IN THE COURT OF APPEAL OF NEW ZEALAND

CA367/2012
[2013] NZCA 506

BETWEEN	GIBBSTON DOWNS WINES LIMITED AND RFD FINANCE NO 2 LIMITED Appellants
AND	PERPETUAL TRUST LIMITED First Respondent
AND	JOHN MORRIS LEONARD AND PAUL GRAHAM SARGISON Second Respondents

Hearing:	2 October 2013
Court:	Randerson, Stevens and Venning JJ
Counsel:	A J Forbes QC and K W Clay for Appellants B A Vautier for First Respondent S O McAnally for Second Respondents (abiding the decision of the Court)
Judgment:	22 October 2013 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

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Introduction

[1] This is an appeal against a decision of Chisholm J dismissing the appellants' application for a declaration that their security interest over the collateral of Anthem Holdings Ltd (in receivership) (Anthem) has priority over the security interest of the first respondent, Perpetual Trust Ltd (Perpetual).[1] The second respondents are the receivers of Anthem. They took no part in the appeal and abide the decision of the Court.

[2] Propertyfinance Securities Ltd (PFS) and Capital + Merchant Finance Ltd (C+M) each loaned money to Anthem pursuant to general security agreements. When C+M insisted on holding a first ranking security interest, the two parties entered into a subordination arrangement. PFS registered a financing change statement under the Personal Property Securities Act 1999 (the Act) confirming the subordination of its security. The subordination details included on the Personal Property Securities Register (the Register) showed an "expiry date" of 31 March 2010.

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1 *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2012] NZHC 1022, [2012] 2 NZLR 574.

[3] C+M's interest in the general security agreement was subsequently assigned to Perpetual. PFS's security agreement was assigned to Propertyfinance Funding Nominees Ltd and another party (together PFF). Following default on the Perpetual loan, Anthem was placed into receivership on 28 August 2008. After the receivership PFF assigned its interest in the security agreement to the appellants in July 2010. The appellants commenced the current proceedings on 5 August 2010, seeking a declaration that their security interest had priority.

Further background

[4] In March 2005 PFS provided finance to Anthem. The parties entered into a loan agreement and a general security agreement. A financing statement was registered under the Act on 31 March 2005. The expiry date of this registration was 31 March 2010.

[5] In April 2006 C+M provided additional finance to Anthem. A financing statement recording the interest of C+M under its general security agreement with Anthem was registered on 3 April 2006. In the loan documentation C+M had agreed to provide the additional finance on the basis that it would hold a first ranking security interest. Shortly after C+M's security interest was registered, its solicitor realised that there was already an existing registered security interest in favour of PFS. C+M contacted Anthem and alerted it to this problem. As a result, Anthem spoke to PFS about whether it would agree to give C+M priority. It took some time to secure such agreement.

[6] The matter was eventually resolved via email in November 2006. On 14 November 2006 Mr Knowles, an accountant/financial intermediary connected with PFS, informed Anthem that PFS was "fine to move to 2nd GSA". This advice was duly communicated to C+M and the solicitor for C+M was asked to forward the necessary documentation.

[7] On 25 November 2006 the solicitor for C+M sent an email to the managing director of PFS:

> I understand that Grant Smith of Cousins and Associates [Anthem's solicitor] has apprised you of the request of our client Capital + Merchant Finance Limited in respect of Anthem Holdings Limited, that Property Finance Securities Limited's existing GSA registered under financing statement FY34ME1YU0562699 be subordinated to Capital + Merchant Finance Limited's GSA registered under financing statement FM2AU7906XS91756. Grant has advised that Property Finance Securities Limited has no objection to that.
>
> It seems to me that the simplest way to do this is by Property Finance Securities Limited registering a financing change statement on Anthem's PPSA register, subordinating its financing statement FY34ME1YU0562699 to Capital + Merchant Finance Limited's financing statement FM2AU7906XS91756. In a discussion with Grant, he was of the same view that this is the simplest way to do this, although you may wish to confirm that with him. ...

[8] Although the email referred to C+M's "request" that the PFS security interest be subordinated and to the fact that PFS has "no objection to that", we note that (as described at [6] above) a subordination agreement had already been reached.

