IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2009-463-286

IN THE MATTER OF	section 167 of the Personal Property Securities Act 1999
BETWEEN	DANIEL SMITH INDUSTRIES LIMITED Applicant
AND	CRANES INTERNATIONAL NZ LIMITED Respondent

Hearing: 12 November 2009

Appearances: K Foley for applicant
M S Crocket for respondent

Judgment: 16 December 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4pm on Wednesday 16 December 2009

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[1] This is an application by Daniel Smith Industries Ltd (DSI) for an order maintaining a security interest pursuant to s 167 of the Personal Property Securities Act 1999 (the Act).

[2] The respondent, Cranes International NZ Ltd (CIL) was placed in liquidation on 30 September 2009. The present application was filed prior to that date. For the purposes of s 248(c) of the Companies Act 1993, the liquidators advised that they consented to the continuation of the application.

[3] On 15 May 2009 Stevens J made an order by consent maintaining the registration of the relevant financing statement pending further order of the Court. That order was made in the light of the strict time limits imposed by the Act. The application now comes before the Court for argument.

Factual background

[4] The parties are each participants in the industrial crane industry. In the latter part of 2007, DSI wished to purchase three new Tadano GT800E cranes. CIL held the exclusive licence to import from Japan and sell Tadano cranes in New Zealand. Mr Daniel Smith of DSI and Mr Wayne Ferguson of CIL held preliminary discussions. Mr Smith wrote to Mr Ferguson on 29 November 2007 setting out DSI's proposals. On 10 December 2007, CIL responded by way of a written quotation expressed to be valid until 21 December 2007. CIL offered to supply three Tadano GT800E cranes for NZ$976,642 + GST each, making a total of $2,929,926 + GST. Of that sum, DSI was to trade in five of its existing cranes identified by model and serial number in the quotation letter, each of which was assigned a value. The total of the allowance made for the traded in cranes was $1,185,000 + GST, leaving a balance payable of NZ$1,744,926 + GST.

[5] Under the heading "Payment", CIL advised in the quotation letter that:

> We would secure your crane Trade In Cranes as listed for the deposit on three new GT-800E and balance payable on delivery.

[6] The delivery date was to be "12 months ex factory from your signed confirmation order".

[7] Mr Smith accepted the quotation by signing it that same day. Although he made a number of handwritten amendments to the quotation, they are not in issue in the present proceeding. The only endorsement of significance is Mr Smith's note in respect of delivery:

> To NZ ready to work 15/Sept 2008.

[8] Mr Smith says he and Mr Ferguson had earlier orally agreed on a 12 month delivery period, but that Mr Ferguson had noted DSI's preference for delivery by 15 September 2008. DSI had a commitment to undertake a major Wellington project for which it required delivery of a new crane as soon as was feasible.

[9] On 7 July 2008 CIL advised DSI that delivery dates would be 1 October 2008, 1 November 2008 and 25 January 2009 respectively. By letter of 11 September 2008 these dates were further amended to 18 December 2008, 18 January 2009 and 20 March 2009.

[10] In order to facilitate delivery arrangements, DSI agreed to pay an additional 10% cash deposit for the third crane at the time of delivery of the first. On 12 December 2008 in accordance with these amended arrangements, DSI paid $109,872.22 to CIL. The first crane arrived in New Zealand on or about 15 December 2008.

[11] At that point, taking into account the trade in values and the cash deposit, DSI had paid $365,200.62, including GST, more than the value of the first crane delivered. Mr Smith says that this sum represented, in effect, the deposit for the remaining two new cranes.

[12] Those new cranes have never been delivered. In early 2009 a dispute arose. Initially CIL contended that DSI was bound to bear the risk of currency fluctuations and was therefore required to pay an additional sum to obtain the second and third

cranes. That point was later conceded, but other obstacles associated with CIL's inability to uplift the cranes from Japan arose.

[13] In the context of that escalating dispute, DSI's solicitors were instructed to register financing statements under the Act in respect of three of the five trade-in cranes, namely:

a) Todano TG500 MY 4380:

b) Todano TR250 EBW 275;

c) Kobelco RK250

[14] The remaining two trade in cranes had already been on-sold by CIL.

[15] There were further developments. By agreement DSI retook possession of the Todano TG500 trade in crane on 23 February 2009, in order that DSI might complete contract works to which it had committed the new (undelivered) cranes.

[16] A dispute also arose about the condition of the Todano TR500 crane, another of the trade-in cranes. CIL contends that the crane was "derelict" and therefore worthless. DSI however, maintains that the crane concerned was thoroughly sound and notes that a third party had used it for more than a year.

[17] A measure of agreement was reached about other issues, including the painting of one crane and cartage of another. Adjustments were made to the trade in value accordingly.

[18] All of these matters are really side issues to the main argument.

