IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2009-441-207

	BETWEEN	RABOBANK NEW ZEALAND LIMITED Plaintiff/Counter Claim Defendant
	AND	STOCKCO LIMITED Defendant/Counterclaim Plaintiff

Hearing: 11 December 2009

Appearances: G.J. Toebes - Counsel for Plaintiff - Rabobank New Zealand Limited
F.M.R. Cooke QC - Counsel for Defendant - Stockco Limited

Judgment: 17 February 2010

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 17 February 2010 at 2.00 pm pursuant to r 11.5 of the High Court Rules.

Solicitors: Buddle Findlay, Solicitors, PO Box 2694, Wellington
Morrison Daly, Solicitors, PO Box 10341, Wellington

Introduction

[1] The defendant in these proceedings, StockCo Limited ("StockCo"), seeks summary judgment under r 12.2 High Court Rules against the plaintiff, Rabobank New Zealand Limited ("Rabobank") in relation to both a claim brought by Rabobank against StockCo, and a counterclaim by StockCo. This case primarily concerns which party had or has a priority security interest over certain livestock pursuant to the Personal Property Securities Act 1999 ("PPSA"). Here StockCo appears to apply for summary judgment as a defendant with respect to both the claim against it by Rabobank and also for its claim as counterclaim plaintiff.

Background Facts

[2] The present dispute arises out of a failed farming operation of Mr. Alexander McKenzie Campbell ("Mr. Campbell") and his wife Mrs. Megan Jan Campbell ("Mrs Campbell"), who farmed a number of properties in the Gisborne area. A partnership agreement dated 29 August 2002 ("the Partnership Agreement") records that Mr. and Mrs. Campbell commenced a farming partnership on 1 July 2002. The partnership name is recorded as "Awapapa Station" and the business of the partnership noted as "sheep and cattle farming and such other business as the partners may from time to time agree can be conveniently carried on in conjunction therewith." In his affidavit dated 17 September 2009 filed in this proceeding, Mr. Campbell states that after signing the Partnership Agreement, he and Mrs. Campbell continued the farming operation in their own names, and entered into all transactions as "AM & MJ Campbell". This is corroborated by Mr. Marcus Barnicoat Kight ("Mr. Kight"), director of StockCo, in his affidavit dated 2 September 2009.

[3] Rabobank provided the farming operation with banking facilities. Rabobank's lending to the operation was secured by first ranking mortgages over three Campbell farm properties and a security over livestock. That livestock security agreement between Rabobank and Mr and Mrs Campbell was entered into on 12 December 2002 ("the Rabobank Security Agreement"). It appears to provide Rabobank with security over all livestock of Mr. and Mrs. Campbell. In particular, it states that security is taken over:

> "All livestock and all products of livestock including carcases, and all present and after-acquired property which is proceeds… including any progeny and unborn young of that livestock, any wool or hair of that livestock (including once shorn), and any produce from that livestock."

[4] On 23 December 2002 Rabobank registered this security interest under the PPSA on the Personal Property Securities Register ("PPSR").

[5] In addition to the bank financing provided by Rabobank, StockCo provided the Campbells with a specific line of financing in relation to certain livestock, pursuant to a livestock agreement dated 14 August 2002 ("the StockCo Livestock Agreement"). The StockCo Livestock Agreement was entered into by Mr. Campbell in his own name. It states that Mr. Campbell was to purchase livestock for StockCo as StockCo's agent.

[6] With regard to the StockCo Livestock Agreement, StockCo raises two arguments. First, it contends that it has a purchase money security interest ("PMSI") under the PPSA in livestock purchased pursuant to this StockCo Livestock Agreement which trumps the security interest of Rabobank. Secondly, it argues that it has a security interest in other livestock by virtue of specific releases of security over those livestock given by Rabobank.

[7] StockCo first registered its security interest in the livestock in question on the PPSR on 8 December 2006, originally listing the debtor as "Alex McKenzie Campbell". On 28 August 2007 StockCo entered into a further financing statement with regard to a number of sheep. That facility was in the name of AM & MJ Campbell as partners. Mr Kight deposes that at this point, StockCo realised that Mr and Mrs Campbell were operating as a partnership, and so registered a financing change statement to include PPSR registrations under both "Alexander McKenzie Campbell" (amended from "Alex") and "AM & MJ Campbell" as partners. Mr Kight indicates that at this stage StockCo was not aware that Mr and Mrs Campbell had entered into a formal partnership deed with the partnership name "Awapapa Station". He deposes that on 9 April 2009, having become aware of this, StockCo changed its PPSR registration again to include "Awapapa Station" as the organisation name.

[8] In late 2008 the Campbells fell into default under their financial arrangements, and both StockCo and Rabobank commenced enforcement action

against them. Rabobank brought these proceedings on 14 April 2009 claiming that StockCo was inappropriately exercising its security rights against Mr Campbell's livestock. The proceedings were initially commenced by Rabobank in support of an ex parte application for "freezing" orders to prevent StockCo taking any further action to so enforce its security rights. Those orders have been modified to allow the stock to be sold, with the proceeds being held on trust by StockCo. Rabobank also earlier "intercepted" the sale proceeds of some stock sold by StockCo at auction, instructing the livestock agent StockCo used (PGG Wrightson) to pay the sale proceeds into its solicitor's trust account (where it is also being held). This case now essentially concerns the sale proceeds being held by both StockCo and Rabobank's solicitors.

