IN THE COURT OF APPEAL OF NEW ZEALAND

CA465/2016
[2017] NZCA 463

BETWEEN	DESMOND JAMES ALBERT CONWAY Appellant
AND	MERCEDES-BENZ FINANCIAL SERVICES NEW ZEALAND LIMITED Respondent

Hearing: 1 August 2017

Court: Clifford, Simon France and Toogood JJ

Counsel: J P Dallas for Appellant
P M Hunter for Respondent

Judgment: 17 October 2017 at 4 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] Between February and August 2011 the appellant, Desmond Conway, bought three Mercedes-Benz vehicles from the Wellington Mercedes-Benz dealership (Ingham Motors Wellington Ltd, trading as Wellington Star). Mr Conway's purchases were financed by the respondent, Mercedes-Benz Financial Services

New Zealand Limited (MB Finance). Mr Conway defaulted on his obligations under those financing arrangements.

[2] MB Finance took steps to enforce its rights. On 29 October 2013 it repossessed two of the vehicles: at that time it could not locate the third. The third vehicle was repossessed in June 2015. MB Finance sold the vehicles and commenced proceedings in the High Court to recover the balance of the monies owing to it by Mr Conway.

[3] In his statement of defence, Mr Conway challenged the way MB Finance had gone about repossessing and selling the vehicles. It had not, he said, complied with the notice requirements of the relevant statutory regime. That was Mr Conway's only defence. Mr Conway counterclaimed: MB Finance's unlawful repossession entitled him to damages. MB Finance applied unsuccessfully for summary judgment in respect of that counterclaim.[1] It was then determined that the validity of Mr Conway's legal defence would be determined first.[2]

[4] That matter was argued before Fogarty J in a three day trial in early August last year. In a judgment released on 16 August 2016, Fogarty J found in favour of MB Finance.[3] Mr Conway now appeals.

Analysis

Overview

[5] One of the purposes of the Personal Property Securities Act 1999 (the PPSA) is to do away with the complex and unpredictable effects of the various methods used by consumers and business people to finance property other than land. That complexity and unpredictability flowed from the many distinctions the law drew depending on whether or not the borrower had acquired title to the property being financed and on the basis of the particular legal form of security created.[4]

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1 *Mercedes-Benz Financial Services New Zealand Ltd v Conway* [2015] NZHC 315.
2 *Mercedes-Benz Financial Services New Zealand Ltd v Conway* [2016] NZHC 1587.
3 *Mercedes-Benz Financial Services New Zealand Ltd v Conway* [2016] NZHC 1896.
4 For example, a mortgage, charge, pledge or hypothecation.

[6] A central definition in the PPSA is that of the term "security interest". Section 17 provides:

> **17 Meaning of security interest**
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> (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).
>
> (2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.
>
> (3) Without limiting subsection (1), and to avoid doubt, 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.

[7] That "in substance" approach is reflected, as regards the traditional significance of a borrower acquiring title, by s 24:

> **24 Application of Act not affected by secured party having title to collateral**
>
> The fact that title to collateral may be in the secured party rather than the debtor does not affect the application of any provision of this Act relating to rights, obligations, and remedies.

[8] Thus the provisions of the PPSA, including as regards creation, registration, and enforceability of security interests, are generally "title neutral" and apply equally to all forms of security. They do so notwithstanding the form in which a particular security is created, whether by reference to the term security interest itself, or by reference to one of the traditional forms of security referred to in s 17(3).

[9] There are a limited number of exceptions to that general proposition. Two are relevant here.

[10] First, where security over consumer goods[5] is being enforced, the financier must comply with the more onerous requirements of consumer protection legislation.[6]

[11] Second, where security over goods that are not consumer goods[7] is being enforced, and that security is in the form of a mortgage, the notice requirements of the PPSA do not apply. Rather s 114(4) of that Act provides:

> If the security interest is created or provided for by a mortgage over goods,—
>
> (a) sections 128 to 136 of the Property Law Act 2007 apply; and
>
> (b) the notice that is given under subsection (1) must be—
>
> (i) in the form prescribed by regulations made under that Act (instead of being in the form prescribed by regulations made under this Act); and
>
> (ii) given to the persons referred to in sections 128 and 130 of the Property Law Act 2007 (instead of to the persons referred to in subsection (1)).