[9] On 28 November 2006 a verification statement confirming the subordination of the PFS security in favour of the C+M security was registered by PFS (as the party which initially held priority). Following registration the "subordination details" on the Register stated:

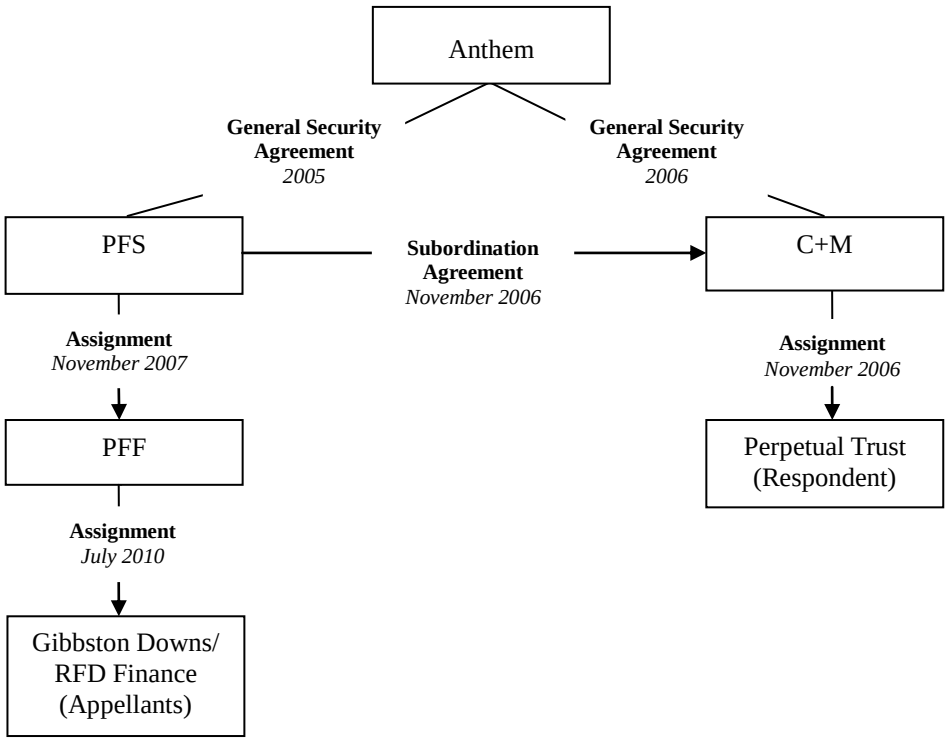
Date of subordination	**Subordination expiry date**
28-Nov-2006	31-Mar-2010

[10] The expiry date of the subordination agreement recorded on the Register coincided with the expiry date of the PFS security interest.

[11] As noted, on 29 November 2006 C+M assigned its interest in the general security agreement to Perpetual. About a year later PFS assigned its security agreement to PFF.

[12] Following default on the Perpetual advance Anthem was placed into receivership by Perpetual on 28 August 2008. On 28 January 2010 PFF renewed its security interest for another five years. The financing change statement continued to record the subordination agreement expiry date as 31 March 2010.

[13] In July 2010 PFF assigned its interest in the general security agreement to the appellants. For ease of reference, the above transactions are outlined in the following diagram:



Issues on appeal

[14] In the appellants' written submissions it was accepted that:

(a) both PFS's and C+M's security interests attached to collateral belonging to Anthem in terms of s 40 of the Act; and

(b) both security interests were perfected by the registration of financing statements in terms of s 41(1)(b)(i) of the Act; and

(c) under s 66(b)(i) of the Act, PFS's security interest initially had priority over C+M's security interest because it had been registered first in time.[2]

[2] Similar acknowledgements were made in the High Court: recorded at [13].

[15] In the High Court, the existence of a subordination agreement was not in question. Importantly the appellants' statement of claim pleaded that "the general security interest of PFS Ltd was subordinated to the general security interest of C+M". That pleading was not challenged in the High Court and the critical issue was described by Chisholm J as "the nature and effect of the subordination agreement between PFS and C+M, in particular the duration of the agreement".[3]

[16] Despite this, the appellants' written submissions contended that there was in law no subordination agreement at all because "there was no consideration for the agreement to subordinate given to PFS by C+M". In oral argument Mr Forbes QC for the appellants did not press the point. He was right not to do so. He accepted that at the very least there was an agreed arrangement to subordinate between C+M and PFS in November 2006 and that the latter party as the party with initial priority took steps, pursuant to the subordination arrangement, to disclose the deferral of its security interest to the previously inferior security interest of C+M on the Register.