[9] StockCo and Rabobank now dispute who had the priority security interest over the livestock in question and thus who is entitled to the sale proceeds from those animals. StockCo has focussed its argument on its alleged security over 3394 bulls, and states that it is willing to abandon its claim to a priority security interest in the other livestock (which includes certain other specified bulls, sheep, cows and heifers) if this claim is accepted.

[10] There are two specific categories of stock in issue in the present application, namely:

(a) 341 bulls, being what remains of 773 bulls Mr Campbell had purchased in 2006 which StockCo maintain were subject to a sale and leaseback with StockCo (with a Rabobank release); and

(b) 3,053 bulls, being what remains of 4,137 bulls which StockCo says it purchased from third parties, and then leased to Mr Campbell in 2007 (being PMSI transactions that have priority).

[11] Since this dispute began, apparently 3433 bulls have been sold, and eight injured bulls remain on the farm. StockCo argues that it can establish security with regard to 3394 of those sold. Of the 3433 bulls, StockCo says that 3053 were

Friesian bulls born in 2007 purchased pursuant to the StockCo Livestock Agreement, such that it has a PMSI over them. StockCo argues that those 3053 bulls are the remainder of 4137 bulls which were originally purchased by StockCo in 2007 (the difference being attributed to stock losses). An additional 39 "home-bred" bulls were born in 2007, being the progeny of animals already on the farm. StockCo accepts that it cannot establish a priority security interest over those 39 bulls, but it goes on to state that those bulls were clearly distinguishable from those over which it does have a priority, as they were of a different colour and were sold separately. Mr. Kight and Mr. Campbell depose in their affidavits that no other bulls were acquired by Mr. and Mrs. Campbell from any other source in 2007.

[12] In addition to the 2007 bulls, StockCo contends that 341 of the bulls sold were acquired in 2006. These bulls are not subject to a PMSI claim. Rather, StockCo argues that it purchased/refinanced all of the bulls born in 2006 (originally 773, the difference between this number and the number of bulls sold again being attributed to stock losses) and it obtained a formal release of security from Rabobank in relation to these specific bulls. StockCo states that no other bulls were acquired by Mr. and Mrs. Campbell in 2006.

[13] StockCo now applies for summary judgment on the basis that it maintains Rabobank does not have any basis to claim rights over the animals which generated the sale proceeds given the relevant priority rules established by the PPSA. StockCo says that the matters pleaded in Rabobank's statement of claim do not provide Rabobank with a basis to claim priority over these animals. It is said they are simply technical points advanced in an attempt to defeat StockCo's priority interest over these animals, and to secure a windfall for Rabobank.

[14] As such, as defendant, in its counter-claim against Rabobank, StockCo seeks summary judgment here for:

- $1,425,532.74, being the sale proceeds of bulls which is held by StockCo on trust;

- $291,487.23 plus interest, being the sale proceeds of bulls which is held by Rabobank's solicitors, Buddle Findlay on trust.

Summary Judgment

[15] StockCo applies for summary judgment here, principally as a defendant but also as a counterclaim plaintiff. With regard to the second matter, its claim as a counter-claim plaintiff, r 12.2(1) of the High Court Rules applies. This states:

> "**12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action."

[16] The principles applying to such applications are well known, and are succinctly summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187 as follows:

> "[26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried*: Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)."

[17] As to StockCo's claim for defendant's summary judgment, r 12.2(2) applies. This states:

> "(2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed."

[18] This summary judgment procedure should only be used by a defendant where it has a clear and complete answer to a plaintiff's claim which cannot be contradicted: *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298,

paras 62-64 (CA). While a plaintiff can apply for summary judgment with regard to only some of its causes of action, a defendant applying for summary judgment must show that *none* of the plaintiff's causes of action can succeed: *McGechan on Procedure*, para HR12.2.07(1).

[19] Rabobank's statement of claim makes claims over a variety of livestock. As noted above, StockCo does not claim it can show priority over all of the animals, but focusses its argument on the Friesian bulls born in 2006 and 2007. StockCo has confirmed that it is willing to abandon its claim over the remaining animals in Rabobank's statement of claim if its summary judgment application with regard to the Friesian bulls is granted. Rabobank takes issue with this approach, saying that conditional abandonment is not a technique available to StockCo here as this does not meet the requirements of r 12.2(2).

[20] A defendant's application for summary judgment is similar to an application to strike out pursuant to r 15.1 in that a defendant has to show the plaintiff cannot succeed. Although a strike out application may apply to only part of a plaintiff's claim, the courts have warned that a strike out application may not be worth the time and expense where it will not result in a full disposal of the case: *Whitman v Airways Corp of NZ Ltd* (1994) 8 PRNZ 155.