[19] On 20 April 2009, CIL's solicitors wrote to DSI's solicitors cancelling the agreement for the supply of the remaining two cranes:

> …due to your client's breach of its obligations under the agreement to provide cranes by way of deposit. We will write to you under separate cover

> setting out our client's reasons for cancellation of the contract in greater detail.

[20] The letter went on to indicate that CIL would proceed with the contract for the remaining two cranes at a figure of NZ$1,482,403 + GST per crane. That was not acceptable to DSI. The additional cost would have been over $1 million.

[21] On 27 April 2009, DSI's solicitors wrote to CIL's solicitors, denying that DSI was in breach of contract and advising that CIL's purported cancellation of the contract amounted to a repudiation. The letter went on to give notice of cancellation of the contract by DSI by reason of that repudiation and of CIL's failure to deliver the second and third cranes, time having earlier been made of the essence.

[22] On 28 April 2009 DSI received notice of a change demand lodged by CIL under the Act. That notice gave rise to the present proceeding and to the making of the consent interim order to which I have earlier referred.

The issue for the Court

[23] The argument for DSI is that it is entitled to maintain the registration of its financing statement because it holds a security interest in the three cranes covered by the registration. The argument is that the trade ins were effectively provided by way of deposit, and so were refundable in the event that CIL (as is alleged) failed to abide by its contractual obligations.

[24] For CIL the argument is that the five trade-in cranes were simply credited to DSI by way of part payment of the purchase price, and that DSI retained no interest in them. (The five trade in cranes were delivered by DSI to or at the direction of CIL between 19 November 2007 and 19 December 2008).

The Court's jurisdiction

[25] The procedure for registering a security interest is set out in Part 10 of the Act. A party who seeks to challenge an existing security interest may give a written

demand to the secured party under s 162. A registered security interest may be challenged by written demand pursuant to s 162(d) where "no security agreement exists between the parties".

[26] Where a written demand is made under s 162 and not complied with within 15 working days, then the financing change statement (given by the challenging party) takes effect.

[27] Under s 165 a party who seeks to avoid that outcome must, within 15 working days after the demand is given, obtain and serve a Court order maintaining the registration. That is what occurred here. Counsel are agreed that the interim consent order made in May 2009 was intended to inure only until revisited by the Court in the course of a defended hearing.

[28] In order to preserve the registration of its security interest, a secured party must invoke s 167 of the Act which provides:

> **167 Secured party may obtain court order in cases not involving security trust deed**
>
> (1) At any time before the financing change statement referred to in section 163 is registered, the Court may, on application by the secured party, and if the Court is satisfied that none of the grounds for making a demand under section 162 exist, order that the registration—
>
> (a) Be maintained on any condition, and subject to sections 153 and 154, for any period of time; or
>
> (b) Be discharged or amended.
>
> (2) The Court may make any other orders it thinks proper for the purpose of giving effect to an order under subsection (1).
>
> (3) The Registrar must amend or discharge a registration of a financing statement in accordance with a court order made under subsection (1) as soon as reasonably practicable after receiving the order.

[29] The Court may, on the application by the secured party, make an order maintaining the security interest, if it is "satisfied that none of the grounds for making a demand under s 162 exist …".

[30] There is a preliminary issue as to the test which the Court ought to apply to the requirement that it be "satisfied". In *Asset Traders Ltd v Fava's Sportscar World Ltd* (2006) 3 NZCCLR 545 at [13], Winkelmann J adopted the approach routinely applied in caveat cases, namely whether the relevant argument is "reasonably arguable": *Sims v Lowe* [1988] 1 NZLR 656 at 659,

[31] More recently, in *Toyota Finance NZ Ltd v Christie* HC AK CIV 2009-404-3797 15 July 2009, Asher J, having cited *Asset Traders* noted also that in *Jones v Auto Imports & Wholesale Ltd* HC WN CIV 2008-435-183 22 September 2008, Clifford J appeared to have determined that no security interest existed on an apparently final basis. However, in that case the Judge appeared to have heard no argument as to the test to be adopted by the Court. Asher J continued in *Toyota Finance*:

> [17] An application such as this is normally brought by way of originating application. Inevitably, given the time constraints, a hearing of a s 167 application will be the type of hearing that is best determined on the affidavits only. There may be third parties with an interest who have not been served. There may be disputed questions of fact and credibility issues. Such a hearing is not suited to a final determination of rights.
>
> [18] I conclude that the tests that apply in respect of maintaining caveats under s 145A should where possible be applied where a party seeks to maintain registration, and the existence of a security interest is at issue. This means that:
>
> (a) The person seeking to maintain their registration has the onus of establishing a sufficient interest. This is the approach taken in caveat cases: *Castle Hill Run Limited v NZI Finance Limited* [1985] 2 NZLR 104 at 106.
>
> (b) The test is whether the person seeking to maintain the registration can establish a seriously arguable case that a security agreement exists between the relevant parties. The test of "reasonably arguable" is used in relation to caveat cases: *Sims v Lowe* [1988] 1 NZLR 656 at 660.
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> (c) Such a summary procedure is unsuitable for the determination of disputed questions of fact. This is also the approach in relation to caveats: *Sims v Lowe* [1988] 1 NZLR 656 at 659-660.
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> (d) The balance of convenience can be of relevance in exceptional cases, but does not have the same significance as it does in relation to an interim injunction hearing. As was stated in the caveat case of *Orams Marine (Auckland) Ltd v*