[17] Quite apart from these acknowledgements, the High Court pleading is decisive against the appellants on this point.[4] Moreover, we are satisfied that the appellants are estopped from contending otherwise. Either on the basis of their subsequent conduct, or on the basis of promissory estoppel,[5] the appellants cannot now be heard to resile from their promise to subordinate in November 2006 by seeking on appeal to claim priority over C+M's security interest on the basis of an absence of consideration for the subordination.

[18] Accordingly the issues for determination on appeal are:

(a) What was the term of the subordination agreement? Was it, as contended for by the appellants, to continue only until 31 March 2010? Or, was it as Perpetual argued, to continue until the C+M advance was repaid or its security interest otherwise satisfied?

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3 At [14].

4 The Judge in the High Court held at [37] that: "It is clear that PFS agreed to subordinate its security interest to that of C+M".

5 *Central London Property Trust Ltd v High Trees House Ltd* [1947] 1 KB 130 (KB) and *Burbery Mortgage Finance & Savings Ltd v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 (CA) at 361 and see James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [19.2].

(b) What are the effects of the assignments of security interests:

(i) by C+M to Perpetual in November 2006; and

(ii) by PFF to the appellants in July 2010?

(c) Depending on the answer to (a), what is the appropriate date on which to determine the competing priorities between the parties?

Statutory provisions

[19] The following sections of the Act are relevant:

> **69 Transfer of security interests does not affect priority**
>
> A security interest that is transferred has the same priority as it had at the time of the transfer.
>
> …
>
> **70 Voluntary subordination of security interests**
>
> (1) A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest.
>
> (2) An agreement to subordinate a security interest is effective according to its terms between the parties and may be enforced by a third party if the third party is the person, or 1 of a class of persons, for whose benefit the agreement is intended.
>
> …
>
> **153 Duration of registration of financing statement**
>
> (1) Except as otherwise provided in this Act or in the regulations, a registration of a financing statement under this Act is effective until whichever is the earlier of—
>
> (a) the expiration of the term specified in the financing statement; or
>
> (b) the expiration of 5 years commencing on the date on which and at the time at which the financing statement was registered.
>
> …

> **159 Registration of financing change statement in respect of subordinated security interest**
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> If a security interest has been subordinated by the secured party to the interest of another person, a financing change statement may be registered to disclose the subordination at any time during the period that the registration of the subordinated security interest is effective.

[20] Schedule 1, cl 19 of the Personal Property Securities Regulations 2001 (the Regulations) is also relevant. Schedule 1 lists the data required to be recorded in financing statements, financing change statements, and change demands, including:

> **19 Subordinations**
>
> If a security interest is subordinated, the date that the effect of the subordination will cease if that date is before the expiry of the registration of either—
>
> (a) the financing statement relating to the security interest that is subordinated; or
>
> (b) the financing statement relating to the security interest to which the security interest referred to in paragraph (a) is subordinated.

High Court decision

[21] Before Chisholm J, both parties accepted that a valid subordination agreement existed in accordance with s 70 of the Act, and that a financing change statement had been registered to disclose the subordination as permitted by s 159 of the Act. The critical issue was the duration of the subordination agreement. The appellants contended that the agreement was only intended to continue until 31 March 2010, after which PFS regained its first priority status. Perpetual argued that the agreement continued until the C+M security interest was satisfied or otherwise released.

[22] Chisholm J found in favour of Perpetual. The Judge held that PFS had agreed to subordinate its security interest to that of C+M. Although this was the only term agreed upon, that was sufficient because "nothing more needed to be said". In terms of s 70 of the Act the agreement was effective between those two parties and their assigns. The Judge continued:

> [38] Both solicitors confirm that there was no discussion about expiry dates. This reflects that it was inherent in the agreement that the C+M security interest would have priority until its advance was repaid or its security interest otherwise satisfied. Again no discussion was necessary. While the C+M advance was only for a year, the commercial reality was that it might not be repaid on due date or that it might be rolled over. C+M had no reason to limit the duration of its priority and this would have been understood by PFS.
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> [39] The email exchanges about the agreement to subordinate are brief for the very good reason that both parties knew what was being sought and granted. C+M wanted priority over the Anthem collateral and PFS agreed without qualification. Had PFS wanted the subordination to be limited in duration it would have said so. The solicitors have confirmed that there was no such requirement.

