IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000159
[2014] NZHC 1020

BETWEEN	WORKING CAPITAL SOLUTIONS HOLDINGS LIMITED Applicant
AND	SARAH JANE PEZARO Respondent

Hearing: 8 May 2014

Appearances: C Light for Applicant
Respondent Appears In person

Judgment: 15 May 2014

JUDGMENT OF GENDALL J

Introduction

[1] This is an application by Working Capital Solutions Holdings Limited ("WCSH") as lender/charge-holder grantee pursuant to s 167 the Personal Property Securities Act 1999 ("the Act"), for an order maintaining a financing statement FP1P97543V84MM78 ("the statement") against the respondent, Sarah Jane Pezaro ("Ms Pezaro"). The application was in time.[1] On 26 March 2014 an interim order was granted maintaining the statement until further order of this Court. This judgment will now determine whether that interim order should be made permanent.

[2] The necessity for this application was brought on by Ms Pezaro as borrower/guarantor grantor lodging a financing change statement with the Registrar of the Personal Property Securities Register ("PPSR") on the basis that "[a]ll of the obligations under the security agreement to which the financing statement relates

[1] Personal Property Securities Act 1999, s 165(1). The change demand was lodged on 11 March 2014, with the expiration of the 15 working day period being 1 April 2014.

have been performed",[2] and therefore requesting that the registration of the statement be discharged.[3]

The test

The cases

[3] By s 167(1) of the Act I can make an order that the financing statement/security interest be maintained if I am "satisfied that none of the grounds for making a demand under section 162 exist". The invariably vexed question then arises as to what is meant by "satisfied" in this context. There is no Court of Appeal or Supreme Court authority on point.

[4] As is patently apparent, there are strong parallels between this procedure and the caveat lapsing procedure.[4] This led Winkelmann J in *Asset Traders Ltd v Favas Sportscar World Ltd* to postulate that the same "reasonably arguable" test that applies in the caveat lapsing context ought equally to apply to applications under s 167.[5]

[5] By contrast, in *Toyota Finance New Zealand Ltd v Christie* Asher J considered that the wording of s 167 was such that the test should be elevated to that of a "seriously arguable" case.[6] This issue was acknowledged, but left unresolved in *Daniel Smith Industries Ltd v Cranes International NZ Ltd* where Allan J also proceeded on the basis of the "seriously arguable" test.[7] Similarly, Toogood J adopted the same test in the more recent decision *Nichibo Trading Company New Zealand Ltd v Lucich*.[8]

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2 Section 162(a).
3 Section 163(a).
4 Land Transfer Act 1952, ss 137, 143, 145 and 145A.
5 *Asset Traders Ltd v Favas Sportscar World Ltd* (2006) 9 NZCLC 264,138, (2006) 3 NZCCLR 545 at [13].
6 *Toyota Finance New Zealand Ltd v Christie* HC Auckland CIV-2009-404-3797, 15 July 2009 at [18] – [19].
7 *Daniel Smith Industries Ltd v Cranes International NZ Ltd* HC Rotorua CIV-2009-463-286 at [32].
8 *Nichibo Trading Company New Zealand Ltd v Lucich* (2011) 9 NZBLC 103,253, [2011] NZCCLR 31 at [35].

[6] In *Universal Trucks and Equipment Ltd v Reynolds*,[9] Mallon J, after discussing the "reasonably arguable" and "seriously arguable" tests, went on to state as follows:

> [34] At the hearing I indicated that I was not necessarily persuaded that the "reasonably arguable" or "seriously arguable" approach should be applied here…
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> [35] The statutory test requires that the Court be "satisfied" that "none of the grounds … exist". In other contexts where a statute requires that a decision maker be "satisfied", the Courts have said that it requires the decision maker to evaluate all the relevant matters and to reach a judgment as to whether he or she is satisfied … If the applicant establishes only a reasonably or seriously arguable case that the registered interest exists, that does not seem to me to be the same as saying that the Court is "satisfied" that "none of the grounds for making the demand … exist".
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> (citations omitted)

[7] The most recent decision on point seems to be the judgment of Associate Judge Bell in *Vegar-Fitzgerald v Noyce*.[10] In this case Associate Judge Bell considered the various approaches and commented as follows:

