Waller v New Zealand Bloodstock Ltd

High Court Auckland CIV 2004-404-4093
13 October; 2 December 2004
Allan J

Commercial law – Personal property securities – Competing security interests – Meaning of "property" – Relevance of legal ownership of leased asset – Collateral repossessed on default – Whether interest perfected – Entitlement to proceeds of collateral – Whether assigned in satisfaction of pre-existing indebtedness – Personal Property Securities Act 1999, ss 4, 16, 17, 23, 40, 41, 45 and 66 – Property Law Act 1952, s 130.

S H Lock (NZ) Ltd was the holder of a debenture over the assets of Glenmorgan Farm Ltd registered in the Companies Office before the Personal Property Securities Act 1999 (the Act) came into force on 1 May 2002. S H Lock registered its security interest on the day the Act came into force.

In 2001 Glenmorgan entered a lease to purchase agreement with New Zealand Bloodstock Ltd (NZBL) in respect of a stallion. After payments had fallen into arrears a second agreement was entered into in 2002. On the same day, NZBL assigned its interest in the agreement to New Zealand Bloodstock Finance Ltd (NZBF) (both companies referred to together as NZ Bloodstock). Neither agreement was registered under the Act.

In 2004 NZ Bloodstock terminated the agreement and took possession of the stallion and a few days later S H Lock appointed Messrs Waller and Agnew as receivers of Glenmorgan pursuant to a power in the debenture. Waller and Agnew claimed that they were entitled to possession of the stallion by virtue of a priority created by the Act, and sought an order by way of summary judgment requiring NZ Bloodstock to render up possession. They also sought a declaration that they were entitled to service fees payable by an English lessee of the stallion.

NZ Bloodstock argued that the stallion was not one of the assets subject to the debenture, and that once they had regained possession, the ownership and possession rights in the stallion had merged, so that the Act was no longer applicable. In respect of the service fees, they claimed that these had been validly assigned to a third party.

Held: 1 The debenture charged all of Glenmorgan's present and future property, and there was no reason to read down the width of the expression "property". It was sufficiently wide to include Glenmorgan's interest in the stallion (see paras [38], [51], [58]).

2 Both the S H Lock debenture and the NZBL lease agreement were security interests under the Act. In order to obtain optimal protection under the Act, the holder of a security interest had to perfect the interest. To be perfected

the interest must have attached, and there must have been registration or the taking of possession of the collateral. Perfected interests took priority over unperfected interests (see paras [23], [26], [29], [30], [62]).

3 A security interest attached when value was given, the debtor had rights in the collateral, and the security agreement was enforceable against third parties. S H Lock gave value when it made the first advances in 1999. Glenmorgan acquired rights in the stallion no later than when it took possession in 2002, and the agreement was enforceable against third parties. S H Lock had therefore acquired a perfected security interest no later than 2002. NZBF had acquired possession of the stallion, but possession as a result of seizure or repossession did not qualify by virtue of s 41(b)(ii). NZBF's interest had therefore never been perfected, and the S H Lock debenture was prima facie entitled to priority (see paras [65], [66], [67], [68], [69]).

4 A lessor's interest in the collateral took priority according to the rules in the Act, not according to the common law relating to legal title. The fact that NZBF claimed to be the legal owner of the stallion was irrelevant in a competition between security interests. By virtue of s 66 of the Act, S H Lock's interest was accorded priority (see paras [93], [95]).

Graham v Portacom New Zealand Ltd [2004] 2 NZLR 528 applied.

5 The entitlement to the stud fees was determined by s 45 of the Act. Because S H Lock had priority to the stallion, it also had priority to the "proceeds" of the collateral. However, there had been a valid assignment of the stud fees in partial satisfaction of a pre-existing indebtedness. That brought the stud fees within the exception created by s 23(e)(ix) of the Act. Messrs Waller and Agnew were therefore not entitled to priority in respect of the stud fees (see paras [119], [120], [121], [129], [130]).

Result: Summary judgment granted in respect of priority to stallion; application declined in respect of stud fees.

Other cases mentioned in judgment

Boat Park Ltd v Hutchinson [1999] 2 NZLR 74 (CA).

Bodnard v Capital Office Systems Inc (1992) 3 PPSAC (2d) 71.

Giffen, Re [1998] 1 SCR 91; (1998) 155 DLR (4th) 332.

Glencoe Express Inc, Re (1992) 3 PPSAC (2d) 239.

Hale v Hale [1975] 1 WLR 931; [1975] 2 All ER 1090.

Jones v Skinner (1836) 5 LJ Ch 87.

Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014; [1940] 3 All ER 549.

O'Brien (Inspector of Taxes) v Benson's Hosiery (Holdings) Ltd [1980] AC 562; [1979] 3 All ER 652.

Peacocke (C B) Land Co Ltd v Hamilton Milk Producers Co Ltd [1963] NZLR 576.

Smith v Perpetual Trustee Co Ltd & Delohery (1910) 11 CLR 148; [1910] HCA 39.

Sprung Instant Structures Ltd v Caswan Environmental Services Inc [1997] 5 WWR 280, [1998] 6 WWR 535; (1997) 219 AR 1.

Toll (FGCT) Pty Ltd v Alpha Farm Pty Ltd (2004) 211 ALR 342; [2004] HCA 52.

Walter & Sullivan Ltd v J Murphy & Sons Ltd [1955] 2 QB 584; [1955] 1 All ER 843.

World Bank of Canada v Sprung Instant Structures Ltd [2000] 266 AR 375.

Application

This was an application for summary judgment by Messrs Waller and Agnew in their action for an order requiring New Zealand Bloodstock Finance to render up possession of a stallion pursuant to a priority right under the Personal Property Securities Act 1999, and for a declaration that they were entitled to stud fees earned by the stallion.

P J Dale for the receivers.
R J Asher QC and *J G Collinge* for NZ Bloodstock.

Cur adv vult

ALLAN J. [1] This application for summary judgment raises some fundamental issues as to the application of the Personal Property Securities Act 1999 (the Act). As will be seen, the Act creates a regime that demands an entirely new approach to issues of securitisation and priority as between competing security interests.

Background

[2] The first plaintiffs (the receivers) are the receivers of Glenmorgan Farm Ltd, having been appointed on 23 July 2004. The second plaintiff (S H Lock) is the holder of a debenture over the assets of Glenmorgan, such debenture having been given on 17 November 1999 and registered in the Companies Office on 19 November 1999. S H Lock appointed the receivers pursuant to the powers contained in the debenture, Glenmorgan having made default in complying with its obligations thereunder.

[3] As at 29 July 2004 the sum owing by Glenmorgan to S H Lock was $3,132,011.89, exclusive of receivership and legal costs.

[4] The Act came into force on 1 May 2002. On the same day, with admirable celerity, S H Lock registered pursuant to the Act the security interest created by the debenture.

[5] The first defendant, New Zealand Bloodstock Ltd (NZBL), carries on business as a bloodstock auctioneer and is a major player in the New Zealand bloodstock market. The second defendant, New Zealand Bloodstock Finance Ltd (NZBF), is a wholly-owned subsidiary of NZBL and carries on business as a bloodstock financier.

[6] On 31 August 2001 Glenmorgan entered into a lease to purchase agreement in respect of a stallion, Generous, with NZBL. Payments under that agreement having fallen into arrears, it was renegotiated and a second lease to purchase agreement was entered into on 28 June 2002, between Glenmorgan and NZBL. This agreement was expressed to inure for a term to expire on 28 March 2004. NZBL assigned its interest under this second lease to purchase agreement to NZBF on 28 June 2002.

[7] On 22 August 2003, Glenmorgan and NZBF entered into refinancing arrangements which had the effect of extending the term of the second lease to purchase agreement until 28 March 2005. Neither agreement was registered under the Act, but Glenmorgan took possession of Generous on or about 31 August 2001, and retained possession thereafter until July 2004.

[8] Generous stood at stud in the Northern Hemisphere for part of each year, and in New Zealand for the remainder of the year.

[9] On 25 June 2004, by reason of continuing defaults on the part of Glenmorgan, the defendants instructed their solicitors to write to Glenmorgan requiring repayment of all the moneys outstanding under the second lease to

purchase agreement, and other agreements, by 5 July 2004. Glenmorgan failed to comply with those requirements. On 6 July 2004 the defendants advised Glenmorgan that they had terminated the lease to purchase agreement and all other outstanding financial agreements between the parties.

[10] On 7 July 2004 the defendants took possession of Generous, which was then in the physical custody of a third-party transit company which had responsibility for managing the transportation of Generous from the Northern Hemisphere to New Zealand for the local breeding season.