[12] When MB Finance took possession of the first two vehicles, it did so — on the basis they constituted consumer goods — in accordance with the procedures of the Credit (Repossession) Act 1997.[8] Mr Conway said that was wrong. Those two vehicles were not consumer goods. So the provisions of the PPSA applied after all. Mr Conway said further that the security interest he had created over those two vehicles was a mortgage. Therefore, under s 114 of the PPSA MB Finance had to comply with ss 128 to 136 of the Property Law Act 2007 (the PLA). MB Finance

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5 The Personal Property Securities Act 1999 defines consumer goods as: "goods that are used or acquired for use primarily for personal, domestic, or household purposes" — Personal Property Securities Act, s 16, definition of "consumer goods".

6 As relevant to this dispute, the Credit (Repossession) Act 1997; now the Credit Contracts and Consumer Finance Act 2003.

7 The Personal Property Securities Act defines goods as tangible personal property, and includes "crops, the unborn young of animals, trees that have been severed, and petroleum or minerals that have been extracted". It "does not include chattel paper, a document of title, a negotiable instrument, an investment security, or money" — Personal Property Securities Act, s 16, definition of "goods".

8 The Credit (Repossession) Act was repealed from 6 June 2015. However, it continues to apply to security arrangements entered into before that date.

had not given notice of its intention to sell those vehicles in the manner required by those sections. MB Finance acknowledged that was so. But it said it was not required to.

[13] By the time MB Finance located and repossessed the third vehicle, it was aware of Mr Conway's position that it needed to follow the PLA procedure. It purported to do so. But, Mr Conway says, it did not: the required notice was in the wrong form and not personally signed as required.

[14] In its submissions in the High Court, MB Finance identified five separate issues requiring determination. Mr Conway identified three. Fogarty J considered that the core issue was whether Mr Conway ever became the owner of the cars.[9] Fogarty J reached that conclusion for the following reasons:

(a) Mr Conway could only sustain his challenge to the lawfulness of MB Finance's action if s 114(4) of the PPSA applied.[10]

(b) Section 114 could only apply if MB Finance's security was a mortgage.

(c) MB Finance's security could only be a mortgage if Mr Conway had obtained title to the vehicles.

[15] The issue of whether Mr Conway had acquired title was accordingly central. The parties approached this appeal on the same basis.

[16] In our view, that approach created unnecessary complexity, reflective of the pre-PPSA regime and the significance of who had title to the secured property and in what form the security was created. As we explain below, we are satisfied that the security held by MB Finance over each of the vehicles was not a mortgage. Rather,

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9 *Mercedes-Benz Financial Services New Zealand Ltd v Conway*, above n 3, at [19].

10 Based on certain aspects of the documentation involved, there was a difference of view between MB Finance and Mr Conway as to whether the vehicles were, in fact, "consumer goods". As the notice provisions of the Credit (Repossession) Act include, but are more onerous than, those found in the Personal Property Securities Act, that difference of view was not material. It was only if s 114(4) of the Personal Property Securities Act applied that Mr Conway could possibly argue the correct procedures had not been followed by MB Finance.

it was simply a security interest, taking effect and enforceable as such under the PPSA. Whether or not Mr Conway acquired title is neither here nor there. But before we get to that analysis, we first deal with a preliminary issue Mr Dallas (representing Mr Conway) raised — an issue of disclosure.

The disclosure issue

[17] The background is this. As is relatively common knowledge, a "floor plan" is the means whereby many traders in larger chattels, and particularly motor cars and other vehicles, finance those goods whilst they are on display for sale. In its affidavit of documents, MB Finance had listed its floor plan with Wellington Star as simply "an agreement", for which it claimed confidentiality. During discovery Mr Conway did not request a copy of that agreement, nor inquire as to the basis upon which confidentiality was claimed in respect of it. It was not until the trial before Fogarty J that the document was referred to, by a witness for MB Finance. By reference to her understanding of the terms of that agreement, that witness explained that, at the point Mr Conway obtained possession of the vehicles, the owner of the vehicles was MB Finance. Fogarty J accepted that explanation, concluding:

> [40] Overall, I am satisfied that under persistent cross-examination Ms Woon [the General Manager of MB Finance and its principal witness] consistently adhered to the proposition that in this case the vehicles on the floor of the Wellington Star's yard were owned prior to sale by [MB Finance] under a finance plan provided to the dealer. There was no evidence to the contrary. Accordingly, I find as a fact that the three vehicles, were prior to the dealing with Mr Conway, owned by [MB Finance] and that Wellington Star was selling on behalf of [MB Finance].

