IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-003603

BETWEEN	SEGARD MASUREL (NZ) LTD Appellant
AND	COLIN NICOL, PETER ANDERSON AND KERRYN MARK DOWNEY Respondents

Hearing: 9 October 2007

Appearances: T J Lamb for Appellant
L A O'Gorman and S R Willetts for Respondents

Judgment: 12 February 2008

JUDGMENT OF COOPER J

This judgment was delivered by Justice Cooper on
12 February 2008 at 9.00 a.m., pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Hughes Robertson, PO Box 2513, Wellington
Buddle Findlay, PO Box 1433, Auckland

[1] The appellant appeals against a decision of the District Court delivered on 23 May 2007 denying its application for summary judgment in the sum of $180,983.31.

[2] The appellant's business is that of a wool wholesaler. Its claim in the District Court was for the alleged conversion of wool that had been delivered to the defendants, but not paid for and not returned to the appellant when it made demand for that to occur. These events had their genesis in the receivership of EXFTX Ltd (formerly known as Feltex Carpets Ltd) ("Feltex") which commenced some 17 days after the wool had been delivered. The respondents are the receivers of the EXFTX Ltd which is now also in liquidation.

[3] In the District Court, Nicola Mathers DCJ held that title of the wool passed to Feltex upon delivery, and the appellant was merely an unsecured creditor. However, should that conclusion be wrong, and the appellant had retained title, she held that a "security interest" would have been created within the meaning of s 17 of the Personal Property Securities Act 1999 ("the PPS Act"). This was because, under s 17(3) of that Act, a "conditional sale agreement (including an agreement to sell subject to retention of title) is explicitly made a security interest.

[4] Feltex had been placed in receivership by ANZ National Bank Ltd and Australia and New Zealand Banking Group Ltd who held a debenture over all of Feltex's assets. Both had registered financing statements on the Personal Properties Securities Register under the PPS Act in respect of the security interest created by the composite debenture. The appellant had not done so, and concedes that if there was a conditional sale agreement, the appellant has only an unperfected security interest in the wool which would be defeated by the bank's perfected security interest.

[5] However, the appellant argues on appeal, as it did in the District Court, that the terms of the contract pursuant to which the wool was supplied to Feltex did not constitute a conditional sale agreement but provided for payment of cash on delivery of the goods. It contends that a conditional sale agreement, by definition, cannot include an agreement for cash on delivery, and that a conditional sale agreement necessarily includes provision for credit to be given by one party to the other.

[6] The appellant further contends that the District Court failed "to fully take into account" the evidence that had been provided by the appellant as to when title to the wool was to pass and Mr Lamb argues, on the facts, that it was clear that the parties only intended property to pass once payment had been made.

[7] A further argument advanced on the appeal is that Feltex, by virtue of an undertaking given by its head wool buyer, Mr John Berry, that the wool would not be touched by Feltex and would be kept separate until payment was made, had effectively acknowledged its status as a bailee. By failing to return the wool when the appellant demanded that it do so, Feltex committed the tort of conversion, for which it was entitled to the value of the wool as claimed.

[8] The respondent essentially argues that the District Court Judge's decision was correct in holding that title to the goods passed on delivery. However, if that was not the case, then a security interest had arisen in the wool which necessarily ranked below the perfected security interest held by the bank since the appellant had never registered any security in respect of the wool on the Personal Properties Securities Register.

[9] To put the respective arguments in context, I now turn to the facts.

The facts

[10] The facts were largely not in dispute. Indeed, the only affidavit that was filed by the respondents in the District Court was to place on the record matters concerning the receivership and subsequent liquidation of Feltex, details about the composite debenture held by the banks and to record the registration of financing statements by the banks in October 2002, and 21 March and 23 June 2006. In those financing statements, the "collateral" was described as "all present and after acquired property" in the case of the October 2002 financing statements, and as "all present and after acquired personal property" in the case of the 2006 financing statements.

[11] The wool was delivered on 5 September 2006. There were three batches of wool delivered on that day, covered by invoices referenced as MS4009, MS4011 and MS40121. Payment was not made at the time of delivery.

