

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

**CIV-2012-404-1425
[2012] NZHC 2583**

BETWEEN AIR LIQUIDE NEW ZEALAND
 LIMITED
 Plaintiff

AND SUPAGAS 2009 LIMITED
 First Defendant

AND EASY FACTORS INTERNATIONAL
 LIMITED
 Second Defendant

AND GERALD STANLEY REA AND PAUL
 GRAHAM SARGISON
 Third Defendants

Hearing: 9 August 2012

Appearances: J H Hunter for Plaintiff
 D M Hughes and D I Durovich for Defendants

Judgment: 5 October 2012

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 5 October 2012 at 12 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

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[1] This is an application by the Defendants to strike out the Plaintiff's ("Air Liquide") statement of claim or, alternatively, for summary judgment against Air Liquide.¹ Air Liquide opposes the application.

Preliminary point

[2] The Defendants submitted that Air Liquide could not be heard in opposition to the application without the leave of the Court,² as, on the Defendants' reckoning, Air Liquide's notice of opposition had been filed out of time. Counsel for Air Liquide disputed that submission. Whatever the position may have been, I am satisfied that this is an appropriate case to grant leave to Air Liquide, if indeed the notice of opposition was filed out of time.

Background

[3] By an agreement dated 30 June 2006 ("Asco agreement"), Asco Gas Limited ("Asco") agreed to supply carbon dioxide gas in bulk to Supagas Holdings Limited ("Supagas") for a term of five years.

[4] It was a term of the Asco agreement that Asco would supply equipment ("equipment") to Supagas for the purpose of storing the carbon dioxide gas, and that Asco would install and maintain the equipment on Supagas' premises. Supagas acknowledged in the agreement that, at all times, ownership of the equipment was to remain with Asco and that Asco was entitled to take possession of and remove the equipment by giving 24 hours' notice to Supagas. The agreement required Supagas to pay a monthly rental for the equipment.

[5] Asco did not register a financing statement ("financing statement"), as defined in s 135 of the Personal Property Securities Act 1999 ("PPSA"), in respect of the agreement.

¹ High Court Rules, rr 12.2(2) and 15.1.

² Ibid, r 12.9(2).

[6] Air Liquide took an assignment of Asco's rights under the agreement in May 2008.

[7] The Second Defendant ("Easy Factors") provided funding to Supagas and, in consideration of that funding, Supagas and Easy Factors entered into a general security agreement ("GSA") dated 6 May 2005. It is common ground between the parties that the GSA created a security interest within the meaning of s 17 PPSA in all of Supagas' present and after acquired property. Easy Factors had registered a financing statement in respect of the GSA on 5 May 2005.

[8] Supagas defaulted on the terms of its loan from Easy Factors and, on 18 June 2009, Easy Factors appointed the Third Defendants ("Receivers") as receivers of all of the assets of Supagas.

[9] On 26 August 2009, the Receivers entered into an agreement to sell all of the assets of Supagas, including the equipment, to the First Defendant ("Supagas 09"). The Receivers advised Air Liquide of the sale in September 2009.

Statement of claim

[10] Air Liquide commenced proceedings on 16 March 2012. Air Liquide pleads two causes of action.

[11] In its first cause of action, Air Liquide alleges that the Defendants have converted the equipment by purporting to sell the same to Supagas 09, and by their continued assertions that they were entitled to do so, that Supagas 09 has acquired ownership of the equipment and that Air Liquide has no rights in respect of the equipment. Air Liquide seeks an order for the return of the equipment and/or damages.

[12] In its second cause of action, Air Liquide alleges that Easy Factors and Supagas 09 (but not the Receivers) have enriched themselves at its expense, that their retention of the equipment without payment is unconscionable, and that Supagas 09 was not a bona fide purchaser for value without notice. Air Liquide

seeks a declaration that Supagas 09 holds the equipment on trust for it, an order for the return of the equipment and equitable damages.

[13] The Defendants' application to strike out is made on the basis that the statement of claim discloses no reasonably arguable cause of action, is vexatious and frivolous and an abuse of the process of the Court.³ As I have said, in the alternative, the Defendants seek summary judgment, and that application must be on the basis that none of the pleaded causes of action can succeed.⁴

Submissions

[14] The Defendants submitted that the parties' rights fall to be determined under the PPSA. They submit that the GSA created a security interest in the equipment within the meaning of s 17 PPSA; that Easy Factors perfected that security interest under the PPSA; that the Asco agreement was a lease for a term of more than 1 year and so created a security interest within the meaning of s 17(1) PPSA but that Asco did not perfect the same; that, pursuant to s 66(a) PPSA, Easy Factors' security interest in the equipment has priority ahead of Air Liquide's; and that as a result Air Liquide cannot succeed.