The Priority Security Interest

The Personal Property Securities Act 1999 and Rabobank's Claim

[21] Rabobank and StockCo both claim a security interest over the livestock in question. Section 66 of the PPSA sets out the general priority rules as follows:

> "**66 Priority of security interests in same collateral when Act provides no other way of determining priority**
>
> If this Act provides no other way of determining priority between security interests in the same collateral,—
>
> (a) A perfected security interest has priority over an unperfected security interest in the same collateral:

(b) Priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest:

(i) The registration of a financing statement:
(ii) The secured party, or another person on the secured party's behalf, taking possession of the collateral (except where possession is a result of seizure or repossession):
(iii) The temporary perfection of the security interest in accordance with this Act:
…".

[22] Rabobank argues that it has the priority security interest because, pursuant to s 66(b)(i), it was the first party to register a financing statement. StockCo appears to accept this as a starting point but goes on to argue that s 66 does not apply here, because all of the bulls sold (with the exception of the 39 home-bred bulls) were subject to either a PMSI in favour of StockCo or a specific release of its security from Rabobank.

[23] Under the PPSA, it is clear that a PMSI takes priority over a non-PMSI, even if the non-PMSI was registered first. This super priority of a PMSI overrides the rules in s 66. Before me there was some dispute as to whether the alleged super priority in this case was the result of ss 73 or 74 of the PPSA, but little turns on that. StockCo argues that it has a PMSI over the 3053 cattle sold which were born in 2007. A PMSI is defined in s 16 of the PPSA as follows:

"Purchase money security interest—
(a) Means—
(i) A security interest taken in collateral by a seller to the extent that it secures the obligation to pay all or part of the collateral's purchase price; or
(ii) A security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire those rights; or
(iii) The interest of a lessor of goods under a lease for a term of more than 1 year; or
(iv) The interest of a consignor who delivers goods to a consignee under a commercial consignment; but
(b) Does not include a transaction of sale and lease back to the seller:"

[24] StockCo contends that prima facie it has a PMSI pursuant to s 16(a)(iii). StockCo also argues that pursuant to s 41 of the PPSA, that PMSI has been perfected by registration on the PPSR, and by attachment of the livestock to the facility by the various purchases of the livestock by StockCo from third parties, and the lease of that livestock to Mr Campbell in 2007.

Validity of StockCo's Purchase Money Security Interest

[25] Rabobank disputes that StockCo can prove, for the purposes of summary judgment, that the 3053 bulls said to be born in 2007 were in fact subject to PMSIs in favour of StockCo. If StockCo does not have a PMSI over those bulls, then the normal priority rules in s 66 of the PPSA apply, and Rabobank would have the priority security interest by virtue of having completed PPSR registration first in time.

[26] In this its first major argument here, Rabobank suggests that PMSI transactions occurring in 2007, pursuant to which StockCo was said to acquire livestock from a third party and then lease it to Mr Campbell, did not qualify as PMSIs because those transactions were actually sales by that third party to Mr Campbell, and then an on-sale from Mr Campbell to StockCo, with a leaseback to Mr Campbell. Rabobank suggests that they are accordingly sales and leasebacks, and not therefore PMSIs.

[27] Turning now to consider the StockCo Livestock Agreement used here, this appears to contemplate two situations:

(a) Where the farmer sells stock to StockCo; and StockCo bails it back to the farmer (which would not create a PMSI); or

(b) Where StockCo purchases stock from third parties, and then bails it to the farmer (which would create a PMSI).

[28] The first situation is what StockCo acknowledges occurred in 2006 – StockCo purchased the livestock from Mr Campbell rather than directly from the third party seller. Mr Kight and Mr Campbell have deposed that in 2007 this arrangement changed to the second situation noted at para. [27](b) above, so that StockCo then purchased stock directly from third parties, it is said via Mr Campbell who acted as StockCo's agent in accordance with the StockCo Livestock Agreement.

[29] Rabobank suggests however that in sourcing this livestock, Mr Campbell may actually have been acting in a personal capacity rather than as an agent for StockCo. In support of this allegation, Rabobank points to the affidavit of Mark Neville Bocock ("Mr. Bocock"), one of the farmers who supplied Mr Campbell with weaner bulls at the time. Mr Bocock states that for each supply, he and Mr Campbell would have verbal discussions followed by an email or fax confirming an order for purchase. Mr Bocock would then email or post a written proposal which would be agreed via telephone, after which the calves would be purchased specifically by Mr Bocock for the order. Mr Bocock goes on to state:

> "We invoice Alec Campbell as per the attached invoices and we post/fax the invoices to him. At Alec's request we charged StockCo for the calves sent during 2007. It is stated clearly on the invoices that the calves are for Alec Campbell and that StockCo will be paying for them… It is standard industry practice for the purchaser to act on behalf of StockCo in the procurement of livestock."