[12] As a result, the appellant made inquiry the following day as to the reason why payment had not been made. Feltex's financial controller advised Mr Whiteman, a director of the appellant, that payment had been temporarily delayed as the ANZ Bank in Australia would not authorise any payments at that time. He was given an assurance that payment would be made by Feltex as soon as possible.

[13] Several days later, payment had still not been made. Mr Whiteman called Feltex's head wool buyer, Mr John Berry. Mr Berry gave Mr Whiteman a "personal guarantee" that Feltex would not touch the wool delivered by the appellant and would keep it separate from the rest of the wool in storage until payment had been made. Mr Whiteman's affidavit evidence was that on the basis of that "personal guarantee" he felt reassured, and it had influenced the appellant not to take steps to repossess the wool immediately. In addition, payment was received from Feltex on 15 September 2006 in respect of the wool that had also been delivered on 5 September, under invoice MS4009.

[14] At this time, the appellant was aware from on-going media coverage that the banks had given Feltex until the end of October 2006 to get its financial affairs into order. Again, the appellant decided against repossessing its wool and waited before taking any further action. Feltex was then placed into receivership, on 22 September 2006. An exchange of correspondence between solicitors acting for the parties failed to result in payment of the outstanding amounts. After adjustments before delivery and scouring costs, the sum outstanding was $180,983.31. The appellant instructed its solicitors to make a further demand of the respondents to pay the outstanding balance or to return the wool, to no avail. The application for summary judgment in the District Court followed.

[15] The above summary is based on the evidence that was given by affidavit by Mr Whiteman in support of the summary judgment application. Although not calling evidence except to the limited extent that I have already mentioned, there

were two aspects of Mr Whiteman's evidence which the respondent sought to emphasise. First, Mr Whiteman had deposed that invoices would normally be issued for the wool up to one week before it was to be delivered. Payment was then generally made by Feltex on the same day as the delivery. He attached a spread sheet designed to show that that was the general pattern of the transactions between the parties. Ms O'Gorman, however, pointed out that it appears from the spread sheet that on 65 occasions out of the 86 transactions referred to, the wool was delivered by the appellant to Feltex without receiving concurrent payment. I did not understand Mr Lamb to dispute that fact, although he submitted that in many of those cases payment had followed between one and three days later.

[16] Secondly, insofar as the appellant sought to rely on the assurances given by Mr Berry, Ms O'Gorman emphasised that the discussion that had taken place between Mr Whiteman and Mr Berry had occurred, on Mr Whiteman's evidence "several days" after his initial discussion with Feltex's financial controller on 6 September 2006.

[17] I conclude this brief summary by mentioning also a relevant term of the agreement between the parties. Clause 4.1 of the agreement stated that:

> Payment will be made cash on delivery on the contracted date of delivery, or actual received date if delivery has been delayed, or receipt of invoice if invoice not received until after delivery date.

[18] Mr Lamb relied on that provision to argue that the arrangements between the parties were such that title in the wool would not be transferred to the respondent if payment was not made.

[19] It will be convenient to deal first with that issue.

The passing of title

[20] In the District Court, the Judge found that although clause 4.1 of the agreement envisaged the payment of cash on delivery, payment had not been made on delivery. She found that "by tacit agreement or actual agreement credit was

effectively given to the company". She indicated her difficulty with the appellant's proposition that notwithstanding what had occurred, on the facts, the payment of cash on delivery remained the effective intention of the parties.

[21] Mr Lamb argued in this Court that s 19 of the Sale of Goods Act 1908 governed the position. That section provides as follows:

> **19 Property passes when intended to pass**
>
> (1) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
>
> (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

[22] The appellant's argument was essentially based on the wording of the contract, although Mr Lamb sought to bolster it by reference to evidence that had been given by Mr Whiteman in his affidavit asserting that if payment was not received on delivery, title to the wool never passed to Feltex and the appellant retained the right to repossess that wool at any time. Further, he maintained that no credit arrangements had been entered into and also submitted that where a cash on delivery arrangement applies, and payment is not received at the time of delivery, the consignee will hold the goods in trust for the consignor until payment is made or waived.