[11] On 23 July 2004, by reason of Glenmorgan's failure to comply with the terms of its debenture to S H Lock, that company appointed the receivers as receivers of Glenmorgan.

[12] Several issues have arisen as between the plaintiffs and the defendants, and this proceeding has resulted.

Statement of claim

[13] Four causes of action are pleaded. Only the first and third are the subject of the summary judgment application. In the first cause of action the plaintiffs claim that the security interest created by the S H Lock debenture entitles them to priority under the Act over the security interest created by the lease to purchase agreement, with the result that the plaintiffs are entitled to possession of Generous.

[14] The statement of claim in respect of this cause of action seeks an order directing that the defendants render up possession of Generous to the plaintiffs. Mr Asher QC for the defendants argues that, on summary judgment, the Court should content itself with granting a declaration as to the rights of the parties in respect of the right to possession, in the event that the Court should hold in favour of the plaintiffs.

[15] The second cause of action is quite separate and distinct from the first. The plaintiffs claim judgment for some $222,000, being the balance said to be owing by NZBL in respect of bloodstock sold on behalf of Glenmorgan in May 2004. The plaintiffs do not seek summary judgment on this cause of action.

[16] The third cause of action, based on s 45 of the Act, seeks a declaration that Glenmorgan (and therefore the plaintiffs) are entitled to receive in November 2004 the sum of £175,000, being Northern Hemisphere service fees earned by Generous and payable by an English lessee of the stallion. The plaintiffs seek by way of summary judgment a declaration to that effect.

[17] In a fourth cause of action, the plaintiffs contend that they are entitled to damages by reason of the loss of revenue suffered as a result of reduced service fees charged by the defendants while in possession of the stallion. Summary judgment is not sought on that cause of action.

Priority under the Act

[18] The Act has brought about significant change in the commercial law landscape in this country. It is the subject of a most helpful text entitled *Personal Property Securities in New Zealand* by Gedye, Cuming and Wood (2002). The introduction to that work commences as follows:

> "The Personal Property Securities Act 1999 represents the most significant reform of commercial law in New Zealand since the enactment of the Companies Act 1993 and associated legislation. The Act, which applies where personal property is used as collateral, employs approaches that are quite different from much of the prior legislation or the common law. Fundamental changes brought about by the legislation include:

- The conception of what is or is not a security interest;
- The implementation of a notice registration system for security interests in personal property; and
- A priority regime (for competing claims to the same assets) based on the time of registration.

In this last respect, the new law resembles the priority regime found in the Land Transfer Act 1952. However, unlike the Torrens system contained in the Land Transfer Act, the new Act does not create such a title-based system. Only security interests are recorded in the personal property securities register. The register does not identify the owner of any particular item of personal property and does not provide indefeasibility of title. Generally, the notice registration system simply provides a warning that a debtor has granted a security interest in a particular item or type of collateral. Only brief particulars are registered by a secured creditor and revealed by a search of the register. If a searching party legitimately requires more information, the Act provides a mechanism by which this can be obtained from the secured party."

[19] Section 4 of the Act describes the scope and purpose of the legislation:

4. What this Act is about – This Act mainly relates to –

- The enforceability of an interest in personal property created or provided for by a transaction that secures payment of money or performance of an obligation; the interest is called a security interest:
- How to determine the priority between security interests in the same personal property:
- How to determine the priority between a security interest and another type of interest (for example, the interest of a buyer of goods) in the same personal property.

[20] At the heart of the scheme of the Act is the concept of a "security interest". The effect of this concept is helpfully described in Gedye, Cuming and Wood as follows at pp 4 – 5:

"The Act creates a regime for the registration of notices disclosing the existence of consensual security interests in personal property and for determining the priority of competing security interests in the same collateral. The concept of a 'security interest' is central to the scheme of the legislation. One of the Act's aims was to do away with the myriad of formalistic distinctions that existed under prior law and to treat in like manner all transactions that in economic substance utilise personal property as collateral for the performance of an obligation. This is achieved by the extensive definition of 'security interest'. Section 17(1) defines 'security interest' as:

(a) 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). 5

This definition encompasses not only traditional security arrangements such as mortgages and charges but also other transactions that under prior law were often treated differently from traditional security devices. Under this new conception of security interest it does not matter whether title is vested in the debtor or creditor." 10

[21] For present purposes, it is important to note that s 17(1)(b) provides that a security interest includes an interest created or provided for by a lease for a term of more than one year, which is deemed to be a security interest in that it is subject to the Act, regardless of whether it secures payment or performance of an obligation. As is pointed out by Gedye, Cuming and Wood, a security 15 interest of that type exists irrespective of the vesting of title. As will be seen, that principle lies at the core of this case.

[22] Section 16 of the Act defines the term "lease for a term of more than 1 year". It:

(a) Means a lease or bailment of goods for a term of more than 1 year; 20 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 25

(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 30 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 35 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) A lease of household furnishings or appliances as part of 40 a lease of land where the use of the goods is incidental to the use and enjoyment of the land; or

(iii) A lease of prescribed goods, regardless of the length of the lease term.

[23] Because in this case the S H Lock debenture has been registered while 45 the lease to purchase agreement of the defendants was not, it is necessary to consider the distinction between registered and unregistered security interests. In order to obtain optimal protection under the Act, the holder of a security interest must perfect that security.

[24] Section 41 of the Act provides:

> **41. When security interest perfected –** (1) Except as otherwise provided in this Act, a security interest is perfected when –
> (a) The security interest has attached; and
> (b) Either –
> (i) A financing statement has been registered in respect of the security interest; or
> **Example**
> Person A registers a financing statement in respect of person B's car.
> Subsequently, person A's security interest in person B's car attaches.
> Person A's security interest is perfected.
> (ii) The secured party, or another person on the secured party's behalf, has possession of the collateral (except where possession is a result of seizure or repossession).
> **Example**
> Person A's security interest in person B's hire purchase agreement (chattel paper) has attached.
> Person A takes possession of the hire purchase agreement.
> Person A's security interest is perfected.
> (2) Subsection (1) applies regardless of the order in which attachment and either of the steps referred to in paragraph (b) of that subsection occur.

[25] For completeness it is to be noted that the expressions "perfected by possession", "perfected by registration" and "perfected security interest" are respectively defined in s 16 as follows:

> **perfected by possession**, in relation to a security interest, means the security interest has attached and the secured party has taken possession of the collateral (except where possession is a result of seizure or repossession):
> **perfected by registration**, in relation to a security interest, means the security interest has attached and a financing statement has been registered in respect of the security interest:
> **perfected security interest**, in relation to a security interest, means the security interest is perfected by possession or by registration or is temporarily perfected, as the case may be:

[26] It will be noted that there are two prerequisites to the perfection of a security interest. The first is that the security interest has attached, and the second is that either a financing statement has been registered, or that the secured party, or another on behalf of that party, has possession of the collateral (except where possession is the result of seizure or repossession).

[27] The provisions of s 40 of the Act determine the time at which a security interest attaches to collateral. That section provides:

40. Attachment of security interests generally – (1) A security interest attaches to collateral when –

(a) Value is given by the secured party; and

(b) The debtor has rights in the collateral; and

(c) Except for the purpose of enforcing rights between the parties to the security agreement, the security agreement is enforceable against third parties within the meaning of section 36.

(2) Subsection (1) does not apply if the parties to a security agreement have agreed that a security interest attaches at a later time, in which case the security interest attaches at the time specified in the agreement.

(3) For the purposes of subsection (1)(b), a debtor has rights in goods that are leased to the debtor, consigned to the debtor, or sold to the debtor under a conditional sale agreement (including an agreement to sell subject to retention of title) no later than when the debtor obtains possession of the goods.

(4) To avoid doubt, a reference in a security agreement to a floating charge is not an agreement that the security interest created by the floating charge attaches at a later time than the time specified in subsection (1).

[28] The term "collateral" means simply "personal property that is subject to a security interest": s 16. Accordingly, attachment is the process by which a security interest will, in terms of the Act, be created in respect of the collateral. A perfected security interest requires both the attachment of that interest to the collateral and either the registration of a financing statement or the taking of possession of the collateral by the secured party. It is immaterial whether attachment precedes or follows registration or the taking of possession. Perfection occurs when all of the requirements of s 40(1) have been complied with.

[29] In summary, therefore, two steps are involved in the process of achieving perfection:

(a) Attachment; and

(b) Registration or the taking of possession.

[30] Priority between security interests in the same collateral is determined, for present purposes, under s 66 of the Act, which relevantly provides 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:

Example

Person A's security interest in person B's car has been perfected by registering a financing statement.

Person C's security interest in person B's car has not been perfected.

Person A's perfected security interest in person B's car has priority over person C's unperfected security interest in person B's car.