[30] StockCo argues that this is completely consistent with the account given by Mr Campbell and Mr Kight. Rabobank submits in response however that this must suggest that the arrangement in 2007 was exactly the same as it was in 2006, except that StockCo was invoiced. An invoice is not a contract, but at best, evidence of an agreement that would need to have been made prior to the invoice being sent: *Canon Finance New Zealand Ltd v Heidelberg Graphic Equipment Ltd* HC Auckland CIV-2003-404-3989, 3 February 2004 Salmon J. paras 25-26.

[31] Rabobank says that if Mr Campbell was truly acting as StockCo's agent with regard to the 2007 bulls, it would have expected Mr Campbell or Mr Kight to exhibit further evidence of that agency appointment for each purchase transaction, the timing and price specified by StockCo for each transaction, the description of each bull, and StockCo's internal treasury documentation. Rabobank contends that, without this evidence, StockCo cannot prove either that the prior purchase contract for the bulls was entered into by Mr Campbell as StockCo's agent rather than in his personal capacity, or that the agency was in accordance with the requirements of the StockCo Livestock Agreement.

[32] In response, StockCo contends that Rabobank has failed to provide a proper pleading for this argument. Paragraph 25 of Rabobank's statement of claim states:

> "Rabobank does not know if any of the livestock purchased and bailed to the Partnership by the defendant were purchased from the Partnership by the defendant, and if so any livestock that was purchased from the Partnership is not subject to a PMSI held by the defendant as it is a sale and lease back transaction."

[33] StockCo takes issue with this pleading, arguing that if Rabobank "does not know" what happened, then it has no basis on which to make the allegations. StockCo states that Rabobank's only argument is that it does not have all of the information relating to the earlier dealings between Mr Campbell, StockCo, and the third party sellers, so that they can confirm that Mr Campbell was acting as StockCo's agent. StockCo suggests that this further indicates that Rabobank has no real claim, and that it is seeking to conduct a fishing expedition through StockCo's records to see if it can find anything which would support its case.

[34] StockCo also suggests that Rabobank's argument is contrary to the evidence given by Mr Campbell, Mr Kight, and Mr Bocock in their affidavits, and is inconsistent with contemporary documentation. For every group of 2007 bulls it is said Mr Kight has exhibited an invoice and the relevant contract between StockCo and Mr Campbell.

[35] Finally, StockCo notes that evidence of prior communications between Mr Campbell and third parties would not support Rabobank's argument, as Mr Campbell was authorised to make arrangements on behalf of StockCo pursuant to the StockCo Livestock Agreement. As Mr Kight notes, even if Mr Campbell had engaged in preliminary dealings in a manner which was inconsistent with StockCo's instructions, the sale transaction would still have been with StockCo.

[36] Although it may be that Rabobank here has failed to properly plead those present allegations, the authorities establish that summary judgment for a defendant will not be appropriate where it is possible for a plaintiff to amend its claim so as to remedy pleading defects relied on by a defendant. It is only to be used where the defendant has a clear answer to the plaintiff which cannot be contradicted – *Westpac Banking Corporation v M.M. Kembla NZ Limited* [2001] 2 NZLR 298.

[37] And, in my view, there are clearly material disputes of fact between the parties on this issue such that summary judgment for StockCo is not appropriate at this point (*Westpac Bank v Kembla* and *Jones v Attorney General* [2004] 2NZLR 433 (PC)) even though Rabobank may ultimately be found to have no factual basis for the suggestion that Mr Campbell personally was the party who purchased the 2007 bulls from the various parties.

Is StockCo's Registration "Seriously Misleading"?

[38] Rabobank's second major argument here is that StockCo's PPSR registration is "seriously misleading" under ss. 149 and 150 of the PPSA, and so remains unperfected. If that is the case, then Rabobank would be the only party with a perfected security interest over the livestock in question, and so its security interest would take priority pursuant to s 66(a).

[39] At paras. 20 and 21 of its statement of claim, Rabobank alleges:

> "20. The defendant registered a financing statement on the Personal Property Securities Register on 8 December 2006 as Financing Statement Registration No F79925N22V14HB61/C0004 (the "StockCo Security"). The StockCo Security was registered against the debtor name "AM & MJ Campbell", a partnership.
>
> 21. Such debtor name means that either the defendant has not perfected its security interest in certain livestock of the Partnership at all; or the financing statement is invalid as being seriously misleading (in terms of sections 149 and 150 of the Personal Property Securities Act 1999)."

[40] Sections 149 and 150 of the PPSA provide as follows:

> "**149 Registration of financing statement invalid only if seriously misleading**
>
> The validity of the registration of a financing statement is not affected by any defect, irregularity, omission, or error in the financing statement unless the defect, irregularity, omission or error is seriously misleading.
>
> **150 When financing statement seriously misleading**
>
> Without limiting the circumstances in which a registration is invalid, a registration is invalid if there is a seriously misleading defect, irregularity, omission, or error in –

(a) The name of any of the debtors required by section 142 to be included in the financing statement other than a debtor who does not own or have rights in the collateral; or

(b) The serial number of the collateral if the collateral is consumer goods, or equipment, of a kind that is required by the regulations to be described by serial number in a financing statement."

