee is a consumer who acquires the motor vehicle from a registered trader (whether or not the motor vehicle trader is acting as a principal or as an agent for the seller or lessor in the transaction under which the buyer or lessee, as the case may be, acquires the motor vehicle); and

“(b) the security interest was not created or provided for in a transaction to which the buyer or lessee is a party; and

“(c) before the transaction to which the buyer or lessee is a party is completed, the security interest was not,—

“(i) in the case of a used motor vehicle, disclosed in accordance with sections 14 and 15 of the Motor Vehicle Sales Act 2003; or

“(ii) in any other case, disclosed in writing to the buyer or lessee.”:

(b) particulars (if any) that are contained in a consumer information standard prescribed by regulations made under section 27 of the Fair Trading Act 1986:

(c) any other prescribed particulars.

(2) Nothing in this section or section 14 derogates from any other enactment, including—

(a) section 58 of the Personal Property Securities Act 1999; or

(b) section 27 of the Fair Trading Act 1986.

[77] Bearing in mind that the onus of proving the non-disclosure lies on the respondents, I am not satisfied on the evidence that this element of s 58 is established. Mrs Minter gave no evidence on that point, although the letter dated 29 April 2010 addressed to Nichibo referred to a “C.I.N”, which I take to be the Customer Information Notice which would usually be attached to the vehicle when it

was placed in Baja's yard for sale. The failure of the respondents to adduce any evidence on the point should not be taken as sufficient to prove the negative.

[78] In those circumstances, I find that the respondents are not able to take advantage of s 58 of the Act.

Conclusion

[79] Having determined, however, that s 53 of the Act applies, it follows that the respondents took the Pajero free of Nichibo's security interest. In those circumstances, Nichibo is not entitled to an order that the registration of financing statement F745264DJ814PT1D registered by the applicant be maintained, and the application is dismissed accordingly.

[80] The respondents are supported by legal aid. In the ordinary course of events I would have considered that the respondents would be entitled to costs on a 2B basis. I leave it to the parties to confer as to costs, which are reserved.

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Toogood J