[18] Mr Conway's complaint in his notice of appeal was that MB Finance should have disclosed the floor plan agreement to him. Failure to do so had prejudiced him.

[19] That agreement was provided to Mr Conway shortly before the hearing of this appeal. Mr Dallas had the opportunity to consider its terms. Mr Dallas responsibly confirmed that he was able to reflect the terms of that floor plan agreement in his submissions, without any prejudice to Mr Conway.

[20] Accordingly, we do not deal with that issue in any further detail.

Mortgages or security interests?

[21] The terms, including as to security, upon which Mr Conway acquired the vehicles were recorded in four documents:[11]

(a) a vehicle offer and sale agreement (VOSA);

(b) an application for finance (finance application);

(c) a disclosure statement for a consumer credit contract (disclosure statement); and

(d) a consumer credit contract (credit contract).

[22] Those documents, as exhibited in affidavits of witnesses for MB Finance, were incomplete. It was not disputed, however, that those documents taken together reflected all the terms of the arrangements between Wellington Star, MB Finance and Mr Conway.

[23] Explained neutrally, in terms of the title issue:

(a) The VOSA recorded the terms, particularly as to price, trade-in credit, transaction fees and amount financed on which Wellington Star would supply the given vehicle to Mr Conway.

(b) In the finance application, Wellington Star applied, pursuant to the dealer agreement, to MB Finance to finance Mr Conway's acquisition. Those "applications", by customary practice between Wellington Star and MB Finance, took the form of a GST invoice apparently issued by Wellington Star to Mr Conway recording the vehicle's price and any trade-in allowance and, hence, the balance to be financed.

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[11] One of the vehicles was acquired in the name of Nipponz Privee Ltd, a company owned by Mr Conway. Nothing in particular turns on that, so we do not refer to the company again.

(c) Between them, the credit contract and the disclosure statement recorded, and provided regulatory disclosure of, the terms of the finance MB Finance made available to Mr Conway.

[24] As relevant to Mr Dallas' argument that Mr Conway had mortgaged the vehicles to MB Finance, those agreements provided:

(a) The VOSA:

> **Retention of title**
>
> I understand that this purchase is subject to the retention of title clause overleaf.
>
> **Security Interest**[12]
>
> Ownership in the vehicle and accessories supplied by the Trader [Wellington Star] shall not pass to the Purchaser until the Purchaser has delivered any trade-in to the Trader's premises and otherwise performed all obligations under this Agreement including but not being limited to making payment of the Purchase Price as required by the Agreement.
>
> The Purchaser acknowledges and grants to the Trader a Purchaser Money Security Interest in the Vehicle and authorises the registration of such an interest on the Personal Property Securities Register.
>
> As collateral security and to the extent the Purchaser Money Security Interest is not sufficient to cover the monies due pursuant to this Agreement the Purchaser grants a security interest on the same terms and conditions as outlined in the standard terms and conditions of General Security Agreements as published by the Auckland District Law Society from time to time. The Purchaser will do all acts and sign all documents necessary to perfect the security interest.
>
> The Trader may register its security interest on the Personal Property Securities Register. The Purchaser will do all acts and sign all documents necessary to perfect the security interest.

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12 This text appeared "overleaf". That is, in the VOSAs there was no "retention of title clause" overleaf.

(b) The Disclosure Statement:

> **Security Interest**
>
> The Lender [MB Finance] has a first registered security interest over the Vehicle to secure performance of your obligations under the Contract, or the payment of money payable under the Contract, or both. If you fail to meet your commitments, then to the extent of the security interest, the Lender may be entitled to repossess and sell the Vehicle.