[23] Mr Lamb argued, further, that it did not matter that clause 4.1 of the agreement contemplated in some circumstances (i.e. where an invoice was not received until after the delivery date) that payment would not be made on delivery of the goods. He submitted that that term was not inconsistent with the parties' intention of title not passing until payment was received because in such circumstances the wool would be held by Feltex on trust, that Feltex's own purchase orders confirmed that payment was to be made immediately, that the standard practice was for the appellant to send the invoice to Feltex one week before delivery, and that if there was any inconsistency between the payment terms (which the appellant submitted there was not) then the wool supply contract should be construed against the respondents as it had been drafted by Feltex.

[24] I do not think that there is any need in this case to resort to special interpretative approaches such as the *contra proferentem* rule on which Mr Lamb purported to rely. Clause 4.1 is expressed in simple language and is readily able to be understood. It does contemplate that payment might be made after delivery date, where an invoice is not received on delivery date. The difficulty, however, with the general thrust of Mr Lamb's argument is that, notwithstanding what clause 4.1 says, the course of dealing between the parties shows that the appellant apparently did not usually insist on concurrent payment, and it did not do so on this occasion.

[25] It is to be noted that the agreement does not expressly provide that title will not be passed until payment is made. Ms O'Gorman submits, in addition, that it is not necessary as a matter of business efficacy to imply a term that title should be retained if the seller chose not to exercise its right to insist on concurrent payment. In my view, that submission must be upheld.

[26] Further, when the appellant did not insist on payment on the date of delivery of the wool, it effectively demonstrated an intention to grant credit if the goods were delivered, without requiring payment. There was nothing unusual in that, as the schedule attached to Mr Whiteman's affidavit showed. In fact, for reasons that Mr Whiteman discussed, it was evidently content not to attempt to repossess the goods right down to the time when Feltex was placed into receivership. Given what happened on this particular occasion, and the frequency with which payment was not made on delivery, I cannot accept the appellant's argument that, pursuant to s 19 of the Sale of Goods Act 1908 the parties intended that property in the wool would not be transferred to the buyer until payment was made. Rather, I consider that r 5 of s 20 of the Sale of Goods Act 1908 applies.

[27] That provision provides as follows:

> Rule 5. (1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.
>
> (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not)

> for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

[28] There is no doubt here that the wool was unconditionally appropriated to the contract. The respondent delivered them to the appellant. That means that, under Rule 5(1) the property in the goods thereupon passed to the buyer. That occurred on delivery. It does not matter on this analysis what discussion Mr Whiteman may have had with Mr Berry several days after the day following delivery. The title in my view had already passed to the respondent by the time of that discussion.

[29] That conclusion is enough to determine the appeal, because upon property in the goods passing to the respondent, the appellant was then simply in the position of an unsecured creditor whose interests in the wool necessary ranked after the debenture held by the banks. However, because I heard argument on the issue of whether a security interest had been constituted (in the event that title did not pass), I now turn to that issue.

Was a security interest constituted?

[30] The meaning of the term "security interest" is set out in s 17 of the PPS Act 1999. That section reads as follows:

> **17 Meaning of "security interest"**
>
> (1) In this Act, unless the context otherwise requires, the term security interest—
>
> (a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to—
>
> (i) The form of the transaction; and
>
> (ii) The identity of the person who has title to the collateral; and
>
> (b) Includes 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).

> (2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.
>
> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[31] Section 17(3) makes it clear that the expression "security interest" embraces all forms of conditional sale agreements, including agreement to sell subject to retention of title. In the District Court, the Judge held that if title had not passed to Feltex upon delivery of the wool on 5 September 2006, there would have been a conditional sale agreement in the form of an agreement to sell (subject to retention of title) caught by s 17(3) of the Act.