> [8] Section 167 provides that the court may make an order maintaining registration (and other orders) "if the court is satisfied that none of the grounds for making a demand under s 162 exist … " Until this year, this court has held that it is sufficient if the applicant can show a reasonably arguable, or seriously arguable, case for the security interest at issue: *Asset Traders Ltd v Fava's Sportscar World Ltd*, *Toyota Finance New Zealand Ltd v Christie* and *Daniel Smith Industries Ltd v Cranes International New Zealand Ltd*.
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> [9] However, in *Universal Trucks & Equipment Ltd v Reynolds*, Mallon J disagreed with this approach…
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> [10] Mallon J went on to point out that the inquiry under s 167 is a narrow one. If there are disputed facts, the originating application procedure enables evidence to be taken orally and for cross-examination to take place. The court can also give directions as to joinder of other parties. If there are time constraints, an interim order can maintain the current position. She accordingly rejected the reasonably arguable or the seriously arguable test.
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> [11] While the text of the statute gives support for the approach of Mallon J, it is also important to have regard to context and purpose. With great respect to Mallon J, I prefer the approach taken in the other cases. An application to maintain a financing statement is a summary procedure. There is a tight 15 working day deadline to obtain a court order for maintaining

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9 *Universal Trucks and Equipment Ltd v Reynolds* [2012] NZHC 483, (2012) 10 NZBLC 99-706, (2012) 11 NZCLC 98-003 at [31] – [33].

10 *Vegar-Fitzgerald v Noyce* [2012] NZHC 1311.

> registration — see s 165(1)(b). The consequences of not serving on the Registrar a court order maintaining the financing statement is that it will be removed by the Registrar under s 166(1). This tight time-frame is similar to other tight limits found when applying to set aside a bankruptcy notice, or when applying to set aside a statutory demand under the Companies Act, or to sustain a caveat under ss 145 and 145(a) of the Land Transfer Act. Another example of a summary procedure requiring resolution within a tight time-frame is the determination of adjudications under Part 3 of the Construction Contracts Act 2002.

Discussion

[8] Despite the reasonably extensive judicial comment on this point, I remain unconvinced that the approach taken in caveat cases is directly transferrable to the present context given the statutory language utilised. Quite helpfully for the purposes of s 167(1), the judgment of the Court of Appeal in *R v White* directly confronted the interpretive exercise of ascertaining the meaning of the word "satisfied".[11] While this case was criminal in nature, that does not derogate from the weight of the exercise undertaken there. In that case, the Court of Appeal said:

> The phrase "is satisfied" means simply "makes up its mind" and is indicative of a state where the Court on the evidence comes to a judicial decision. There is no need or justification for adding any adverbial qualification to "is satisfied" - *Blyth v Blyth* [1966] AC 643. In that case the House of Lords rejected the view of the Court of appeal that "it is satisfied" means "satisfaction beyond reasonable doubt". Lord Pearson said:
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> > "The degree or quantum of proof required by the Court before it comes to a conclusion may vary according to the gravity of the subject matter to which the conclusion relates, but in relation to which subject matter the specified conclusion is reached or not reached by the end of the trial: the Court either is or is not satisfied upon each point."
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> To much the same effect is the dictum of Smith J in *Angland v Payne* [1944] NZLR 610 at 626:
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> > "… the Judge must be 'satisfied'. This implies, I think, the weighing of the opposing contentions and the reaching by the Judge of a clear conclusion that a substantial ground exists. The Judge must pass beyond the stage of saying that there 'seems' to be a substantial ground. He must be 'satisfied' that there is a substantial ground."
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> And Adams J in *Robertson v Police* [1957] NZLR 1193, 1195:
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> > "The mind of the Court must be 'satisfied' - that is to say, it must arrive at the required affirmative conclusion - but the decision may rest on the reasonable probabilities of the case, which may satisfy the Court that the fact was as alleged, even though some reasonable doubt may remain … the

[11] *R v White* [1988] 1 NZLR 264 (CA).

> Court is not at liberty to uphold the defence unless the evidence produces in its mind the required acceptance of the truth of the allegation."

[9] This approach has recently been confirmed by the Court of Appeal.[12] The older decision of the Court of Appeal in *Re Woodcock and Woodcock* further fortifies this approach:[13]

> The best opinion I can form is that on such an application as this the evidence must enable the Judge to feel what Dixon J in *Briginshaw's* case defined as "an actual persuasion". That means a mind not troubled by doubt or, to adapt the language used by Smith J in *Angland v Payne* [1944] NZLR 610, 626; [1944] GLR 266, 270, "a mind which has reached a clear conclusion". If a formula has to be phrased, I would adopt one analogous to that expressed in *Edwards v Edwards and Elsegood* [1947] SASR 258, 271, and would say that the Judge must be "satisfied with the preponderance of probability arrived at by due caution in the light of the seriousness of the charge". That formula conforms to the formula expressed by Lord Stowell in *Loveden v Loveden* (1810) 2 Hagg. Con. 1, 3; 161 ER 648, where he said that: "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to [a] conclusion"… It conforms, too, to the formula suggested in *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; [1956] 3 All ER 970.