(c) The Credit Contract:

> 5.1 Security Interest
>
> You acknowledge that the Vehicle, and all of your present and future rights in relation to the Vehicle and any proceeds, are subject to a continuing security interest in favour of the Lender for the payment of all amounts owing under this Contract and the performance of all your obligations under this Contract.
>
> 5.7 Ownership of Vehicle
>
> You agree that legal and beneficial ownership of the Vehicle will remain with the Lender until you have paid all amounts owing to the Lender by you under this Contract.

[25] Do those covenants evidence the creation of a mortgage?

[26] The term mortgage is defined inclusively in s 2 of the PLA as follows:

> **Mortgage** includes—
>
> (a) any charge over property for securing the payment of amounts or the performance of obligations; and
>
> (b) any registered mortgage; and
>
> (c) any mortgage arising under a mortgage debenture.

[27] The starting point is that, under the common law, a mortgage involves a borrower (the mortgagor) transferring ownership of the mortgaged property to the secured party (the mortgagee), whilst retaining the right traditionally known as the equity of redemption. That is, when the mortgagor has discharged its obligations to the mortgagee, the mortgagee is required by law to transfer title to the mortgaged property back to the mortgagor.

[28] Where a borrower (the chargor) creates a charge over property, it grants the chargee not ownership of the charged property, but — traditionally — the right to prevent the disposal of the charged property in a way prejudicial to it. Put simply, the chargor can only dispose of the charged property with the consent of the chargee.

[29] The inclusive reference to "any registered mortgage" in s 4 of the PLA is best understood as a reference to mortgages of land. Under s 79 of the PLA, and in distinction to the position under common law:

> **79 Mortgage over land to take effect as charge**
>
> (1) A mortgage over land, whatever its form,—
>
> (a) takes effect as a charge; and
>
> (b) does not operate as a transfer of the estate or interest charged.
>
> (2) Subsection (1) does not apply if the mortgage is created by a registered transfer instrument.

[30] The inclusive and final reference in s 4 of the PLA to any "mortgage arising under a mortgage debenture" is a reference to debentures (an acknowledgement of debt) by a company secured over the assets of that company.

[31] On their face, the terms of the security arrangements between Mr Conway and MB Finance were neither a mortgage nor a charge. Rather, a security was created, which takes effect — irrespective of questions of title — in the manner provided for by the PPSA.

[32] We have considered whether the decision of this Court in *Dunphy v Sleepyhead Manufacturing Co Ltd* calls that conclusion into question.[13] In *Sleepyhead* the question was whether liquidators of a company to which Sleepyhead had supplied goods, and in which goods Sleepyhead had a security interest, were required to recognise that security interest when, as agent of the company, they disposed of those goods. In holding that the liquidators were so obliged, this Court agreed with the High Court that a security interest includes a charge under the Companies Act 1993. That conclusion was reached in the context of the more

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[13] *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602.

general proposition that liquidators act as agents of the company in question. Therefore, they can have no better right to goods in the possession of the company than the company itself. The Court reached that conclusion on the basis of the following analysis:

> [36] We add that we agree with Harrison J that Sleepyhead's security interest amounts to a '"charge" as defined in s 2(1) of the Companies Act. That definition includes:
>
> > … a right or interest in relation to property owned by a company, by virtue of which a creditor of the company is entitled to claim payment in priority to creditors entitled to be paid under section 313 …
>
> [37] In pre-PPSA terms, the goods supplied by Sleepyhead would not have been "owned" by King Robb — they would have been wholly outside the liquidation because title remained with Sleepyhead. Now that the PPSA governs the method by which creditors obtain security, "owned" must be read in a manner that is consistent with the PPSA, which means that King Robb's interest in the goods must be treated as sufficient for them to be "owned" by King Robb for the purposes of this definition: *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528 (HC) at [28] and *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) at [89]. As Sleepyhead has a security interest which has attached for the purpose of enforcing its rights against King Robb (and its liquidators), it is entitled to claim payment in priority to unsecured creditors. Its security interest is, therefore, a "charge" and Sleepyhead is a "secured creditor" as defined in s 2(1) of the Companies Act.

[33] Whether a security interest is a charge for the purposes of the definition of mortgage found in the PLA is a different question. If that were the case, s 114(4) of the PPSA would apply to all security interests over goods other than consumer goods: being a charge, such security interests would also constitute a mortgage. As the drafting of subs (4) makes clear, that cannot have been the intention of Parliament. Subsection (4) distinguishes between security interests and mortgages in a way that only makes sense if the traditional, title based, approach is taken to the meaning of the term mortgage.