[31] Section 43 of the Act provides that a security agreement may provide for security interests in after acquired property, and s 44 provides that such security interests arise without specific appropriation by the debtor.

First cause of action: issues for determination

[32] It is common ground that the S H Lock debenture was registered under the Act, while the defendants' lease to purchase agreement was not. Prima facie, therefore, s 66 will operate to accord priority to the S H Lock security interest. Mr Asher for the defendants submits, however, that the plaintiffs do not enjoy priority in respect of their claim to Generous. He makes that submission on two quite separate and distinct grounds:

(a) That Glenmorgan's leasehold interest in Generous was not included in the assets charged by S H Lock's debenture.

(b) By its acts in terminating the lease to purchase agreement and regaining possession of Generous, NZBF merged its rights to possession to and ownership of Generous. Accordingly, NZBF's interest was no longer a mere security interest and the terms of the Act were no longer applicable to it.

The S H Lock debenture

[33] Unless Generous is subject to the charge created by the debenture, then the plaintiffs cannot succeed, because, quite simply, no relevant security interest exists within the meaning of s 17. Mr Asher points to the date of the debenture (7 November 1999) and submits that it was drafted under what he termed "the old regime where the doctrine of nemo dat quod non habet applied, and a debenture holder had no interest over leased goods". He developed this submission by arguing that S H Lock could not claim that its security agreement (the debenture) covered assets leased to Glenmorgan because, prior to the Act, the horse would not "have been considered an asset of Glenmorgan". He said that only by reason of the new regime created by the Act can it be argued that Generous might be covered by the debenture: the common law nemo dat rule would earlier have prevented a claim against a leasehold interest.

[34] Mr Asher referred to *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 in support of the uncontentious submission that the debenture must be interpreted as at the time it was entered into, and he further argued that it could not possibly be suggested that it was the parties' intention to include the leased assets, when the law at the time precluded S H Lock from having any claim to such assets. He also pointed to the form in which the debenture was prepared and argued that it was clearly not drafted with the new Act in mind. It utilised old terminology, referred to fixed and floating charges and to crystallisation (concepts which are largely otiose under the Act), and dealt with book debts in a manner no longer relevant under the Act. He referred also to the fact that the Act is not mentioned in the debenture document itself.

[35] In my view, Mr Asher placed rather more weight on this argument than the circumstances permit. The Act received the royal assent on 14 October 1999, although it did not come into force until 1 May 2002, pursuant to an Order in Council to that effect. The parties to the debenture must be taken to have been aware, when the document was executed on 7 November 1999, that the new legislation was pending. That being so it is difficult to accept the submission that the parties could not have intended the debenture to include the leasehold interests, when legislation already enacted expressly provided for such interests. An analysis of the presumed subjective

intentions of the parties is of course impermissible. For a very recent reaffirmation of that prohibition see *Toll (FGCT) Pty Ltd v Alpha Farm Pty Ltd* [2004] HCA 52. The common intention of the parties is to be ascertained from the language of the debenture document.

[36] That leads to a consideration of the terms of the debenture itself. Clause 2 of the debenture provides: 5

> "2. **CHARGING CLAUSE**
>
> 2.1 **Charge**: The Company charges in favour of the Debentureholder all its present and future assets as continuing security for the payment of the Secured Money and the performance of all other obligations of the Company to the Debentureholder. 10
>
> 2.2 **Nature of charge**: The charge created by this Debenture is:
>
> a. a fixed charge in the case of the Company's freehold and leasehold land, plant and machinery, motor vehicles, chattels (except stock in trade), Book Debts, Other Monetary Debts, Intellectual Property Rights, unpaid or uncalled capital, goodwill and other assets; and 15
>
> b. a floating charge in the case of stock in trade of the Company (or assets to which the fixed charge may not attach or be effective)." 20

[37] As relevant, cl 1.2 of the debenture provides:

> "1.2 **References**: In this Debenture, unless the context otherwise requires, any reference to:
>
> . . .
>
> the '**assets**' of any person is to be read as a reference to the whole or any part of its business undertaking, property, assets (including its uncalled capital, unpaid capital and goodwill) and revenues (including the right to receive revenues) present or future." 25

[38] Of particular importance, in my view, is the inclusion, among the items comprised within the definition of the term "assets", of the word "property". It follows that cl 2.1 charges in favour of the debenture holder all of Glenmorgan's "present and future property" as security for the sums outstanding under the debenture. 30

[39] In developing his argument that the charging clause in the S H Lock debenture did not extend to cover Glenmorgan's interest in Generous, Mr Asher submitted that the terms "assets" and "property" "lead back to notions of legal title and are insufficient to incorporate leased goods, title to which is held by the lessor". He further submitted that all of the elements of the definition of "assets" in the S H Lock debenture have a common feature, in that they all point to items of a capital nature. He said that leasehold land was specifically included in cl 2.2a, whilst there is no specific reference to leasehold interests in chattels. 35 40

[40] Mr Asher's submissions tended to skirt around somewhat the significance of the inclusion of the word "property" in cl 1.2. It is clearly intended in my view that the term take a meaning different from, and is by way of addition to, the expressions "business undertaking", "assets" and "revenue". If the word "property" is notionally substituted for the word "assets" where it appears in cl 2.1 of the debenture, as is mandated by the definition of the term 45

"assets" in cl 1.2, then the relatively wide reach of the charging clause becomes apparent. Further, I do not consider much can be taken from the fact that cl 2.2a contains an express reference to leasehold land, but not to a leasehold interest in chattels, given that the clause concludes with a reference to "other assets". The latter expression is wide enough to include the term "property". In any event, the purpose of cl 2.2 is merely to distinguish between fixed and floating charges; the primary charging clause remains cl 2.1.

[41] All of this begs the essential question, namely whether the expression "property" as defined in the debenture is sufficiently wide to catch Glenmorgan's interest in Generous pursuant to the lease to purchase agreement. Prima facie, the term "property" as used in cl 1.2 is of wide application. It is patently intended to go beyond what is understood by the terms "business undertaking", "assets" and "revenue" which are separately caught by the subclause.

[42] Moreover, the expression "property" when used generally in a legal context will normally be taken to include all possible interests in that property. In *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at p 1033, Lord Atkin said that, taxing statutes apart, the word 'property', standing by itself has been said to "include property, rights and powers of any description", and in *O'Brien (Inspector of Taxes) v Benson's Hosiery (Holdings) Ltd* [1979] 3 All ER 652 at p 655, the House of Lords dismissed the taxpayer's contention that the rights of an employer under a contract of service were not "property" of the employer, because they could not be turned to account by transfer or assignment to another. It was held that, because the employer was able to exact from the employee a substantial sum as a term of releasing him from his obligations to serve, the rights of the employer constituted "property" or were an "asset" of the employer, notwithstanding limitations on the employer's ability to turn that property to account.

[43] In the context of a dispute over a will, Langdale MR said long ago that:

> ". . . it is well known, that the word 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have. . . . But when we find the word, 'property' used, nothing can be more strong, for the purpose of adopting that construction, which would carry any interest the testator might have in any property, or over which he had any controul [sic]." (*Jones v Skinner* (1836) 5 LJ Ch 87 at p 90.)

[44] In a different context again, the Court of Appeal held in *Hale v Hale* [1975] 2 All ER 1090 at p 1094 that, whether or not a weekly tenancy was capable of assignment, it nevertheless constituted "property" within the Matrimonial Causes Act 1973 (UK).

[45] Section 2 of the Property Law Act 1952 defines the term "property" as including: "real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest".

[46] Under the Act itself (s 16) the term "personal property" is defined as including "chattel paper, documents of title, goods, intangibles, investment securities, money, and negotiable instruments".

[47] The true meaning of the term "property" where it appears in cl 1.2, and its proper construction in the context of the debenture, were not the subject of detailed argument. Mr Asher tended to concentrate on other aspects of the charging clause and of cl 1.2.