[10] Given the approach taken by these authorities as to the meaning of the phrase "is satisfied", in my view Parliament must be taken as having accepted this to be the position when enacting the Act. However, this does leave alive the issue of the tight timeframes imposed by s 165 of the Act. I am in agreement with the view of Mallon J in *Universal Trucks and Equipment Ltd* that these issues can be ameliorated however, if not eliminated, by obtaining interim orders to maintain until further order of the Court, as was done in the present case. The Court is then able to hear fuller argument on the discrete point at a later hearing, while still preserving the position of the applicant until full argument is heard.

[11] I therefore propose to consider the present application not on the basis of any approaches previously proposed but rather, by an evaluation of the submissions and evidence before me. In doing so, I will ask whether WCSH has persuaded me that none of the grounds contained in s 162 apply here. I do not intend to qualify the statutory language in any way. Either I will be satisfied or I will not.

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12 See for example *R v A* [2009] NZCA 380 at [9] – [12].

13 *Re Woodcock and Woodcock* [1957] NZLR 960 at 963 – 964, per Finlay ACJ.

The parties' positions

Company names

[12] It is prudent at this juncture to briefly traverse the history of Pezaro Interiors Limited, for reasons which will become evident below.

[13] The company now known as Pezaro Interiors Limited (In Receivership) (3351050) has its genesis in a shareholders' agreement dated 6 April 2011 between Ms Pezaro, Working Capital Solutions Limited ("WCS") and Edward McKee Wright (Mr Wright). It was originally incorporated on 7 April 2011 under the name Pezaro No 2 Limited, with its name being changed to its current name on the same day.

[14] Another company, now known as Retrospective Designs Limited (2161265) was incorporated on 6 August 2008 under its original name, Pezaro Antiques Ltd. The name was changed on 8 September 2009 to Pezaro Interiors Ltd, which remained until it was changed to its current name Retrospective Designs Limited on 7 April 2011, to coincide with the incorporation of the new Pezaro Interiors Limited mentioned above.

[15] This history is set out to ensure that it is clear that references to Pezaro Interiors Limited are references to the correct company. I will refer to the company now called Retrospective Designs Limited as ("PIL1") and the company now known as Pezaro Interiors Limited as ("PIL2").

Background facts

[16] On 16 July 2010 Ms Pezaro, Mr Carlton Pezaro, PIL1 and WCS entered into a Factoring Facility Agreement ("FFA1") and a General Security Agreement ("GSA1"). GSA1 is the security agreement the subject matter of the statement and is effectively the subject matter of the present application. These agreements were purported to be assigned to the respondent WCSH by Deed of Assignment dated 3 August 2011.

[17] GSA1 relevantly provided as follows:

1 DEFINITIONS AND INTERPRETATION

1.1 Definitions

"Moneys Hereby Secured" means all present, future, direct or indirect consequential indebtedness of the Grantor (solely or together with any other person) to WCS or any Related or Subsidiary Company, or incurred by WCS or any Related or Subsidiary Company on behalf of the Grantor and includes (by way of example, and not limitation):

(a) all interest, costs, taxes, duties, commissions, charges or expenses (including legal expenses (on a solicitor and own client basis) and any other expenses) incurred or sustained in any way by WCS, in the protection or attempted protection of WCS's interests under this General Security Agreement; and

(b) where the Grantor is or is described (in this General Security Agreement or elsewhere) as a trustee of a trust, all indebtedness of all former, present and future trustees of the trust, whether incurred or purported to be incurred as a trustee of the trust or personally;

"Related or Subsidiary Company" means any related or subsidiary company of WCS within the meaning of Sections 2(3) and 5(1) of the Companies Act 1993;

"Secured Obligations" means all obligations of whatever nature (whether present or future) of the Grantor to WCS under this General Security Agreement;

"Secured Property" means all the right, title and interest (present and future, legal and equitable) in the undertaking, property, assets and revenues (including its uncalled capital, and called but unpaid capital) of the Grantor, whether situated in New Zealand or elsewhere;

2 CHARGING PROVISION

2.1 The Grantor charges in favour of WCS the Secured Property as security for the payment of Moneys Hereby Secured and for the performance and observance of the Secured Obligations.