[23] Chisholm J was satisfied that the decision to register the subordination "was not a term of the agreement" and "was not intended to, and did not, undo or alter the agreement that had already been reached".[6] On the effect of registration, the Judge held:

> [41] While registration might have had implications for third parties, those implications do not arise in this case. Even if the first defendant had noticed the expiry date on the register before it took an assignment from C+M, it was entitled to rely on s 70. By enacting s 70 Parliament specifically defined the effect of an agreement to subordinate between the parties to the agreement and those for whose benefit the agreement was intended. *As between the parties to this litigation the agreement to subordinate remained operative until the C+M security interest was satisfied or otherwise discharged*.
>
> (Emphasis added.)

[24] Thus the Judge concluded that the priority arrangement did not expire on 31 March 2010 and the declarations sought by the appellants could not be made.[7]

[25] The second issue arising in the High Court concerned the time at which the competing priorities ought to be assessed. Perpetual argued that the relevant date for determining the priority of the security interests was the date of receivership. This was important because Anthem was placed in receivership in 2008, well before the claimed "expiry" of the subordination. Therefore if the correct time for assessing priority was the date of receivership, it was unnecessary to determine whether the subordination had since expired.

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6 At [40].
7 At [42].

[26] Chisholm J concluded that on the facts of this case the competing priorities fell to be determined when the receivers were appointed. The Judge noted that the Act does not specify the time at which priorities are to be determined. However, he concluded that the observations in the Canadian case of *Sperry Inc v Canadian Imperial Bank of Commerce* were of assistance.[8] There the Ontario Court of Appeal held that "it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests came into conflict".[9] In this case, Chisholm J was persuaded that the respective security interest came into conflict at the time when the receivers were appointed.

Issue one: term of the subordination agreement

Submissions

[27] Mr Forbes submits that the subordination agreement expired on 31 March 2010 as recorded on the Register. In the absence of any express agreement to the contrary, he argues it cannot be the case that a subordination agreement will not expire until the release of the secured party's security interest. Rather, the subordination will expire when the registration of the subordination expires and is not renewed. Any other outcome will compromise the integrity of the Register.

[28] Mr Vautier for Perpetual submits that there is no evidence to support the claim that the subordination agreement was only to subsist for a limited time. While subordinations by agreement are recognised by s 70 of the Act, they are not governed by it. The registration of the financing change statement pursuant to s 159 should be taken as confirming, rather than creating, the subordination. Accordingly, the subordination agreement between PFS and C+M continues until the C+M security interest is satisfied or otherwise discharged.

Our analysis

[29] Under s 70(1) of the Act a secured party such as PFS may, in a security agreement or otherwise, subordinate its security interest to the security interest of another. Where such a voluntary subordination of security interests occurs, s 70(2)

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8 *Sperry Inc v Canadian Imperial Bank of Commerce* (1985) 50 OR (2d) 267 (ONCA).

9 At [37].

provides that the agreement to subordinate is "effective according to its terms between the parties". As to enforcement, the same subsection provides that a subordination may be enforced by a third party, if that party is the person, or within a class of persons, for whose benefit the agreement is intended.

[30] Thus subordination of security interests is provided for by the Act. However, s 70 cannot be said to "govern" subordination agreements. The terms of a subordination agreement are left to the parties. Unlike other provisions of the Act, which set out a comprehensive, stand-alone system of rules, s 70 acknowledges the independent existence of subordination agreements without setting any restrictions on the form such agreements may take. In this sense subordination agreements are effective in their own terms and do not depend on the Act for their validity.