[48] Mr Dale for the plaintiffs contented himself with a broad reference to cl 2.1 and the submission that the clause catches "all of the debtor's present and after acquired property" which is the term used in s 36(1)(b)(ii) of the Act. I consider that the inclusion of the term "property" in the definition of the expression "assets" is the key to the question of whether the charging clause in the debenture is sufficiently wide to catch Glenmorgan's interest in the stallion Generous. 5

[49] The authorities and statutory provisions to which I have referred on the point cover a wide range of factual and legal circumstances. Taken together, however, they demonstrate that the term "property" generally takes a wide meaning, which is not lightly to be read down. 10

[50] Mr Asher does, however, invite me to read down the charging clause so as to restrict it, in essence, to items of a capital nature. In particular, he submits that the term "property" ought to be confined to cases in which Glenmorgan has legal title and that it is insufficient to cover leased goods, title to which is held by a lessor. A good deal of evidence was adduced (on both sides) as to the manner in which Generous was treated, or alternatively ought to have been treated, in the books of Glenmorgan. I do not regard that evidence as of any real assistance. The question is not how for accounting purposes Generous was treated in the books of the company, but rather whether, as a matter of construction of cl 2 of the debenture, it falls within the assets of the company charged. That is a matter of law and is not to be determined by reference to disputed opinion evidence as to the proper method of treating Generous in the books of Glenmorgan for accounting purposes. 15 20

[51] I do not think that the expression "property" ought to be confined in the manner for which Mr Asher argues. His approach would have the effect of largely rendering the expression otiose where it appears in cl 1.2 of the debenture. The term, construed in its textual setting, is designed in my view to take effect more widely than he argues for. I think that the definition of the term "assets", simply by reason of the express reference to "property", is sufficiently wide to encompass the rights and interests of Glenmorgan in the stallion Generous. 25 30

[52] I have also considered the judgment of Rodney Hansen J in *Graham v Portacom New Zealand Ltd* [2004] 2 NZLR 528. His Honour there dealt with certain issues under the Act which appear to have been raised for the first time in this Court. Some of those issues arise again in this present proceeding. Of particular note is the fact that, as here, it was contended that the terms of the debenture were not sufficiently wide to cover the security interest involved. The debtor company charged in favour of the debenture holder: 35

> ". . . all its right, title and interest (present and future, legal and equitable) in, to, under or derived from the secured assets." 40

[53] The term "secured assets" was defined as "all assets of the Company of whatever kind and wherever situated". The debenture went on to create a fixed charge over all secured assets, including: "interests in personal property not referred to above that are not normally acquired for disposal in the ordinary course of the Company's business . . ." and "all agreements evidencing the Company's title to, right to possession of or other right or interest in, to, under or derived from any of the secured assets described above". 45

[54] While the debenture in that case was couched in somewhat different terms from those which arise in this proceeding, it is evident that Rodney Hansen J's conclusion, that both the leasehold and proprietary interests of the debtor in the relevant property (moveable buildings) were subject to the charge, was based on the broad consideration that those interests constituted "assets". He held that they fell comfortably within the definition of an asset in Butterworths' *New Zealand Law Dictionary* (5th ed, 2001), as:

> "A tangible or intangible item having economic value to its owner, which may be converted into money to the owner's benefit. An asset is available for the payment of the debts of an individual or company, or of a deceased person."

[55] As Mr Asher submits, the terms of the debenture in that case were different in important respects from that which falls for consideration here, and so care needs to be taken over the extent to which *Graham v Portacom* is regarded as a direct authority. That said, it seems that, at para [31] of the judgment (p 538), His Honour has held that the charge created by the debenture extended to all of the interests of the lessee in moveable buildings, simply by reason of the fact that those interests fell within the definition of "assets" for the purposes of the charging clause.

[56] At paras [32] and [33] of the judgment, His Honour moved on to consider clauses in the debenture which have no counterpart in the present case, but that analysis appears to have been conducted independently of the primary finding appearing in para [31].

[57] Although the charging clause in that case was materially different from that in the present case, I believe that the broad approach adopted by Rodney Hansen J is likewise appropriate here, and that, quite apart from my finding that the inclusion of the term "property" in the charging clause is sufficient to catch Glenmorgan's interest in Generous, the interest also falls more generally within the expression "assets" as defined in cl 1.2 of the debenture.

[58] I therefore hold that the charging clause in the S H Lock debenture is sufficiently wide to catch the possessory, contractual and statutory interests of Glenmorgan in the stallion Generous, and accordingly, I do not uphold Mr Asher's first argument.

[59] It is therefore necessary to turn to his second point, namely that by reason of the retaking of possession by NZBF, Glenmorgan's interests in the stallion came to an end, with the result that NZBF's interest was no longer "a mere security interest" and the terms of the Act no longer applied.

Does lease termination make a difference?

[60] In his written submissions, Mr Asher neatly put his case in this fashion:

> ". . . where a lease involving a lessor who has retained legal title to goods leased is lawfully terminated and the lessor regains possession ownership and possession are merged. As such, the lessor no longer possesses a mere security interest but rather the lessor's interest is that of absolute ownership. The PPSA's priority rules have no application to a contest between the holder of a security interest and the absolute owner in possession."

[61] There is a superficial attraction about that proposition but it is, I believe, based upon a misapprehension of the statutory rights and obligations created by the Act. That misapprehension is cogently illustrated by a line of Canadian authority referred to in part by Rodney Hansen J in *Graham v Portacom* and to which I will shortly refer. However, the starting point is s 17 of the Act. 5

[62] The S H Lock debenture created a security interest by virtue of s 17(1)(a). It was an interest in personal property created by a transaction that in substance secured payment. NZBF also had a security interest. Its lease was caught by the general provisions of s 17(1)(a) as amplified by s 17(1)(b) which specifically includes within the ambit of the term "security interest" leases for 10 a term of more than one year. That much is common ground between the parties.

[63] In passing, it should be noted that it is unnecessary to consider whether the S H Lock security interest amounts to a fixed or floating charge; the distinction is irrelevant for the purposes of the Act: s 17(3). 15

[64] The question of which security interest has priority is governed for present purposes by s 66(a) of the Act, which provides that a perfected security interest has priority over an unperfected security interest in the same collateral. It will be recalled that a perfected security interest is defined in s 16 as meaning "the security interest is perfected by possession or by registration or is 20 temporarily perfected, as the case may be". A security interest will be perfected by registration when "the security interest has attached and a financing statement has been registered in respect of the security interest".

[65] Section 40 provides that a security interest attaches to collateral when:

(a) Value is given by the secured party; and 25
(b) The debtor has rights in the collateral; and
(c) Except for the purpose of enforcing rights between the parties to the security agreement, the security agreement is enforceable against third parties within the meaning of section 36.

[66] In the present case, S H Lock gave value to Glenmorgan for the purposes 30 of s 40(1)(a) when it first made advances under the financing facility in 1999. Glenmorgan acquired rights in the collateral (Generous) when the lease was executed for the purposes of s 40(1)(b), but in any event no later than the date upon which Glenmorgan took possession of Generous, which was on or about 28 June 2002: s 40(3). At that same time, the provisions of s 40(1)(c) were 35 complied with in that S H Lock already fulfilled the requirements of s 36(1).

[67] Accordingly, S H Lock acquired a perfected security interest in respect of Generous no later than 28 June 2002.

[68] The position of NZBF is different. The lease was not registered under the Act. Accordingly, for the purposes of s 41, NZBF could acquire a perfected 40 interest only by taking possession of the collateral. Possession has indeed been taken, following default by Glenmorgan, but s 41(b)(ii) specifically excludes the taking of possession as a result of seizure or repossession from qualifying as a perfecting step for the purposes of the Act. That exception is also reflected in the definition of the term "perfected by possession" in s 16. 45

[69] It follows in my view that NZBF's security interest has never been perfected, with the result that s 66(a) operates to accord the S H Lock security interest priority over that of NZBF. That is, prima facie, the position under the

Act. However, as recorded above, Mr Asher submits that the Act simply has no application in cases where a lessor has retaken possession of leased goods, with the result that the NZBF security interest has terminated to be replaced by the absolute rights of an owner in possession. It is necessary therefore to consider the basis upon which Mr Asher advances that submission.

[70] His argument is based primarily upon three Canadian authorities. Legislation similar to the Act was enacted in a number of Canadian provinces some years ago with the result that a substantial body of helpful case law has been built up there. Unfortunately, the cases are not ad idem. There are marked divergences in approach. It is upon one line of authority that Mr Asher relies.

[71] I refer first to *Sprung Instant Structures Ltd v Caswan Environmental Services Inc* [1997] 5 WWR 280, before the Alberta Court of Queen's Bench. Sprung Instant Structures Ltd had leased two portable tent structures to Caswan Environmental Services Inc. The Royal Bank of Canada had advanced funds to Caswan under the terms of a general security agreement. The bank had registered its rights under the agreement, pursuant to the Alberta legislation which is equivalent to our Act. Sprung had not registered its financing statement within the period required to achieve super-priority: such priority would have been obtained had it registered within a period prescribed by the legislation. The equivalent provision under our Act is s 73.

[72] Forsyth J at first instance held that the terms of the general security agreement covered the security interest concerned, and that the bank had priority over Sprung. There are interesting parallels between the facts of that case and those which arise here. The bank's general security agreement was executed on 23 December 1994 and a financing statement was registered that same day. Sprung's two lease agreements with Caswan were executed on 5 August 1994 and 9 September 1994 respectively; that is, several months prior to the date of execution of the bank's security. However, Sprung did not register its financing statement until 24 May 1996. The following day, Sprung seized and took possession of the portable tents.