[32] Mr Lamb challenged that conclusion. He argued that a conditional sale agreement, as a matter of definition, cannot include an agreement that cash would be paid on delivery, and that a conditional sale agreement necessarily included a term that credit would be given by one party to the other. He maintained that the various examples of a "security interest" set out in s 17(3) of the PPS Act are all examples of some form of credit arrangement that cannot, he argues, apply where the terms of sale are cash on delivery. He referred to the definition of "hire purchase agreement" in the now repealed Hire Purchase Act 1971, noting that it excluded contracts in terms of which property passed absolutely to the purchaser at the time of the agreement or upon or at any time before delivery of the goods. He argued that what happened on the present facts was not analogous to a conditional sale agreement of the kind covered by the definition in the Hire Purchase Act.

[33] He argued also that the District Court Judge had misunderstood the difference between a true cash on delivery situation, which he asserted arose on the present facts, and a retention of title clause such as a Romalpa clause. In the case of a Romalpa clause, he pointed out that the parties agreed that title is not to pass until performance of certain conditions, for example, payment of the purchase price in full, even though the buyer may take possession prior to that point. On the other hand, in the case of a cash on delivery arrangement he submitted that no credit is

extended. There is no need, nor any ability to create a security interest to secure payment or performance of an obligation as the buyer either pays in full upon delivery or holds the goods for the vendor to repossess. Further, under an agreement for cash on delivery, the buyer on receiving delivery of the goods, has no proprietary or equitable interest in them until payment is made. Nor does the buyer have any immediate right to deal with the goods prior to payment, and simply holds the goods on trust until payment is made.

[34] Mr Lamb amplified the last point by reference to a decision decided in the Supreme Court of New York in 1845: *Leven v Smith* (1845) 1 Denio 571. On the facts of *Leven v Smith* the goods had been sold for cash, to be paid for on delivery and the sale was held to be conditional with property in the goods not passing until the condition was complied with. Jewett J on appeal said, *inter alia*:

> The goods in question were sold by the plaintiffs to the defendant for cash, to be paid on delivery. Payment and delivery were to have been simultaneous. No credit was given, and there is no evidence that the delivery to the defendant was intended to be absolute, or that the condition of payment was waived; and the mere handing over of the goods under the expectation of immediate payment, did not constitute an absolute delivery.

[35] However, the facts of the present case are different. Importantly, the appellant delivered the wool without insisting on contemporaneous payment. Thereafter, it left the wool in the respondent's possession. Having delivered the wool without obtaining payment, and leaving it with the respondent, the appellant effectively evinced an intention to grant credit. If, as must be notionally assumed for the purposes of this part of the appellant's argument, title had been retained by virtue of an implied term to that effect, then it seems plain that there was an agreement to sell subject to retention of title, and the transaction therefore fell within s 17(3) of the PPS Act, so as to be a security interest under that Act.

[36] It is to be remembered that a security interest arises where an interest in personal property is created by a transaction that *in substance* secures payment or performance of an obligation, without regard to the form of the transaction (s 17(1)(a)). It is to be remembered too that, under s 24 of the Act, the fact that title to collateral may be in the secured party rather than the debtor, does not affect the application of any provision in the Act relating to rights, obligations and remedies.

[37] As was said by William Young J in *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 69 at [89]:

> The PPSA equates what the law previously regarded as true security interests (for example, created by a chattel mortgage) and in substance security interests (for example pursuant to a *Romalpa* clause). Priority between competing securities is always to be determined in accordance with the priority rules provided for in the PPSA. Subject to the special super-priority which is accorded to registered purchase money security interests, the priority rules apply irrespective of the form in which security is taken. In this respect, s 24 is very important.

[38] It is worth noting also at this point what was said by Gedye in *What's Yours is Mine: Attachment of Security Interests to Third Party Assets* (2004) 10 NZBLQ 203, at 205:

> The common law *nemo dat* principle has been substantially abrogated by the PPSA and simply does not apply in the context of those priority competitions that are regulated by the Act. The ability to create security interests in assets not "owned", in the traditional sense of the word, by a debtor is fundamental to the PPSA.

[39] For these reasons I am of the view that the decision of the District Court on this second issue is also correct.

Result

[40] For the reasons I have given, the appeal is dismissed. The respondent is entitled to costs on a Category 2 Band B basis. If there is any disagreement as to the quantum of those costs, I will receive memoranda on the issue.