Ports of Auckland Ltd (1984) 6 TCLR 88 at 92 (CA), after a review of the authorities:

> The appellant wishes to maintain its caveat. … The approach to this type of application has been settled by this Court in *Sims v Lowe*.
>
> Other cases in this Court … confirm that while consideration of the balance of convenience may be required in exceptional cases, once a reasonably arguable case has been established, justice will require the maintenance of the caveat.

(e) In relation to caveats the Court has the discretion to require an undertaking as a condition of an order: *BP Oil New Zealand Ltd v Van Beers Motors Ltd* [1992] 1 NZLR 211. Where, as here, the undertaking is filed with the application, it can be a relevant factor.

> [19] I consider, therefore, that the Court should make a decision on whether there is a seriously arguable case. If there is, the interest will be maintained and the parties may litigate the substantive question between them.

[32] Asher J appears to have concluded that there is no significant difference between a "reasonably arguable" and a "seriously arguable" case. Ms Crocket contends however that there is a difference and that a "seriously arguable" test establishes a higher threshold. On the view I take of the matter it is unnecessary to resolve the question. I proceed upon the basis that it is necessary for DSI to establish that it has a seriously arguable case for the maintenance of its registration.

DSI's security interest

[33] It is common ground that the security interest is an interest in personal property that secures payment or performance of an obligation. Ms Crocket refers to the test propounded in Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (Revised ed, Butterworths, Wellington, 2002) at [2.9]

> In determining whether a transaction is in substance a security interest, the starting point is to disregard the form of the agreement and focus on what the transaction purports to do. If the transaction involves one party providing, or putting up, some personal property to secure an obligation, then the PPSA applies.

[34] It is also common ground that questions of title are irrelevant to the necessary analysis. The Act disregards both form and title. It is the substance of the transaction that counts: Widdup and Mayne at [2.11].

[35] Section 17 of the Act reflects these fundamental considerations. It provides:

> **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; …

[36] Although by virtue of s 36 of the Act a security agreement will be enforceable against a third party only if it is in writing, or the collateral is in the possession of the secured party, no such restriction applies in the present case, which involves a dispute between only two parties. The expression "security agreement" is defined in s 16 of the Act, as meaning:

> (a) an agreement that creates or provides for a security interest; and
>
> (b) includes a writing that evidences a security agreement (if the context permits).

[37] The case for DSI is that a security interest arose by reason of the provision of trade-in cranes by DSI to CIL and the retention by DSI of an interest in the trade-in cranes until the new cranes were delivered. The substance of the transaction was the exchange of new cranes for old cranes and cash. Accordingly, Ms Foley submits, DSI put up the trade-in cranes as a deposit to secure the delivery of the three new cranes. Ms Foley further argues that, although both the beneficial interest and the legal interest should be viewed as passing to CIL as purchaser, nevertheless, DSI retained a security interest that is capable of being enforced in the event of default.

[38] Ms Crocket maintains that DSI never had a security interest in the secured cranes, which were simply a trade-in, constituting part payment of the purchase price

of the new cranes. The key issue, she submits, is the intention of the parties; their conduct being inconsistent with the existence of a deposit, but consistent with a trade-in to be credited towards the purchase price.

[39] Ms Crocket points out that there was, at the time of physical transfer, no reservation or assertion of a security interest. DSI was content to transfer the trade-in cranes without any reservation of rights. It even delivered two of the cranes direct to third parties at the direction of CIL (no claim to a security interest is made by DSI in respect of these two cranes).

[40] Moreover, CIL contends that DSI must have known that CIL would be relying upon the value of the trade-in cranes in order to finance the transaction, rather than simply holding the trade-in cranes as a "true deposit". This aspect of the CIL argument is hotly contested by DSI which says that it was not in a position to know how CIL proposed to manage its relationship with its Japanese suppliers. So that is a question of fact which is not capable of resolution on the affidavits.

[41] Ultimately, Ms Crocket argues, this is not a principled attempt to maintain the registration of a security interest pursuant to a security agreement. Rather, it is an attempt to secure DSI's intended damages claim against CIL. That is an inference to be drawn, she argues, from the fact that no security interest was registered until the dispute arose between the parties, from DSI's conduct in delivering two cranes to third parties without objection or reservation, and to its preparedness to permit CIL to treat the trade-in cranes as its own for a long period.