[73] Before Forsyth J, Sprung claimed that the bank in terms of its general security agreement took a security interest only in property owned by Caswan and that, as a result, the security interest could not attach to the tents as Caswan did not own them but merely leased them. Sprung further claimed that from the moment the tents were seized on 25 May 1996, they were in Sprung's exclusive possession and ownership and, as a result, Caswan no longer had an interest in the structure, capable of being attached by the bank's security interest.

[74] Forsyth J commenced his analysis of the question of priority in the following way at pp 290 – 291:

> "Sprung in constructing its argument focuses upon the portion of the charging clause where the Royal Bank particularizes the personal property in which the Royal Bank claims a security interest. However, the critical portion of the clause is the general charging portion which states '. . . [Caswan] . . . hereby grants to [Royal Bank] . . . a security interest . . . in all of [Caswan's] present and after acquired personal property including, without limitation . . .'. The clause then proceeds to particularize the personal property. If the words of the charging clause and in particular the words of the general charging portion are given their natural and ordinary

meaning: *Grand Trunk Pacific Coast Steamship Co v Victoria-Vancouver Stevedoring Co* (1918), 57 SCR 124 at 126, it is clear that ownership of the personal property is not required before a security interest will attach. Here the parties intended that the Royal Bank be granted a security interest in all present and after acquired property, that includes the structure. 5

Between the Royal Bank and Sprung whose interest has priority?

'The implementation of the [*PPSA*] by the Alberta legislature on October 1, 1990 resulted in the most significant change in personal property security law ever to occur in the history of the province. The Act employs approaches that are quite different from either prior legislation or 10 the common law.': R C C Cuming & R Wood, *supra* at 1.

The pre-PPSA law of personal property security has been described as a 'patchwork of different species of security devices with no specific statutory rules to accommodate priority situations in which conflicting security interests existed in the same collateral.': R H McLaren, *Secured* 15 *Transactions in Personal Property in Canada*, vol 1, 2d ed, (Toronto: Carswell, 1992) at § 5.01[1]. Prior to the enactment of the *PPSA* priority conflicts were resolved by tracing legal title. For centuries under this system the common law principle *nemo dat quod non habet* reigned supreme. This system, however, was developed in the context of a 20 comparatively simple economy where the majority of commercial transactions were concluded with 'cash on the barrel head'. Over time as commercial transactions grew more complex and the granting of credit became more and more common these rules based on legal title failed to reflect modern commercial practice or the principles of the marketplace. 25

In order to address modern commercial reality it was necessary to sweep away the old judicial rules based on legal title. This was accomplished with the enactment of the *PPSA* under which title and form are irrelevant: s 3(1); *Donaghy v CSN Vehicle Leasing* (1992), 4 Alta LR (3d) 40 (QB) at 45; *International Harvester Credit Corp of Canada Ltd v* 30 *Bell's Dairy Ltd (Trustee of)*, [1986] WWR 161 (Sask CA) at 168.

The *PPSA* introduced the concept of the 'security interest'. Under the Act 'security interest' is given a broad scope which covers 'all transactions that in substance, without regard to form or title, create a security interest in personal property.': R H McLaren, *supra*. Priority conflicts are now 35 resolved based on a series of specific priority rules enacted to 'reflect a comprehensive system of priority based upon a conscious and explicit recognition of policy.'; R H McLaren, *supra* at § 5.01[1]; *International Harvester Credit Corp of Canada Ltd v Bell's Dairy Ltd: (Trustee of), supra*. The priority rules divide into two broad categories: rules for 40 perfected security interests; and rules for unperfected security interests. Therefore in order to determine which priority rules are to be applied in any given case it is necessary to characterise the type of interests involved."

[75] The Judge then noted that Sprung would have been entitled to 45 super-priority had it perfected its security interest not later than 15 days after the date upon which Caswan obtained possession of the collateral, but that Sprung had neglected to do so. As a result, the bank had priority over Sprung,

because it had registered first. Sprung was unable to claim priority, the Judge decided, as a result of its seizure of the tents because the equivalent of s 41 of the Act did not permit a creditor to perfect a security interest as a result of possession arising through seizure or repossession. But even if Sprung had perfected its security interest by possession, the bank would have retained priority because the taking of possession occurred after the bank's interest was perfected by registration.

[76] As to the claim that Sprung's interest was that of an owner in possession, and that it was no longer subject to the provisions of the equivalent Act, Forsyth J said at p 297:

> "In this case, as set out above, the competition is between two parties, each of whom has a perfected security interest. Under the residual priority rule the Royal Bank has priority to the structure by virtue of the fact that its perfected security interest was registered first in time. Caswan held the structure subject to the Royal Bank's interest. Sprung's seizure does not reconstitute it as the owner of the structure from the beginning of its relationship with Caswan without recognising the [Royal Bank's] continuing interest in the structure. Sprung may be the owner of the structure as against the trustee in bankruptcy, but it remains a competing creditor as against the Royal Bank. Sprung's seizure, pursuant to its lessor security interest, does not override nor erase the Royal Bank's priority to the structure; *CIBC v Otto Timm*, supra."

[77] Having ceded priority to the bank, Sprung was unable simply by seizing the relevant property, to regain unqualified ownership. The tents, in Sprung's hands following seizure, remained subject to the prior security interest of the bank. Forsyth J accepted that "this result may at first glance appear harsh", but he pointed to the provisions of s 34 of the Alberta legislation (s 73 of our Act), which enabled the lessor to acquire super-priority by registering its security interest within 15 days after the date upon which the debtor obtained possession of the collateral. Had it done so, then it would have attained priority over the bank's perfected security interest.

[78] On appeal, the Alberta Court of Appeal reversed the decision of Forsyth J in a remarkably brief judgment that held (at p 536) that the terms of the bank's general security agreement did not extend to the structures in dispute, and further, that:

> "Even if the General Security Agreement somehow does cover the lessee's interest in the lease or somehow covers the leased goods, that lessee's interest is worthless and was terminated. That lessee's interest is not what the bank seeks here. The bank seeks the reversion."

[79] The entire judgment is less than a page long: see [1998] 6 WWR 535 and (1997) 219 AR 1.

[80] The judgment of the Alberta Court of Appeal was given on 4 November 1997. A month earlier, on 8 October 1997, the Supreme Court of Canada heard argument in *Re Giffen* (1998) 155 DLR (4th) 332. Judgment in *Re Giffen* was given on 12 February 1998. In *Re Giffen* an automobile had been leased to Giffen for a term of more than one year, which, as in New Zealand, rendered the leasehold interest a security interest. The lessor had not perfected

its interest when the lessee went bankrupt. The trustee in bankruptcy claimed to be entitled to the proceeds of sale under a provision of the British Columbia Act which provides that a security interest in collateral is not effective against the trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy. The Judge at first instance held that the trustee in bankruptcy was entitled to the proceeds of the prior sale of the car by the lessor. The British Columbia Court of Appeal allowed the appeal, holding that the provincial statute could not confer a property interest upon the trustee in bankruptcy because the relevant legislation provided that a trustee may only receive the property of the bankrupt, and that the bankrupt had no property interests in the collateral, but only a right to use it and a future contingent right of purchase.

[81] The Supreme Court held that the Court of Appeal had "erred fundamentally in focusing on the locus of title and in holding that the lessor's common law ownership interest prevailed, despite the clear meaning of [the relevant bankruptcy legislation]". The Supreme Court amplified its criticism of the Court of Appeal judgment as follows at p 344:

> "[26] The Court of Appeal did not recognise that the provincial legislature, in enacting the *PPSA*, has set aside the traditional concepts of title and ownership to a certain extent. T M Buckwold and R C C Cuming, in their article 'The *Personal Property Security Act* and the *Bankruptcy and Insolvency Act*, Two Solitudes or Complementary Systems?' (1997), 12 Banking and Finance L Rev 467, at pp 469 – 70, underline the fact that provincial legislatures, in enacting personal property security regimes, have redefined traditional concepts of rights in property:
>
>> Simply put, the property rights of persons subject to provincial legislation are what the legislature determines them to be. While a statutory definition of rights may incorporate common law concepts in whole or in part, it is open to the legislature to redefine or revise those concepts as may be required to meet the objectives of the legislation. This was done in the provincial PPSAs, which implement a new conceptual approach to the definition and assertion of rights in and to personal property falling within their scope. The priority and realization provisions of the Acts revolve around the central statutory concept of 'security interest'. *The rights of parties to a transaction that creates a security interest are explicitly not dependent upon either the form of the transaction or upon traditional questions of title*. Rather they are defined by the Act itself." (Emphasis added.)