[41] Section 142 of the PPSA sets out what data is required to register a financing statement, and includes at subs (1):

" (a) if the debtor is an individual, the debtor's name, address, and date of birth or, if the debtor is an organisation,—

(i) the name and address of the organisation; and

(ii) the name or job title, and contact details, of the person acting on its behalf:

…

(g) Any other data required by this Act or the regulations to be contained in the financing statement."

[42] The Personal Property Securities Regulations 2001, in reg 8 and clause 6 of Part 1 of Schedule 1 require the following further information:

"6 Name of debtor: organisation

If the debtor is an organisation, the following data:

(a) if the debtor is incorporated under an enactment, the statutory or registered name of the organisation:

(b) if paragraph (a) is not applicable, the name of the organisation as set out in its constitution or other document defining its constitution:

(c) if paragraphs (a) and (b) are not applicable, the trading name of the organisation or the name by which it is commonly known (if it does not have a trading name)."

[43] As I have noted above, Mr and Mrs Campbell had been farming in partnership since July 2002 and their partnership name as recorded in their 22 August 2002 Partnership Agreement was "Awapapa Station". StockCo first registered its security interest on the PPSR on 8 December 2006, but it was not until August 2007 that it recorded the organisation type as "partnership", and not until 9 April 2009 that the name "Awapapa Station" was added to the registration.

[44] From para. 40 above, it is clear that s 149 of the PPSA confirms that registration of a financing statement is not affected by any defect, irregularity, omission, or error in the statement unless it is seriously misleading and s 150 specifies that a registration is invalid if there is a seriously misleading defect or error in the name of any of the debtors required by section 142

[45] In considering these PPSR registration issues, the High Court in *Service Foods Manawatu Limited (in rec and liq) v NZ Associated Refrigerated Food Distributors Limited* (2006) 9 NZCLC 263,979 stated:

> "[32] The starting point of the analytical exercise is to examine the purpose of the Personal Property Securities Register, as provided for by the Act. As Mr Toebes advised there are two constituent groups using the Register: those who register Financing Statements in respect of security interests; and those who search for prior registration of security interest. Mr Toebes described the situation succinctly thus:
>
> The search function exists to provide information to prospective buyers and lenders who are purchasing property or taking property as collateral for a loan. Thos [sic] parties will want to know if there are any prior security interest claims on the property which could affect a decision to buy the property or accept it as collateral. The test is an objective one – there is no need to prove anyone was actively misled by the error (s 151). Would a reasonable searcher be misled? "Reasonable searches" must be referenced to persons who would usually be prospective purchasers or lenders because they will be concerned with questions of enforceability and priority of security interests. That is a wide section of the population but it is not the entire population. A reasonable searcher does not include:
>
> (a) Persons simply doing a credit check on the debtor – to see who their secured lenders are;
>
> (b) Persons using PPSR as an alternative to Auto-check – putting the identification details of a vehicle to find out who owns it;
>
> Reasonable searchers must be deemed to be both familiar with the search mechanisms available and be able to use them reasonably competently – knowing the search criteria available in the system and the result produced by each type of search."

[46] Rabobank argues that a reasonable searcher in the present case would know that they were dealing with a partnership, and would know the rules regarding the registration of financing statements where the debtor is a partnership.

[47] Because livestock are not serial numbered goods, the only search function available to a reasonable searcher of the PPSR in a case such as the present is the

debtor's name. Searching under the correct debtor name of "Awapapa Station", "Awapapa", or "AWA" (a wild card search) here would not have revealed StockCo's financing statement. In these circumstances, Rabobank argues that the failure to provide the correct debtor name of "Awapapa Station" causes StockCo's registration to be "seriously misleading" and therefore invalid pursuant to s 150.

[48] On this, Rabobank points to the decision of the British Columbia Court of Appeal in *Gold Key Pontiac Buick (1984) Limited v Bdo Dunwoody Limited* (1999) 12 CBR (4th) 210. In that case, the debtor name in the financing statement was the trading name of the debtor company, being "Pinecraft Furniture Manufacturing", while the company's actual name was "464750 B. C. Ltd". The failure to include the correct legal name of the debtor was found to be seriously misleading. Rabobank says that the situation in the present case is no different. In my view, however, the reasoning in *Gold Key Pontiac Buick (1984) Limited v Bdo Dunwoody Limited* is somewhat limited here. That case concerned an incorporated company and in my view it is not readily applicable to a situation concerning a partnership such as we have here, for the reasons highlighted by Gedye et al in the extract below.