[15] Counsel for Air Liquide did not dispute the Defendants' analysis as set out in [14] except as to the issue of whether the Asco agreement created a security interest within the meaning of s 17 PPSA, that is whether the Asco agreement is a lease for a term of more than 1 year. Counsel submitted that, if Air Liquide were to prevail on that point, the case would not be determined by s 66(a) PPSA, and Air Liquide's claim in conversion would remain open.

[16] In addition to raising that point, counsel for Air Liquide made two further submissions during the course of the hearing, neither of which has yet been the subject of any pleading or claim for relief. The first of these was a submission that the Defendants had breached s 25 PPSA and the second was that the Receivers had not been appointed for a proper purpose. I refer to these below.

³ High Court Rules, r 15.1(1).

⁴ High Court Rules, r 12.2(2).

PPSA

[17] As I have said, there is no dispute that Air Liquide's cause of action in conversion could not succeed if s 66(a) PPSA applies. Section 66(a) reads 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.

[18] The question which arises, however, is whether the Asco agreement created a security interest and that in turn reduces to whether the Asco agreement is a lease for a term of more than 1 year.

[19] Section 17(1) PPSA defines security interest as follows:

17 Meaning of "security interest"

- (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 ... 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) ...

(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.

[20] A “lease for a term of more than 1 year” is defined as follows:⁵

Lease for a term of more than 1 year—

- (a) Means a lease or bailment of goods for a term of more than 1 year; and
- (b) Includes—
 - (i) A lease for an indefinite term, including a lease for an indefinite term that is determinable by 1 or both of the parties not later than 1 year after the date of its execution; and
 - (ii) A lease for a term of 1 year or less that is automatically renewable or that is renewable at the option of 1 of the parties for 1 or more terms, where the total of the terms, including the original term, may exceed 1 year; and
 - (iii) A lease for a term of 1 year or less where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period of more than 1 year after the day on which the lessee first acquired possession of them, but the lease does not become a lease for a term of more than 1 year until the lessee's possession extends for more than 1 year; but
- (c) Does not include—
 - (i) A lease by a lessor who is not regularly engaged in the business of leasing goods; or
 - (ii)

[21] For the purposes of determining this application, I assume that the Asco agreement was a lease for a term of more than 1 year. It is dated June 2006 and equipment (presumably the same equipment) was still on the premises of Supagas in June 2009. However, a factual issue which does arise is whether Asco was a lessor or bailor regularly engaged in the business of leasing (or bailing) goods.⁶ If it were not, then the Asco agreement would not be a lease for a term of more than 1 year, would not create a security interest and s 66(a) would have no application.⁷

⁵ Personal Property Securities Act 1999, s 16.

⁶ *Rabobank New Zealand Ltd v McAnulty* [2011] NZCA 212, [2011] 3 NZLR 192 at [14]-[27].

⁷ At [28]-[48].

[22] At present there is no reference to this issue in the pleadings and none of the affidavits that have been filed to date touch on the matter. Regardless, as counsel for Air Liquide submitted, at present it cannot be said that Air Liquide's statement of claim discloses no reasonably arguable cause of action. That is because, absent a resolution of the s 16 "lease" matter, there is no certainty as to the application of s 66(a) PPSA. For that reason I do not propose to grant the Defendants' application. The case is to proceed to a case management conference in the usual way, with the issues which arise to be defined in the course of that conference.

Additional contentions

[23] I referred above to additional contentions that counsel for Air Liquide advanced at the hearing of the application.

[24] The first of these related to s 25 PPSA, which reads as follows:

- 25 Rights or duties that apply to be exercised in good faith and in accordance with reasonable standards of commercial practice**
- (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.
 - (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

[25] As I understood it, Air Liquide's position is that there may have been a breach of s 25(1) PPSA as a result of the Defendants' conduct following the Receivers' appointment.

[26] The second additional argument concerned whether the Receivers had been appointed for a proper purpose. Counsel submitted that there is evidence that the Receivers were appointed to effect a change in the management of Supagas, and that did not constitute an appointment for a proper purpose. Counsel submitted that a receiver who is improperly appointed has no right to deal with the company's property. In a case such as the present such a determination might have consequences for the other Defendants.

[27] Whatever the position may be regarding these contentions, at the moment there is no pleading which identifies the issues. However, as I propose to dismiss the application, it will be a matter for Air Liquide if it believes it can properly plead a case addressing these two issues. That would require an amended pleading.

Result

[28] I dismiss this application for the reasons given. The Registry is asked to allocate a case management conference for the earliest possible date.

[29] I make no order as to costs. On the face of it the Defendants' application had prospects of success. Costs are to lie where they fall.

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M Peters J