[42] DSI rests its argument substantially upon CIL's quotation letter, which assures DSI that: "We would secure your crane Trade-In Cranes as listed for the deposit on [the new cranes] …".

[43] Much turns upon the use of the word "deposit" in the quotation document, coupled with the expression "secure". The character of a deposit is widely understood. In *Garratt v Ikeda* [2002] 1 NZLR 577 at [34], Tipping J delivering the judgment of the Court of Appeal said:

> [34] In the present context the word "deposit" has a well-settled meaning. The Oxford English Dictionary (2nd ed, 1989) defines a deposit as "Something, usually a sum of money, committed to another person's charge as a pledge for the performance of some contract, in part payment of a thing purchased, etc". The definition of a "pledge" is "Anything handed over to or put in the possession of another, as security for the performance of a contract or the payment of a debt, or as a guarantee of good faith, etc, and liable to forfeiture in case of failure." Moving from general usage to legal usage, Black's Law Dictionary (6th ed, 1990) describes a deposit as "Money placed with a person as an earnest or security for the performance of some contract, to be forfeited if the depositor fails in his undertaking."
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> [35] The case law is to the same effect. In *Soper v Arnold* (1889) 14 App Cas 429 at p 435 Lord Macnaghten described a deposit in this way:
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> > "Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes – if the purchase is carried out it goes against the purchase-money – but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."
>
> Similar observations had been made by Cotton LJ in *Howe v Smith* (1884) 27 Ch D 89 at p 95:
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> > "What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."
>
> Denning LJ also gave a similar description in *Stockloser v Johnson* [1954] 1 QB 476 at p 490 (CA).

[44] And in *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370 at 373, Lord Browne-Wilkinson said:

> Ever since the decision in *Howe v Smith* the nature of such a deposit has been settled in English law, even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture.

[45] Ms Foley accepts that the agreement of the parties to the relevant security interest may need to be implied, but argues that it is evidenced by the provision in the written agreement which I set out above, and by later correspondence.

[46] There is some substance in her submission that both parties needed to look beyond the terms of the accepted quotation for the terms of their agreement. As to the status of the trade-in cranes, DSI wrote to CIL on 18 April 2008, noting that it had "passed over possession" of three of the cranes, but that two had "yet to be handed over".

[47] Later, in the context of the dispute about the so-called "derelict" crane, CIL wrote to DSI on 8 January 2009, to the effect that it considered DSI still owned the crane concerned. It might be thought that a statement of that sort is inconsistent with a claim that the five cranes had simply been transferred to CIL in part payment of the purchase price.

[48] Ms Crocket is right to argue that the use by the parties of the word "deposit" will not be determinative. The Court will give effect to the underlying intention of the parties, rather than to the use of a particular word, especially where neither party had legal advice at the time of the transaction. Ms Crocket relies on *Reid Motors Ltd v Wood* [1978] 1 NZLR 319 where this Court declined to treat as a deposit an advance payment amounting to some 55% of the total purchase price, even though it was so described in the contract. Ms Crocket seeks to draw comfort from *Reid Motors* by suggesting that, here a trade-in of 40% of the purchase price could not realistically be regarded as a true deposit viewed in commercial terms.

[49] *Reid Motors* is a case which ought to be read very much in the context of its own factual matrix. In particular, it was a case about the sale and purchase of land where deposits of the order of 10% (and not 55%) are commonplace. But the present proceeding does not involve the sale and purchase of land. The mere fact that the proportion of the "deposit" was significantly higher than 10% of the total purchase price is simply one circumstance among several to be taken into account in the overall assessment. Likewise, the fact that DSI was prepared to permit two of the cranes to be transferred to third parties cannot be conclusive of the status in law of the trade-in cranes.

Conclusion

[50] In my view DSI has established that there is a seriously arguable case that a security agreement existed between the parties. This is a case in which the Court will need to have the benefit of oral evidence from the main participants in order to supplement the sparse documentary material upon which the parties presently rely. In other words, the true character of the agreement between the parties can be gleaned only after their evidence has been given and tested in the usual way. It is unnecessary to consider the balance of convenience.

[51] There will be an order that DSI's alleged security interest in financing statement FN1K86TOR69D9995 on the Personal Properties Security Register be maintained until further order of the Court. The order is conditional upon DSI filing a proceeding in this Court, on or before 31 January 2010, seeking inter alia, a declaration that it has a security interest in terms of the security agreement alleged to exist between DSI and CIL.

[52] I make an order pursuant to s 248(1)(c) of the Companies Act 1993 authorising the commencement of that proceeding.

Costs

[53] DSI is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J