3 PAYMENTS

3.1 **Payment of Moneys Hereby Secured:** The Grantor covenants to pay the Moneys Hereby Secured to WCS in accordance with the terms agreed in writing between the Grantor and WCS, or failing agreement Upon Demand.

4 SECURITY

4.6 **Release of security**: If:

(a) **Performance**: the Grantor has paid all of the Moneys Hereby Secured and performed and complied with all the Secured Obligations;

(b) **No further Obligation:** WCS is satisfied that it is not, and will not be, under any obligation to make available any further credit, advance or facility to or at the request of the Grantor;

(c) **Discharge of Obligations:** the Grantor has discharged all its obligations under this General Security Agreement; and

(d) **No Deductions:** WCS is satisfied that there is no reasonable possibility that any part of the Moneys Hereby Secured received or recovered by WCS from the Grantor or any other person will or may have to be refunded or repaid by reason of operation of any principle of law or otherwise (including, without limitation, any law relating to preferences or insolvency);

WCS will, on the receipt of a request in writing from the Grantor, and at the cost of the grantor (and subject to clause 3.10), execute a release of the Security Interest created by this General Security Agreement. All documents in connection with any such release must be in a form acceptable to WCS.

[18] On 7 July 2011 Ms Pezaro, Mr Carlton Pezaro, PIL2 and WCSH entered into a further General Security Agreement ("GSA2"). On 11 September 2011 a Factoring Facility Agreement ("FFA2") providing for additional lending and guarantees was entered into between the same parties, with Ms Pezaro and Mr Carlton Pezaro acting as guarantors.

[19] FFA2 was allegedly breached by PIL2, which led to a default judgment being entered against Ms Pezaro in the District Court on 20 June 2013. This was followed by an application to have Ms Pezaro declared bankrupt. She is now challenging the judgment entered against her, and by association the bankruptcy application. This challenge is manifested in the form of a contest as to the validity of GSA2 and FFA2. The hearing of this dispute as I understand it has already been partially heard, with the remainder set down for hearing on 26 August 2014.

[20] Ms Pezaro also claims here that she took certain steps to have the statement discharged on 5 July 2013 by sending an email to WCS requesting that the statement be discharged. A copy of the email was annexed to her affidavit. WCSH acknowledged that Ms Pezaro referred to the email, but denied it had any knowledge, and stated that it did not change its position in any event.

Parties' arguments

[21] The arguments of each party as I see it ultimately distil down to only a few salient points. WCSH submits as follows:

(a) The statement relates not to FFA1, but to GSA1. WCSH contends that Ms Pezaro had misunderstood this distinction.

(b) GSA1 secures all obligations of the grantors, of which Ms Pezaro is one, to WCS. Those obligations are not only the obligations of Ms Pezaro under FFA1, but any obligation of Ms Pezaro to WCS at any time. Accordingly, it implicitly suggests that the assignment of GSA1 and FFA1 from WCS to WCSH is valid.

(c) If the District Court rules that GSA2 and FFA2 are invalid, with the result that Ms Pezaro is not liable as guarantor under FFA2, then it is arguable that FFA1 will again be operative which would potentially trigger liability under GSA1, clause 4.6(d). If so, Ms Pezaro still owes a debt to WCSH which falls within the definition of "Moneys Hereby Secured".

[22] In response, Ms Pezaro submits as follows:

(a) All obligations under GSA1 were performed as of 7 April 2011, with the result that the security interest was extinguished on the same day. There are no monies currently owing.

(b) A demand was made to WCSH to register a financing change statement on 5 July 2013 to reflect this but the demand was never responded to.

(c) Ms Pezaro is unable to obtain any further funding, and once again trigger any obligations under GSA1, for the reason that WCS, the original party to GSA1 is in liquidation. Accordingly, Ms Pezaro challenges the validity of the assignment from WCS to WCSH.

Discussion

[23] For the reasons that will follow, WCSH has failed to satisfy me that s 162(a) of the Act is inapplicable and therefore that this Court should make an order under s 167 of the Act maintaining the registration of the statement. Accordingly, the present application fails, with the result that no order maintaining the statement will be made, and the interim order made earlier will be discharged.