[82] The Supreme Court continued at p 345:

> "[28] The Court of Appeal in the present appeal did not look past the traditional concepts of title and ownership. But this dispute cannot be resolved through the determination of who has title to the car because the dispute is one of priority to the car and not ownership in it. It is in this context that the *PPSA* must be given its intended effect . . .."

[83] The primacy of priority over title is neatly explained in this passage from the Supreme Court judgment at p 347:

> "[38] The Saskatchewan Court of Appeal explained the theory behind s 20 of the Saskatchewan *PPSA* in *International Harvester* (at pp 204 – 5). A person with an interest rooted in title to property in the possession of another, once perfected, can, in the event of default by the debtor, look to

the property ahead of all others to satisfy his claim. However, if that interest is not perfected, it is vulnerable, even though it is rooted in title to the goods (at p 205):

> A third party may derive an interest in the same goods by virtue of some dealing with the person in possession of them, and . . . he may become entitled to priority. That is, he may become entitled, ahead of the person holding the unperfected security interest, to look to the goods to satisfy his claim."

[84] Because the judgment of the Court of Appeal in *Sprung v Caswan* was given before that of the Supreme Court in *Re Giffen*, an attempt was made to have the former decision reconsidered following the judgment in *Re Giffen*. However, the Court declined to review the *Sprung* decision, upon the ground that it was limited in scope to the interpretation of the security agreement and that it did not in its terms decide the security issues which were directly before the Supreme Court: see *World Bank of Canada v Sprung Instant Structures Ltd* [2000] 266 AR 375.

[85] Mr Asher placed reliance on the Alberta Court of Appeal decision in *Sprung* and on two further decisions. The first is *Bodnard v Capital Office Systems Inc* (1992) 3 PPSAC (2d) 71, a decision of the Saskatchewan Court of Appeal. There, a lessor of a motor vehicle had registered its interest under the PPSA but the registration had expired. The four-year term of the lease expired and was not renewed. The lessor effectively repossessed the vehicle by arranging for it to be transferred to a new lessee. Approximately a week later the vehicle was seized by a representative of the original lessee's creditors.

[86] The judgment of the Court of Appeal is the very essence of brevity. It reads in its totality:

> "This appeal turns essentially on a question of fact. The appellant contends that the lease of the subject vehicle has expired by its terms, that possession of the vehicle was granted to a successor company and a new lease entered into. In the appellant's submission, the trial judge erred in failing to find that a new lease had been entered into, that the defendant debtor Capital Office Systems Inc had no interest in the collateral, and that the principles enunciated by this Court in *Int Harvester Credit Corp of Can v Bell's Dairy Ltd (Trustee of)* (1986) 6 PPSAC 138, 34 BLR 76 (sub nom. *Int Harvester Credit Corp of Can v Touche Ross Ltd*) 61 CBR (NS) 193, [1986] 6 WWR 161, 30 DLR (4th) 387, 50 Sask R 177 (CA) were not applicable.
>
> In our opinion, the appellant's submission is correct. There is uncontradicted evidence that the original vehicle lease between Transportation [sic] Lease System Inc and Capital Office Systems Inc had expired and that the financing statement protecting Transportaction's interest in the security agreement had expired. Possession of the vehicle passed from Capital to GDV Marketing Inc and an oral lease was entered into between the parties. In the circumstances of this case, the debtor, Capital, has no interest in the collateral and consequently Capital's creditors have no claim to the collateral.

> The appellant Transportaction is the owner of the subject vehicle. The appeal is allowed and the appellant shall have its costs on double Column V."

[87] I do not find the *Bodnard* case to be of assistance. It concerned an expired motor vehicle lease and an expired registration of interest. The contest was between the creditors of the lessee on the one hand and the new lessee of the vehicle on the other. The case did not involve a party with a perfected security interest, and does not provide any assistance here on the crucial question, which is whether a party with a perfected security interest may take priority over a party with a non-perfected security interest who nevertheless retains legal title to the collateral.

[88] Mr Asher further relies on *Re Glencoe Express Inc* (1992) 3 PPSAC (2d) 239, a decision of Wilkinson J in the British Columbia Supreme Court. The Court had to consider the competing interests of a trustee in bankruptcy and a lessor who had seized a leased motor vehicle shortly before bankruptcy. The Court held that the lessor should prevail against the trustee in bankruptcy, because the lessor no longer had a security interest in the collateral; instead it was the owner of the vehicle, as against the trustee.

[89] I do not regard this case as assisting Mr Asher's clients either. The issues there were different from those faced in this case. There, the contest was between a lessor with an unperfected security interest who had repossessed its goods, and a trustee in bankruptcy. Neither had perfected security interests. It was not a case of a contest between a party with a perfected security interest and one with an unperfected interest.

[90] That was also the basis upon which Forsyth J in *Sprung* distinguished the *Glencoe* decision (see p 296 of the judgment).

[91] As to the Alberta Court of Appeal's judgment in *Sprung Instant Structures Ltd v Caswan Environment Services Inc*, I share the misgivings of Rodney Hansen J as articulated in *Graham v Portacom (New Zealand) Ltd* (p 536). The judgment is simply unsatisfactory. It makes no attempt to analyse the impact of the PPSA, and is devoid of analysis of the extent to which the far-reaching provisions of the Alberta legislation had altered established rights of ownership. Like Rodney Hansen J I believe the judgments of Forsyth J in *Sprung* and of the Supreme Court of Canada in *Re Giffen* properly reflect the fundamental changes wrought by the PPSA. I note in passing that the judgment of Rodney Hansen J in *Graham v Portacom* meets with the approval of Mr M Gedye (one of the authors of Gedye, Cuming and Wood) in (2004) 10 NZBLQ 203. In a closely reasoned article, the author says at p 206:

> "In essence, under the PPSA the lessor under a lease that comes within the definition of security interest is effectively no longer the 'owner' of the leased asset when it comes to a conflict with other security interests. The leased asset is merely collateral of the lessor and the lessor's rights vis a vis third party claims to the leased asset are only those of a secured party. The corollary of this concept is that the lessee/debtor is effectively considered to be the owner of the collateral. The lessor's interest in the collateral is then prioritised according to the Act's priority rules. It is these priority rules that determine whether the lessor will win and not the

common law notion of *nemo dat*. This recharacterisation of the lessor's and lessee's rights allows both third party security interests to attach and the lessee to pass good title to the leased assets, even though the lessee had no contractual right to acquire title itself. When Rodney Hansen J stated: 'A security interest can therefore attach to the *lessee's interest* in the goods,' (emphasis added) he was not referring to the lessee's leasehold interest as traditionally conceived. He made it clear that he was referring to the lessee's interest as reconceptualised by the PPSA when he said: 'the lease is treated as a security agreement and the lessee is treated as the owner of the goods for registration and priority purposes.' It is the lessee's interest as reconceptualised as owner of the goods to which a security interest can attach."

[92] In my view, this passage accurately captures the issue which lies at the heart of this part of the case.

[93] The fact that NZBF may have legal title to Generous is simply irrelevant in a situation where, as here, NZBF holds an unperfected security interest and is in competition with a party which has a perfected security interest. The lessor's interest in the collateral takes or cedes priority as the case may be according to the Act's priority rules, not according to the dictates of the common law relating to legal title. It is the lessee who is to be treated as the owner of the goods for registration and priority purposes, and not the lessor.

[94] Although the lessee does not itself hold legal title to Generous, it is nevertheless capable of passing good title to the leased assets, despite the fact it has no absolute contractual right to require title itself. That is further spelt out in s 24, which appears to have no counterpart in the Canadian legislation.

[95] The result is that s 66 operates to accord S H Lock priority. It has a perfected security interest. NZBF's security interest remains unperfected.

[96] The result would, of course, have been quite different under the former law. There NZBF would have been entitled to rely upon its title to Generous and to defeat any claim by S H Lock, because the interest of Glenmorgan in Generous was simply that of a lessee, unable to give title until it had exercised its rights in accordance with the lease to purchase agreement.

[97] The fact that NZBF retook possession of Generous prior to the appointment of the receivers is of no relevance. The seizure did not improve the legal position of NZBF, which remains subordinated to S H Lock.

[98] To those unfamiliar with the Act, this conclusion may be surprising, and perhaps difficult to accept. After all, prior to the commencement of the Act, there could be no doubt that NZBF would have been entitled to priority over S H Lock, simply by reason of its title to Generous. But the result is a reflection of the extent to which the registration regime introduced by the Act has altered long-established priority principles grounded in notions of legal title. Irrespective of title, it is paramount that security interests be the subject of registration if priority is to be preserved.