[49] StockCo offers three answers to Rabobank's claim that the error in the identity of the debtor was seriously misleading here. First, StockCo disputes that the debtor was incorrectly described, and states that Mr Campbell was the correct debtor. StockCo accepts that Mr and Mrs Campbell carried on business as the Awapapa Station partnership, but argues that they also carried on business as individuals. It was Mr Campbell personally who entered into the StockCo Livestock Agreement, and all relevant transactions with StockCo were in Mr Campbell's name alone. Mr Campbell in his affidavit states that he and Mrs Campbell continued to transact in their personal names after signing the Partnership Agreement, and it is said that all major creditors of the overall business other than Rabobank dealt with Mr and Mrs Campbell in their personal names. The difficulty regarding the correct name of an unincorporated organisation for the purposes of the PPSR has been noted in Gedye, Cumming and Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at 480-481:

> "However, the Act also contemplates the possibility of a debtor being an unincorporated organisation. The proper name of such an organisation is the name set out in its constitution, if it has one, or otherwise its trading name (or common name if it does not have a trading name).

> There is considerable scope for uncertainty here. A registering or searching party may not necessarily know whether the organisation has a constitution and an organisation's trading or common name may not be consistently stated and is easily changed. Furthermore, a secured party may choose to contract with an organisation's members jointly and severally, rather than the organisation, and register under the members' individual names rather than the organisation's name. A subsequent search against the organisation's name would not reveal any such registrations. Clearly, it is necessary to take care when dealing with unincorporated organisations and when determining the proper name of such organisations or reacting to name changes."

[50] Noting these difficulties with names of unincorporated organisations such as partnerships, StockCo argues that the relevant debtors here may be more numerous than just the partnership itself. As Mr Campbell entered into the StockCo Livestock Agreement in his own name, and it is said he carried on some business in his own name, StockCo suggests that the "correct" names of the debtors involved in the business would include debts under all three names: Awapapa Station, Mr Alexander Campbell, and Mrs Megan Campbell.

[51] I am not satisfied however that in this case StockCo has shown that Mr Campbell is clearly a correct debtor for the purpose of StockCo's registration. The livestock over which the security interest is claimed are owned by the partnership, and Mr Campbell in conducting the farming business would have been acting for the partnership. In those circumstances, I am not satisfied that the fact that Mr Campbell used his personal name in some business transactions means that he is, in addition to Awapapa Station, a correct debtor. Even if he were, I am not satisfied that the failure to include Awapapa Station as well is not still seriously misleading.

[52] StockCo's second argument on this point is that even if Mr Campbell is not a legitimate debtor independently of the partnership, and Awapapa Station is the only valid debtor name for the purposes of the PPSR, the error is still not "seriously misleading" and so registration is saved by s 149.

[53] StockCo points to the decision of the Court of Appeal in *Simpson v New Zealand Associated Refrigerated Goods Distributers Limited* [2007] 2 NZLR 130. There, the Court found that an overly broad description of the secured property was not seriously misleading, as anyone searching the PPSR would have been put on notice that there may be a security interest in the goods. In my view, however, that is not a particularly relevant point in the present case. The debtor name is a searchable field on the PPSR, whereas non-serial numbered goods are not: s 172 PPSA. An

error in a non-searchable field is much less likely to be seriously misleading, and would not have prevented a searcher from coming across the financing statement in the first place. An error in the debtor name could mean that a reasonable searcher cannot retrieve the financing statement and so is not put on notice at all.

[54] Counsel for StockCo also referred me to the decision in *Re Lambert* (1994) 119 DLR (4th) 93. This, however, was a case in which the Ontario Court of Appeal found that an error in the debtor name was not likely to mislead a reasonable searcher, because a reasonable searcher could instead have identified the registration by conducting a search against the serial number of the secured property. This approach has been criticised: Gedye, Cumming and Wood, at 477. And in any event, in my view the reasoning in *Re Lambert* is of doubtful application to the present case, where no serial numbers exist to enable an alternative search to that under the debtor's name. In *Re Lambert*, the Court itself stated of its findings:

> "The result would be very different if the financing statement incorrectly set out the debtor's name and did not contain the V.I.N., ... In that situation, the error in the debtor's name would be fatal since the reasonable person conducting both a specific debtor search and a V.I.N. search could not locate the financing statement."

[55] A reasonably arguable point that StockCo does make with regard to whether the failure to include the correct debtor name of Awapapa Station is seriously misleading involves consideration of the nature of a partnership. As noted above in the extract from Gedye, Cumming and Wood, often it is not easy to discern the correct name of an unincorporated entity. Partners may use their own names instead of the partnership name, and third parties may not be aware of the existence of a constitution or a trading name. Also, StockCo notes that, in comparison to incorporated organisations, there is no central register of the proper name of partnerships. Given that this is the situation, and particularly in circumstances where the evidence suggests that the Campbells always traded in their personal names, StockCo argues that any reasonable searcher would have conducted a check against the Campbells' personal names, as well as or as an alternative to searching under the debtor name of Awapapa Station.

[56] The PPSA and associated regulations clearly require that where the debtor is a partnership, the name should be that in the partnership's constitution (where there

is one) and not the personal names of the partners. The present case however highlights some serious issues for the PPSR where the debtor is an unincorporated organisation. But, it is not at all clear that the burden of these difficulties should necessarily fall on a searcher of the PPSR rather than a registering party. As I understand it, StockCo essentially is arguing that a reasonable searcher of the PPSR, when searching for a debtor which is a partnership, should be expected to search under the partnership's correct name in accordance with the regulations, and the personal names of those involved in the partnership, at least in certain situations. This involves a major question of policy, in an area of law which is still developing and which rarely appears to come before the courts. In those circumstances, I am satisfied that Rabobank has an arguable case on this point.