[24] It is important here to bear in mind that if the registration of the statement were to lapse, it would not substantively affect the security interest itself, but only its enforceability against parties not bound by its terms. As Linda Widdup in Personal Property Securities Act: A Conceptual Approach noted at 1.3:[14]

> 1.3 One other significant reform objective (of the Act) was to create a reliable, unified registry to give notice of and determine the priority of competing securities.

[25] And in addition the Act does not purport to create a system for the registration of ownership of personal property. Instead it has been described by Fogarty J in *Cameron v Phelps* as:[15]

> …a statute facilitating registration of securities over personal property.

[26] There does seem to be some confusion on this point in Mr McKee Wright's affidavit. By s 35 of the Act, except as otherwise provided, a security agreement is effective according to its terms. WCSH could still therefore enforce the agreement against Ms Pezaro, though the corollary of this is that it remains open to Ms Pezaro to mount a substantive challenge to the validity and/or applicability of GSA1. However, that is not what is in issue in this proceeding. In this context lapsing would merely have implications as to priority of the security interest created by GSA1 in accordance with the principles contained in Part 7 of the Act, as the security interest would no longer be perfected (unless WCSH has possession of the collateral).[16]

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[14] Linda Widdup *Personal Property Securities Act: A Conceptual Approach* (3rd Ed, Lexis Nexis 2013) at 1.3.

[15] *Cameron v Phelps* HC Christchurch CIV-2008-409-2648, 25 March 2009 at [21].

[16] Personal Property Securities Act 1999, s 41.

[27] The first reason for this outcome is that WCSH has placed no evidence before this Court or advanced any uncontested submission to the effect that Ms Pezaro is indebted to it. Nor is there any evidence before the Court as to the quantification of such indebtedness or even how a debt may have arisen originally. Given that its submission rests on a contingency that such debt may ultimately fall once again within the purview of GSA1, rather than GSA2, in order to satisfy me that this is even a possibility, some evidence must be required. It is however absent here. On this basis alone I would have declined to make the order sought by WCSH.

[28] The second reason for reaching this conclusion is that by s 167 of the Act I must be satisfied that none of the grounds for making a demand in s 162 exist. In the present case Mss Pezaro relies on s 162(a). I must therefore be satisfied that some obligation under GSA1 remains unperformed. In this respect WCSH contends that obligations under GSA1 may still remain unperformed because in the contingent event that the challenge to the validity of GSA2 and FFA2 is successful, obligations may once again arise and be incumbent upon Ms Pezaro. By its very nature, however, such a submission tends to acknowledge that at present there is no such obligation – it is a safeguard merely protecting a potential future obligation.

[29] My view in this regard is enforced by the fact that as I see the position, clause 4.6 of GSA1 itself creates no such obligation. On the contrary, it is explicitly expressed as a clause dealing with release from obligation contained elsewhere in the agreement. It is a declaration of the rights of the Grantors under GSA1 as to when the security interest created will be discharged, not an imposition of further obligations. In any event, the circumstances contained in GSA1 in which the security interest simpliciter will be discharged are quite different to the statutory criteria governing the circumstances in which registration of that interest can cease.

[30] For the reasons I have outlined above, I do not need to consider the issue of the validity of the assignment of GSA1 from WCS to WCSH. Neither party made any detailed submissions on this point and it is unnecessary to resolve in any event. However, I do simply note that WCSH is currently registered as the secured party on the PPSR, though this is not determinative of the legality or enforceability of the assignment itself.

[31] The non-compliance of WCSH with the email request to discharge the registration of the statement has no impact on the outcome of this proceeding. That email dated 5 July 2013 merely paved the way for Ms Pezaro to lodge the change demand and thereby trigger the process that has lead to this proceeding.

Costs

[32] Ms Pezaro has been successful in resisting the present application. However, as she was unrepresented, she is entitled only to disbursements, not costs.[17] There is to be no order made here as to costs. Her entitlement therefore is only to reasonable disbursements (if any) as may be fixed by the Registrar. An order to this effect is to follow.

Result

[33] The application by WCSH under s 167 to maintain registration of the statement fails. The interim order made in this proceeding on 26 March 2014 is discharged.

[34] In its place, I now order that:

(a) registered financing statement FP1P97543V84MM78/C0004 be discharged from the Personal Property Securities Register.

(b) this order is to lie in Court for 5 working days.

(c) the applicant is to pay the reasonable disbursements of Ms Pezaro on this application as fixed by the Registrar.

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Gendall J

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17 *R v Meyrick* [2008] NZCA 45 at [10].

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Copy to Respondent