[34] Accordingly, s 114(4) of the PPSA did not apply as regards the security interests held by MB Finance and the requirements of the PLA were of no relevance when MB Finance came to exercise its rights as a secured creditor. As Mr Dallas acknowledged, Mr Conway's defence could only succeed if, contrary to that conclusion, the PLA did apply. That is, it was only if the PLA applied that any issue

of compliance with the relevant notice provisions would arise. That defence, and this appeal, must fail accordingly.

The remaining issues

[35] On the basis of that analysis, it is not necessary for us to determine the issues which were the focus of the Court below and the submissions we heard. That is, given the terms of the contractual arrangements between the parties, who held title to the vehicles immediately prior to Mr Conway obtaining his interest in them, and whether, at that time, Mr Conway obtained title to them. Having said that, and recognising the careful submissions were heard, we set out in brief terms our understanding of those matters.

[36] The relationship between MB Finance and Wellington Star is recorded in two agreements:

(a) a dealer agreement (Dealer Agreement); and

(b) a commercial consignment agreement (Consignment Agreement).

[37] Under the Dealer Agreement, and as already noted, Wellington Star (the dealer) is authorised to submit applications to MB Finance on behalf of customers wishing to purchase vehicles. As the dealer, Wellington Star agrees to promote MB Finance "finance products" and, in general terms, covenants that the information it will provide to MB Finance in support of finance applications is correct. The Dealer Agreement provides for MB Finance to finance both vehicles held by the dealer on consignment from MB Finance, and other vehicles that the dealer has acquired.

[38] The Consignment Agreement sets up a relationship between MB Finance and Wellington Star recognised by the PPSA. Section 16 of the PPSA defines the term "commercial consignment" in the following way:

Commercial consignment—

(a) means a consignment where—

(i) a consignor has reserved an interest in the goods that the consignor has delivered to the consignee for the purpose of sale, lease, or other disposition; and

(ii) both the consignor and the consignee deal in the ordinary course of business in goods of that description; but

(iii) does not include an agreement under which goods are delivered to an auctioneer for the purpose of sale.

[39] The term "commercial consignment" is used — inclusively — in the PPSA:

(a) to define as a debtor a person who receives goods from another person under a commercial consignment; and

(b) in the definition of security interest.

[40] The Consignment Agreement builds upon that recognition. Clause 6 provides that the terms of that agreement are intended to create, and be characterised as, a commercial consignment under the PPSA. To the extent that, at law, that object is not achieved, the balance of cl 6 provides contractually for the creation of security interests in vehicles that are subject to the Consignment Agreement.

[41] The Consignment Agreement works initially in the following way:

(a) Both new and used vehicles may be subject to consignment. As the vehicles Mr Conway purchased were new vehicles,[14] we limit our explanation of the Consignment Agreement accordingly:

2. CONSIGNMENT REQUESTS

2.1 **Vehicles other than Used Vehicles**: The Dealer may, from time to time on behalf of [MB Finance], order New Vehicles form an Approved Supplier[15] and then collect and hold those vehicles on commercial consignment for the purpose of sale, lease or other dispositiopn upon the terms of this Agreement.

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14 The Consignment Agreement defines "New Vehicle" in the following way: "a brand new vehicle supplied by an Approved Supplier including new Demonstrator Vehicles and new Service Loan Vehicles".

15 In the Consignment Agreement, "Approved Supplier" means: "Mercedes-Benz New Zealand Limited or such other supplier of New Vehicles, Demonstrators and Service Loan Vehicles approved as an approved supplier by [MB Finance] in writing from time to time".

…

2.8 **All rights reserved**: [MB Finance], as consignor, reserved all rights and title in, and to, each Vehicle delivered to the Dealer on commercial consignment pursuant to this Agreement until the sale of that Vehicle to the Dealer pursuant to this Agreement or until the Dealer has fully paid all Curtailment Payments and other amounts owing by the Dealer to [MB Finance] in respect to that Vehicle under this Agreement.