[57] StockCo's third and final argument is that StockCo's registration was saved by registering the financial change statement in 2009 to include the debtor name Awapapa Station, because s 90 applies. Section 90 states as relevant:

> **"90 Transfer of debtor's interest in collateral where secured party has knowledge of certain information**
>
> (1) Despite section 88, subsection (2) applies where a security interest is perfected by registration and the secured party has knowledge of—
>
> …
>
> (b) The new name of the debtor, if there has been a change in the debtor's name.
>
> (2) The security interest, in the transferred collateral where subsection (1)(a) applies, and in the collateral where subsection (1)(b) applies, is subordinate to—
>
> (a) An interest, other than a security interest, in that collateral, arising during the period commencing on the expiration of the fifteenth day after the secured party has knowledge of the information referred to in subsection (1)(a) or the new name of the debtor to the time the secured party amends the registration to disclose the name of the transferee as the debtor, or to disclose the new name of the debtor, or takes possession of the collateral; and
>
> (b) A perfected security interest in the collateral that is registered or perfected in the period referred to in paragraph (a); …"

[58] As noted above, the StockCo Livestock Agreement is dated 14 August 2002. The Partnership Agreement which states that the name of the partnership is "Awapapa Station" is dated 29 August 2002. StockCo contends that, as such, the best argument that Rabobank can make is that the correct debtor name at the time the StockCo Livestock Agreement was entered was Mr Campbell's personal name and the correct name of the debtor changed to "Awapapa Station" later that month when the Partnership Agreement was concluded. StockCo suggests that in those

circumstances, the matter is regulated by s 90. Because StockCo did not become aware of the change of name to Awapapa Station until within 15 days before registering the financial change statement with the correct name in April 2009, StockCo does not lose its priority security interest to a secured party who perfected its security interest in the meantime. As it is not suggested that StockCo knew of the name change any earlier, and as Rabobank did not register or perfect a security interest after StockCo had learnt of the name change, s 90 is said to operate to preserve StockCo's security interest.

[59] Rabobank states that s 90 relates to transfer of debtor's interests in collateral, and that it does not apply here as there is no evidence or suggestion that any livestock was transferred from Mr Campbell to the Awapapa Station partnership. Despite the heading of the section, this is not the effect of ss 90(1)(b) and 90(2). Section 90 applies where a debtor changes its name without transferring collateral as well: Gedye, Cumming, and Wood, at 332.

[60] In any event, the evidence, including the Partnership Agreement would seem to suggest here that Mr and Mrs Campbell have been trading in partnership as "Awapapa Station" since 1 July 2002, and so StockCo's assertion that Mr Campbell was the correct debtor at 14 August 2002 is a matter of genuine factual dispute.

[61] I remind myself that the application before me is one for summary judgment, in which I must be satisfied first that StockCo has clear evidence which is a complete defence to Rabobank's claim and secondly, that Rabobank has no defence to the counterclaim brought by StockCo. With that in mind here, in my view, Rabobank has done enough to suggest a reasonably arguable case that StockCo's financing statement registration on the PPSR may be seriously misleading; and that StockCo's security interest therefore remains unperfected and subject to Rabobank's perfected security interest.

Cattle Identification

[62] As noted above, StockCo argues that it has PMSIs over 3052 of the bulls sold; and a security interest in 341 of the bulls sold by virtue of a release of its security from Rabobank. Rabobank accepts that the documentation shows a release of security over 773 bulls (the difference between 773 and 341 being attributed to

stock losses). However, Rabobank states even accepting this documentation, and accepting that StockCo has a PMSI interest in 3052 bulls, StockCo cannot show that each or any of the individual bulls sold were in fact the bulls which were subject to either a PMSI or a release.

[63] StockCo states that it does not need to trace every individual animal to show that it is entitled to the proceeds from the bulls sold, because:

> "The 3052 bulls were acquired by StockCo from third parties and leased to Mr Campbell in 2007, creating a PMSI. StockCo originally acquired 4137 bulls in this manner. Mr Kight and Mr Campbell state that the Campbells did not acquire any other bulls from any other source in 2007. As such, it is clear that all of the 2007 bulls are subject to StockCo's PMSI.
>
> The 341 bulls were acquired by Mr Campbell in 2006. StockCo refinanced (by purchasing) all 773 of the bulls acquired by Mr Campbell in the 2006 season, and received a Rabobank security release for every animal. There were no other animals acquired in 2006 from any other source."

[64] As all the 2007 bulls were subject to PMSIs, and all the 2006 bulls subject to a security release, StockCo states that it is not necessary to trace each animal to prove this point, unless Rabobank has some basis for claiming that additional animals were coming onto the farm.