[99] In the present instance, because NZBF's security interest was a purchase money security interest, NZBF could have obtained "super-priority" by perfecting its interest by registration within ten working days after the date upon which Glenmorgan took possession of Generous: s 73. It failed to do that, and indeed, the relevant security interest remains unperfected.

[100] In the course of argument, Mr Asher suggested that an outcome which favoured S H Lock would lead, in the business world, to a situation in which there was uncertainty as to priority entitlements, with the result that property might pass through several hands and yet still be reachable by a party with a perfected security interest. The answer to that concern is to be found in Part 5 of the Act (dealing with goods generally) and Part 6 (which contains additional provisions relating to motor vehicles). These Parts of the Act contain detailed provisions enabling parties in certain circumstances to give title to personal property despite the existence of adverse prior security interests.

[101] For the reasons set out above I have reached the conclusion that, by virtue of s 66 of the Act, the S H Lock debenture takes priority over NZBF's lease to purchase agreement, irrespective of the fact that legal title resides with NZBF.

[102] This finding is in line with that reached by Rodney Hansen J in *Graham v Portacom New Zealand Ltd*. The facts of that case were similar to these, although there the lessor had not attempted, as here, to seize possession. I have held that repossession by way of seizure makes no difference.

Third cause of action: entitlement to stud fees

[103] In their third cause of action the plaintiffs claim that Glenmorgan was entitled to receive, in November 2004, the sum of £175,000 being Northern Hemisphere service fees earned by Generous in respect of the 2004 northern breeding season.

[104] The plaintiffs further claim that this sum is secured by the S H Lock debenture and by its prior security interest and, the defendants having claimed an entitlement to receipt of the stud fees, the plaintiffs seek a declaration that those fees are secured by the S H Lock debenture and accordingly payable to the plaintiffs.

[105] The defendants resist this claim on two broad grounds:

(a) it is argued that the stud fees concerned do not properly fall within the charging clause in the S H Lock debenture and accordingly are not caught by that debenture, with the result that Glenmorgan's assignment of the sum concerned to the defendants is effective at law; and

(b) in the alternative, the provisions of s 23(e)(ix) of the Act apply so as to exclude the stud fees from the operation of the Act, with the result that the defendants are entitled to payment of the stud fees.

[106] In order to deal with this issue, it is necessary to canvass some further (undisputed) factual material.

[107] As earlier outlined, Generous has for some years been flown to Europe each year to participate in the Northern Hemisphere breeding season, which usually lasts from about February to July. Significant stud fees were payable to Glenmorgan in respect of Generous as a result of the stud duties undertaken by him during each northern breeding season. For several years, Generous has stood at the Plantation Stud situated at Newmarket, England during the northern breeding season. By an agreement made in 2001 (the exact date is not in evidence), Glenmorgan and Plantation Stud Ltd entered into a leasing agreement pursuant to which Generous was to stand at stud at Newmarket for each of the 2002 and 2003 breeding seasons. The agreement provided that Plantation should, at its option, have the right to renew the lease for one further term of one year, being the 2004 northern breeding season.

[108] On 22 August 2003, Glenmorgan and NZBF entered into a refinancing agreement which, having recited that Glenmorgan had fallen into default with respect to its obligations under the lease to purchase agreement, rescheduled Glenmorgan's financial obligations. In particular, cl 7 provided for the assignment to NZBF of stud fees payable to Glenmorgan by Plantation in respect of the 2004 and 2005 breeding seasons.

[109] Clause 7 in its entirety reads as follows:

> "7 **Conditions Relating to 'Generous (IRE)'**
>
> (a) In the event that Glenmorgan is unable to successfully negotiate, by the 30th day of September 2003, a northern hemisphere stud to stand Generous for the 2004 breeding season, NZBS shall have the right to take over negotiations with a stud of its choice. This shall also apply to the subsequent northern hemisphere breeding seasons until all of the obligations of Glenmorgan to NZBS under the Lease to Purchase Agreement, the Contract for Current Advances and this Refinancing Agreement shall have been performed.
>
> (b) For the 2004 northern hemisphere breeding season, the letter of credit shall be in favour of NZBS, whether the negotiations have been made by NZBS or Glenmorgan. All income received from the 2004 northern hemisphere breeding season shall be applied towards reducing Glenmorgan's debt to NZBS under the Lease to Purchase Agreement or the Contract for Current Advances.
>
> (c) For the 2005 northern hemisphere breeding season, the letter of credit shall be in favour of NZBS, whether the negotiations have been made by NZBS or Glenmorgan. All income received from the 2005 northern hemisphere breeding season shall be applied towards reducing Glenmorgan's debt to NZBS under the Lease to Purchase Agreement, the Contract for Current Advances and this Refinancing Agreement shall have been performed."

[110] Subsequently, on 17 December 2003, Glenmorgan and Plantation entered into an agreement which renewed (and varied to some degree) the earlier leasing agreement between the parties. It provided that Generous should stand at Plantation Stud during the 2004 and 2005 northern breeding seasons, the 2004 season to commence on 1 February 2004. The base rental for the 2004 breeding season was fixed at £175,000 payable on 1 November 2004. The rental for the 2005 breeding season was to be agreed by the parties no later than 30 September 2004.

[111] Paragraph 2.5 of the renewal agreement provided as follows:

> "Glenmorgan hereby authorizes Plantation to pay the base rental and any additional rental directly to NZ Bloodstock for the 2004 NHBS."

[112] The 17 December variation agreement was returned to the defendants under cover of a letter dated 16 December 2003 from Plantation. In that covering letter, Plantation notes that it is authorised to pay the rental directly to NZ Bloodstock.

[113] Generous did stand at stud at Newmarket during the 2004 breeding season, and consequently the agreed base rental of £175,000 became payable on 1 November 2004. Both the plaintiffs and the defendants lay claim to that sum.

[114] Mr Dale simply relies upon s 45 of the Act, which provides:

> **45. Continuation of security interests in proceeds –** (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds –
> (a) Continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and 5
> (b) Extends to the proceeds.
> **Example**
> Person A has a security interest in person B's car.
> Person B sells the car without person A's consent. 10
> Person A has a security interest in the car and in the money received by person B from the sale of the car.
> (2) The amount secured by a security interest in collateral and the proceeds is limited to the value of the collateral at the date of the dealing that gave rise to the proceeds, if the secured party enforces the security 15 interest against both the collateral and the proceeds.
> **Example**
> Person A has a perfected security interest in person B's car.
> The car had a value of $6,000 at the date that person A advanced $4,000 to person B. 20
> Two years later, without person A's consent, person B sells the car for $3,500, which is the value of the car at that time.
> Person A enforces its security interest in the car and the proceeds.
> Person A can recover only $3,500 as the amount secured by person A's security interest. 25

[115] As relevant, the expression "proceeds" is defined in s 16 as follows:

> (a) identifiable or traceable personal property –
> (i) That is derived directly or indirectly from a dealing with collateral or the proceeds of collateral; and
> (ii) In which the debtor acquires an interest. 30

[116] Mr Dale submitted that if the plaintiffs are entitled to priority in respect of Generous, then it must follow by virtue of s 45 that they are also entitled to the stud fees which are "proceeds" in that they are "derived directly . . . from a dealing with collateral".

[117] As indicated above, Mr Asher's first argument is that the stud fees do not 35 fall within the charging clause in the debenture, and accordingly S H Lock cannot claim any entitlement to them. In developing that submission, he pointed out the stud fees were assigned in the agreement of 22 August 2003 by which date neither the 2004 Northern Hemisphere breeding season had commenced, nor had the variation agreement of 17 December 2003 between 40 Plantation and Glenmorgan been executed. At the time of assignment, the stud fees were not fixed, were not payable, and did not yet even accrue since a number of factors or events could have occurred in the intervening period which would have negated the liability of Plantation to pay the fees at all. As such, Mr Asher submitted, what was assigned on 22 August 2003 was not a 45 right to receive payment, but a mere expectancy. He further submitted that expectancy was not covered by the charging clause in the S H Lock debenture.

[118] That submission may well be right. The relevant portion of the definition of the term "assets" in the charging clause brings in "revenues (including the right to receive revenues) present or future". Stud fees arguably do not fall within the expression "revenues" because they were never received by Glenmorgan. Further, Glenmorgan never enjoyed "the right to receive revenues" because the precondition for the right to the stud fees (fulfilment by Generous of the 2004 breeding season commitments) had not been undertaken prior to assignment.

[119] It is, however, unnecessary to decide that question, which is not free from doubt, because the entitlement to the stud fees is not, in my view, to be determined by reference to the scope of the charging clause, but simply by reference to s 45. Having held that the plaintiffs have priority to Generous, it follows that I must hold (subject to Mr Asher's alternative argument) that they also enjoy priority to the "proceeds" of Generous, namely the stud fees for the 2004 northern breeding season. It is not a question of whether the stud fees fall within the charging clause, but simply of whether Generous falls within that clause. I have already determined that question in favour of the plaintiffs.