3.1 **Delivery of New Vehicles**

(a) The Dealer shall collect each New Vehicle from an Approved Supplier, at its cost and risk and transport that New Vehicle to the Dealer's Premises.

(b) The parties shall procure the Approved Supplier to issue to [MB Finance], an invoice for each New Vehicle supplied to the Dealer under the Agreement and to deliver a copy of that invoice to the Dealer. Each invoice shall:

(i) confirm that the relevant New Vehicle is being sold by the relevant Approved Supplier to [MB Finance], and has been, or will be, delivered by the Approved Supplier to the Dealer on behalf of [MB Finance]; and

(ii) specify the wholesale price of that New Vehicle determined by the Approved Supplier.

[42] As can be seen, at this point in the process MB Finance is the owner of the consigned vehicles: as owner, it has paid approved suppliers the relevant purchase price. The dealer is not directly liable to MB Finance for that purchase price: rather it agrees to indemnify MB Finance, in the case of new vehicles against:

> … all actions, claims, fines, penalties or forfeitures (and all expenses incurred in connection therewith) arising and or losses, costs, fees and expenses suffered or incurred by [MB Finance] in connection with the acquisition of a Vehicle under this Agreement.

[43] Vehicles subject to the Consignment Agreement are held by Wellington Star for the sole purchase of display for sale. The way in which sales are effected is set out in cls 7.3 and 7.4:

7.3 **Offers**: During the Consignment Period for a Vehicle, the Dealer may seek (on its own account and not as agent for [MB Finance])

offers to purchase or lease that Vehicle. If the Dealer receives such an offer which the Dealer wishes to accept, the Dealer must promptly request that [MB Finance] sell that Vehicle to the Dealer in writing.

7.4 **Sale of Vehicles**: If [MB Finance] agrees to a request by the Dealer under clause 7.3 it shall sell the relevant Vehicle to the Dealer on a date agreed by [MB Finance] and the Dealer or, failing agreement, a date specified by [MB Finance]. The Dealer shall immediately on-sell that Vehicle to the relevant buyer on that same date. Within 48 hours after the sale of a Vehicle by the Dealer to a third party, the Dealer shall pay to [MB Finance]:

(a) an amount equal to the amount originally paid by [MB Finance] to the Approved Supplier or the Dealer for that Vehicle plus the cost of all modifications, accessories or other improvements of or to that Vehicle paid for, or funded by, [MB Finance] less all Curtailment Payments paid by the Dealer to MBFSNZ in respect to that Vehicle.

(b) all interest (if any) accrued and due to [MB Finance] in respect to that Vehicle up to the date of such sale;

(c) all taxes and outgoings payable in respect to that Vehicle; and

(d) all outstanding Facility Fees and all other costs, fees and expenses incurred by [MB Finance] and all other amounts owing to [MB Finance] in connection with that Vehicle, including (without limitation) any costs incurred in discharging the registration of any Security Interest in respect of that Vehicle on the PPSR.

[44] Those provisions reflect that the Consignment Agreement has been drafted to work independently from the Dealer Agreement. In particular, the obligation on the dealer to pay MB Finance the price MB Finance has originally paid for the vehicle most aptly applies to a transaction which MB Finance was not financing under the Dealing Agreement: for example, a cash sale by the dealer. Analysed on that basis, Mr Conway obtained title from Wellington Star when he purchased the vehicles.

[45] There would therefore appear to be inconsistencies between the terms of the Consignment Agreement and those reflected in the documentation between Mr Conway, Wellington Star and MB Finance. In particular, the term of the Consumer Credit Agreement that ownership of the vehicle remains with MB Finance as a lender is, in terms of traditional concepts of title, difficult to reconcile with the Consignment Agreement's arrangements. That is, they clearly provide for title to the

vehicle to pass, at the point of sale, from MB Finance to Wellington Star and then on to Mr Conway. Having said that, pursuant to the PPSA, and as already noted, the creation of a security interest can arise irrespective of who holds title. Those inconsistencies do not therefore make any material difference to the relationship between MB Finance and Mr Conway as regards the matter at issue here: namely, the enforcement by MB Finance of its security interests over the vehicles.

Result

[46] For the reasons given, Mr Conway's appeal is dismissed.

[47] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Simpson Western, Auckland for Respondent