[65] However, as Rabobank points out, there is evidence that more than 773 bulls were acquired by the Campbells in 2006. Mr Campbell says so himself in his affidavit and exhibits an invoice for 998 bulls. StockCo argues that at the time it took the security for the 773, those were the only bulls remaining, due to stock losses. However, it seems the StockCo purchases of the 2006 bulls were made in four separate transactions over a period of eight months. There is no evidence that 773 bulls were all that were remaining at the time of the first transaction, and it seems improbable that no bulls died between the first and last StockCo purchases, given the level of stock losses alleged. If stock was being lost between the StockCo purchases, then there is apparently no way of knowing whether bulls that died were StockCo or Rabobank bulls, because StockCo does not appear to have operated on the basis of individually identified bulls. Indeed, the evidence presently before the Court appears to confirm that StockCo operated on a "bucket principle" for its advances to and repayments from the Campbells, not caring particularly about the identity of the units of stock that had been purchased.

[66] Although Rabobank presents little evidence to support its claim here, I am satisfied that this stock reconciliation issue provides a significant obstacle for StockCo and the factual dispute between the parties on this point is real. It clearly requires detailed evidence to confirm the actual position from time to time regarding the stock in question. For this reason also, summary judgment is therefore not appropriate at this point.

Conclusions

[67] In my view, Rabobank has done enough here to show a reasonably arguable claim that its security interest in the livestock in question may be seen to take priority over StockCo's security interest when all the detailed evidence (much of it presently disputed between the parties) is considered at trial. The grounds for this are first, that StockCo's financing statement registration ultimately may be seen to be seriously misleading and its interest therefore remains unperfected, and secondly, that StockCo may not be able to properly reconcile its security interests with the individual bulls which form the basis of the claim.

[68] I am also satisfied that Rabobank has done enough here to indicate it may succeed in its claim that StockCo has no PMSI interest in the 2007 bulls because Mr Campbell, rather than StockCo, was the real purchaser and StockCo thus engaged in a non-PMSI and purchase leaseback arrangement with Mr Campbell. For the purposes of a defendant's summary judgment application, in which the defendant must show that none of the plaintiff's causes of action can succeed, any one of these matters is sufficient to result in StockCo's summary judgment application as defendant failing.

[69] One final matter needs to be mentioned. Before me, counsel for StockCo complained at what he said was an attempt by Rabobank in this proceeding to achieve an unmeritorious windfall at the expense of Stockco. Mr Cooke QC noted that there can be no dispute that Rabobank here knew of the additional line of financing provided by StockCo, and that it clearly provided releases of its own security whenever called upon to do so. He went on to complain that Rabobank is now raising technical arguments to try and defeat StockCo's security, so that Rabobank can receive this windfall from the sale proceeds of livestock which

StockCo has paid for. Although some sympathy might well be expressed for StockCo in these circumstances, counsel for Rabobank is correct to point out, as he did before me, that this application is concerned with property rights and PPSA interpretation issues rather than matters of justice and equity. Mr. Toebes for Rabobank noted that StockCo is an experienced financier and it could have protected itself and its securities here which he alleges it did not do. All those issues can be properly canvassed at trial. In my view they are not appropriate for determination in a summary judgment context.

StockCo's Counterclaim

[70] In its application as counter-claim plaintiff, StockCo seeks summary judgment against Rabobank for conversion, theft, and obtaining property by false pretences. This counter-claim was not actively pursued by counsel before me, but I now mention it briefly.

[71] StockCo had arranged to sell a number of animals through PGG Wrightson. Rabobank subsequently informed PGG Wrightson that the entitlement to the proceeds of the animals was in dispute, and that those proceeds should be transmitted to Buddle Findlay's trust account to be kept there until the dispute was resolved, which PGG Wrightson did. That is how, as noted above, certain of the proceeds came to be held by Buddle Findlay.

[72] In its counterclaim, StockCo argues that by having the proceeds diverted to the Buddle Findlay trust account, Rabobank improperly interfered with StockCo's exercise of its rights in relation to the stock, amounting to conversion, theft, and/or obtaining property by false pretences.

[73] As evidenced by StockCo's failure in its summary judgment application as defendant in my view at this early part of this proceeding, Rabobank was right to assert that the proceeds of the sale were a matter of genuine dispute. There is no evidence or suggestion of any intention on the part of Rabobank to do anything with the proceeds other than have them held on trust until final determination of the dispute. In these circumstances, in my view StockCo is unable to show that Rabobank has no arguable defence to a claim in tort for diverting the money.

Result

[74] For the reasons I have outlined above, StockCo's two applications before the Court for summary judgment pursuant to rules 12.2(1) and 12.2(2) are dismissed.

[75] Rabobank has succeeded here and in the usual way is entitled to costs against StockCo on these applications which I award on a category 2 B basis together with disbursements as fixed by the Registrar.

[76] This proceeding is now to be the subject of a case management telephone conference at 8.45 am am on 22 March 2010 to discuss time-tabling directions towards trial.

'Associate Judge D.I. Gendall'