[31] Where a subordination of a security interest has occurred, s 159 of the Act permits but does not require registration of a financing change statement. The permissive nature of s 159 is evident from the text of the section: the financing change statement "*may* be registered to disclose the subordination at any time during the period that the registration of the subordinated security interest is effective".[10]

[32] Registration of a financing change statement in respect of a subordinated security interest under s 159 achieves disclosure of the subordination agreement but does not otherwise confer any particular benefits on the registering party. Nor does failure to register endanger either party's security interest in any way. This can be contrasted with other provisions of the Act, under which registration is crucial. Under s 41, for example, a security interest will only be "perfected" when the security interest has attached and either a financing statement has been registered or the secured party has possession of the collateral. This is important because under s 66 perfected security interests have priority over unperfected security interests, and priority between perfected interests is determined by the order in which each interest

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[10] Although the draft act proposed in the 1989 Law Commission Report (Law Commission *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989)) recommended that such registration be mandatory (at 56 and 138), by the time the Personal Property Securities Bill 1998 was introduced this had been amended to an optional provision (see cl 156). The same report also noted that such agreements "will often be the only means by which the priority rules of the statute can be modified to suit the needs of the parties to particular transactions": at 138.

was perfected. In most cases, priority is determined by the operation of the "first to file" rule.

[33] Where the registration of a financing statement[11] occurs, the duration of such registration is governed by s 153. Subsection (1) provides that a registration is effective until the earlier of either the date of the expiry of the term in the financing statement or the expiration of five years from the date of registration. This explains, for example, why the PFS security interest[12] registered on 31 March 2005 had an expiry date of 31 March 2010.

[34] Where a subordination agreement is disclosed on the Register by the registration of a financing change statement[13] the data that is required to be included in such statement is governed by Schedule 1 of the Regulations. For registration purposes cl 19 requires the inclusion of the date that the effect of subordination will cease if the subordination is to cease before the date on which the financing statement for either the postponed or the promoted security interest expires.[14] The official website for the Register[15] suggests that the expiry date must be the same as, or pre-date, the earlier of the two financing statement expiry dates. But we agree with Chisholm J when he said that these data requirements do not restrict the freedom of the parties to enter into a subordination agreement under s 70 of the Act.[16]

[35] The requirements of Schedule 1, Part 2, cl 19 explain the reference to the expiry date in the financing change statement following the PFS agreement with C+M to subordinate its security interest. The earlier of the expiry dates of the two financing statements was 31 March 2010, being the expiry date for the registration of the PFS financing statement. We agree that the recording of this date, pursuant to the data requirements in the Regulations, says nothing about the term of the subordination agreement which PFS and C+M had entered into.

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11 Pursuant to s 135 a financing statement includes a financing change statement.
12 Referred to at [4] above.
13 As permitted by s 159.
14 Clause 19 is quoted at [20] above.
15 www.ppsr.govt.nz.
16 At [18].

[36] For these reasons, we consider that Chisholm J was correct to conclude that ss 159 and 153 are intended as "notice" or disclosure provisions only. It is the subordination agreement which alters the priority as between the two security interests; registration merely provides a means of giving notice of that alteration. In situations where a subordination agreement is noted on the Register, the agreement will continue according to its terms notwithstanding the fact that the notation on the Register may have expired.

[37] We are satisfied this outcome will not compromise the integrity of the Register as Mr Forbes contends. Section 159 makes it clear that parties are not required to register a subordination. Accordingly, any third parties will be aware that the absence of a registered subordination agreement does not guarantee that no subordination agreement is in place. Likewise, the fact that subordination for a particular term is noted on the Register cannot be seen as a guarantee that the subordination does not extend past the specified term. In either scenario, the third party must appreciate that further inquiries or due diligence may be necessary.

[38] In terms of the duration of the subordination agreement, the parties accept the Judge's finding that in November 2006 there was no discussion of the length of time the agreement would last. We agree with the Judge's findings on this point as recorded at [38]–[39] of the judgment.[17] In particular we see no basis to interfere with Chisholm J's finding that it was "inherent in the agreement" that C+M would have priority until its advance was repaid or its security interest otherwise satisfied.

[39] The context for these findings is important. In the course of an application by the appellants for an interim injunction to restrain the receivers from selling the assets of Anthem, French J was required to consider the issue of the term of the subordination agreement.[18] The Judge said this:

> [39] In the absence of evidence of any reasons why Capital + Merchant would have agreed to a term of only four and a half years, I consider it highly unlikely they would have done so. In my view it is much more likely that it was intended and always understood by both parties that the subordination would endure. If that is the correct position then I consider

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17 Quoted at [22] above.

18 *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* HC Christchurch CIV-2010-409-1716, 25 August 1010.

> the subordination agreement and its terms would be binding on the plaintiffs as the assignees of Propertyfinance. However, while I consider it unlikely there was an agreed expiry date of 31 March 2010, I accept on the basis of the material before me that it must undoubtedly be arguable. It follows that in my view the plaintiffs definitely satisfy the threshold of there being a serious question to be tried.