[120] But that is not the end of the matter. It is necessary to turn to Mr Asher's alternative argument, namely the effect of s 23(e)(ix) of the Act. That subsection provides:

> **23. When Act does not apply –** This Act does not apply to –
> . . .
> (e) an interest created or provided for by any of the following transactions:
> . . .
> (ix) an assignment of a single account receivable or negotiable instrument in whole or in partial satisfaction of a pre-existing indebtedness.

[121] It will be observed that a transaction falling within this exception falls totally outside the Act. If Mr Asher were right in his argument, then even though the plaintiffs have priority in respect of Generous, entitlement to the stud fees would need to be determined in accordance with the general law.

[122] Section 23(e)(ix) has no counterpart in the corresponding Canadian legislation. The genesis and purpose of the subsection is explained in Gedye, Cuming and Wood as follows at p 113:

> "**23.13 Assignments in satisfaction of debts**
> The exclusion for the assignment of a single account receivable in satisfaction of a pre-existing debt is not found in the Canadian legislation. It has been taken from art 9 of the UCC. Such transactions are excluded from the Act on the basis that they do not involve commercial financing transactions and do not serve as security for the performance of an obligation. However, this will not always be so, particularly where the assignment is with recourse, and it is not clear whether the exclusion would apply where the transaction came within the in substance definition of 'security interest' in s 17(1)(a) and was not merely a deemed security interest under s 17(1)(b). There is no reason why the exclusion should apply to an in substance security interest. In any event, the exclusion does not apply where more than one account receivable is assigned."

[123] The case for the defendants is that cl 7 of the refinancing agreement of 22 August 2003, together with the renewal agreement between Plantation and Glenmorgan of 17 December 2003, coupled with the acknowledgment of Plantation in its letter of 16 December 2003, constitute a compliance with s 130 of the Property Law Act. In the result they say there has been a valid statutory assignment to the defendants of Plantation's obligations to Glenmorgan in respect of the fee due on 1 November 2004.

[124] Alternatively, it is submitted that there has been a valid equitable assignment. Equity does not require an assignment to be in any particular form, provided that the assignor should have made clear his or her intention to make the assignment and that the debtor is on notice to that effect: see *C B Peacocke Land Co Ltd v Hamilton Milk Producers Co Ltd* [1963] NZLR 576 at p 584, *Smith v Perpetual Trustee Co Ltd & Delohery* (1910) 11 CLR 148 at p 159 and *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584 at p 588.

[125] I accept Mr Asher's submission that the requirements of s 130 of the Property Law Act have been fulfilled. Mr Dale did not seriously argue otherwise. The assignment is in writing; it is unconditional, and notice has plainly been given to the debtor (Plantation). All the requisite elements are present. Accordingly, under the general law the stud fees have been assigned by Glenmorgan to the defendants and are payable to them unless s 45 of the Act applies so as to entitle the plaintiffs to priority. Whether or not s 45 does so apply turns on the application of s 23(e)(ix).

[126] Prima facie the assignment of the Plantation debt by Glenmorgan to the defendants falls within the exception. Mr Dale argued, however, that the subsection must be confined to stand-alone transactions, and that the present case did not qualify since the refinancing agreement of 22 August 2003 dealt with not one, but two, separate seasons and therefore the assignment of two separate accounts receivable. (As I understood him he was also inclined to argue that s 45 overrode s 23 to the advantage of the plaintiffs, but having regard to the opening words of s 23 that proposition does not appear tenable.)

[127] It is therefore necessary to consider what is meant by the expression "assignment of a single account receivable", and in the light of that term, whether in this case the assignment of the stud fees takes the transaction outside the Act.

[128] Clause 7(b) and (c) respectively of the agreement of 22 August 2003 between NZBF and Glenmorgan provide that income to which Glenmorgan was entitled for the respective Northern Hemisphere breeding seasons was to be applied towards reducing Glenmorgan's debt to NZBF under the lease to purchase agreement for the 2004 and 2005 seasons respectively. Although the language of cl 7 is not as clear as it might be, I am satisfied that the clause evidences an assignment by Glenmorgan to NZBF of its entitlement to stud fees for the two seasons concerned.

[129] However, in order to constitute an enforceable assignment, whether under s 130 of the Property Law Act or in equity, it is necessary that there be evidence of notice to the debtor. The only documents to which I have been taken as evidence of such notice are the 17 December 2003 renewal agreement made between Glenmorgan and Plantation, and the covering letter of 16 December 2003, from Plantation. Both documents have been referred to above. The 16 December letter simply refers to the renewal agreement and acknowledges the authorisation "to pay the rental directly to NZ Bloodstock". The renewal agreement itself (para 2.5) authorises Plantation to pay the base

rental and any additional rental directly to NZ Bloodstock "for the 2004 NHBS". There is no reference in the renewal agreement of 17 December 2003 to the 2005 stud fees, save for para 2.2 where there is a reference to an agreement by the parties to fix the rental by no later than 30 September 2004. Neither counsel pointed to any other document which might serve as the giving of notice of assignment to Plantation in respect of stud fees for the 2005 northern breeding season, nor is there any other evidence of notice having been so given.

[130] In those circumstances I conclude that the assignment does fall within s 23(e)(ix) in that it is "an assignment of a single account receivable . . . in partial satisfaction of a pre-existing indebtedness". I have noted the misgivings expressed by Gedye, Cuming and Wood as to the extent of the reach of the subsection in the passage from p 113 of the text (set out earlier in this judgment). However, the issues raised by the authors were not touched upon by counsel and I have simply construed the language chosen by the legislature. I hold that the assignment falls outside the Act and the plaintiffs are not entitled to priority in respect of the amount concerned.

[131] Although it is not necessary for the purposes of my decision on this point, I express the tentative view that, even if it could be shown that the refinancing agreement of 22 August 2003 incorporated in truth two separate assignments covering the 2004 and 2005 Northern Hemisphere breeding seasons respectively, nevertheless the exception created by s 23(e)(ix) should still apply. Paragraphs 7(b) and (c) of the 22 August 2003 agreement operate separately to assign (as between Glenmorgan and the defendants) two separate and distinct debts arising one year apart. They are two separate transactions recorded for convenience in the same agreement. Each can therefore properly be regarded as "an assignment of a single account receivable".

[132] The purpose of s 23(e)(ix) is, I think, to place outside the provisions of the Act isolated assignment transactions entered into bona fide by persons not in the business of buying or selling such obligations, for the genuine purpose of discharging, wholly or partly, pre-existing obligations. Here, there were two genuinely separate accounts receivable; the language and purpose of the Act would not be thwarted by a conclusion that each assignment fell within the exception. However, I am in any event satisfied on the evidence relied upon by the parties that a valid assignment existed in respect only of the 2004 breeding season, with the result that the assignment clearly falls within the exception.

Relief

[133] In respect of the first cause of action I have concluded that there is no arguable defence to the plaintiffs' claim. In their statement of claim the plaintiffs seek an order for possession of Generous.

[134] Mr Asher has asked me to take a different course. He has advised the Court that in the event that the plaintiffs should succeed on any cause of action, he will be making an application to the Court for the deployment of the Court's powers under the equitable doctrine of marshalling, and that accordingly the Court should defer the making of any final orders, save for a declaration.

[135] This is an unusual case, involving as it does the right to possession and control of a valuable asset. Satisfactory interim arrangements have been made between the parties for the possession of Generous. In all the circumstances I consider the appropriate course for me to follow is to give the plaintiffs summary judgment as to liability and to grant a declaration to the effect that the plaintiffs are entitled to possession of Generous.

[136] If the parties cannot agree on consequential relief, they should file memoranda or arrange a further hearing before me in order to determine the final form of appropriate relief.

[137] As to the third cause of action, I have determined that the defendants have an arguable defence to the plaintiffs' claim in respect of stud fees. Indeed, in my view, the defendants, rather than the plaintiffs, are entitled to those fees. I therefore decline to grant the declarations sought by the plaintiffs by way of summary judgment.

Costs

[138] The plaintiffs have succeeded on one cause of action and failed on the other. I will consider memoranda from counsel as to costs if the parties cannot agree. Leave is reserved generally to apply.

Summary judgment granted in respect of priority to stallion; application declined in respect of stud fees.

Solicitors for the receivers: *Grove Darlow & Partners* (Auckland).
Solicitors for NZ Bloodstock: *J G Collinge* (Auckland).

Reported by: Andrew Beck, *Barrister*