[40] Despite the clear signal from the Judge on the then evidential gap as to the term of the subordination agreement, the affidavit evidence at the substantive hearing went no further than is recorded by Chisholm J at [38]–[39]. The parties did not expressly address this point.

[41] Given the absence of discussion between the parties as to the duration of the subordination agreement, we consider that it is open to imply a term on the basis of business efficacy. The question is whether it is appropriate in law to imply a term that the subordination agreement would continue until the C+M advance was repaid or its security interest was otherwise satisfied.

[42] The circumstances in which a Court might imply a term in a commercial context are governed by the question of what a reasonable person would consider both parties must have meant to happen in circumstances not expressly addressed by the contract.[19] The general subject of implication of terms into contracts was recently discussed by the Privy Council in *Attorney General of Belize v Belize Telecom Ltd*. There Lord Hoffmann stated:[20]

> … The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912–913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.

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[19] *Dysart Timbers Ltd v Nielsen* [2009] NZSC 43, [2009] 3 NZLR 160 at [25] per Tipping and Wilson JJ.

[20] *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10 at [16].

[43] Lord Hoffmann also referred to the business efficacy and obviousness tests discussed in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings*.[21] Lord Hoffmann observed that these expressions are different ways of saying that "… although the instrument does not expressly say so, that is what a reasonable person would understand it to mean".[22] Commenting on the list of conditions spelled out in the *BP Refinery* case, Lord Hoffmann said:[23]

> The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not have understood that to be what the instrument meant.

[44] This Court in *Hickman v Turn and Wave Ltd*[24] endorsed this approach noting that the approach adopted in the *BP Refinery* case:[25]

> ... should not necessarily be regarded as a cumulative list of elements all of which must be satisfied before a term may be implied. However, each element is a useful indicator relevant to the ultimate question of what a reasonable person would have understood the contract to mean. This is to be construed objectively by a notional reasonable person with knowledge of the relevant background.

[45] Finally, we refer to Lord Hoffmann's observations on whether an implied term is "necessary to give business efficacy" to the contract. His Lordship said:[26]

> That formulation serves to underline two important points. The first, conveyed by the use of the word "business", is that in considering what the instrument would have meant to a reasonable person who had knowledge of the relevant background, one assumes the notional reader will take into account the practical consequences of deciding that it means one thing or the other. In the case of an instrument such as a commercial contract, he will

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21 *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 (PC) at 283.
22 At [25].
23 At [27].
24 *Hickman v Turn and Wave Ltd* [2011] NZCA 100.
25 At [248].
26 At [22].

> consider whether a different construction would frustrate the apparent business purpose of the parties. That was the basis upon which *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 was decided. The second, conveyed by the use of the word "necessary", is that it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means.

[46] Applying these principles to the present case, we have no doubt that it is appropriate to imply a term that the duration of the subordination agreement would continue until the C+M loan was repaid or until its security interest was otherwise satisfied. Such a term is justified in the present commercial circumstances by business efficacy. As at November 2006, although the C+M advance was for a period of 12 months, it was entirely realistic to consider the loan might not be repaid by then or might be rolled over. The notion that C+M and PFS might need in the future to engage in repeated commercial negotiation on the question of priority is contrary to business commonsense.

[47] Importantly, the date in the financing change statement was not related to the subordination agreement. Rather it was driven by the date of expiry of the registration of the PFS security interest. The parties did not agree that the subordination agreement would terminate at that point. We are satisfied that to apply that date as the expiry date of the subordination agreement, as suggested by the appellants, would be to frustrate the apparent business purpose of the subordination agreement.

[48] For the above reasons we consider that Chisholm J was correct to conclude that the subordination agreement did not expire on 31 March 2010. It was an implied term of the agreement that it would continue until the C+M/Perpetual loan was repaid or until its security interest was otherwise satisfied. In any event in the absence of a specific expiry date the subordination agreement brings about a state of affairs that endures until the parties agree otherwise.

Issue two: the effect of the assignments

[49] In the High Court the relationship between the assignments and the subordination agreement was not contested. Chisholm J observed that the agreement was effective between the parties to it "and their assigns".[27]

[50] On appeal, however, Mr Forbes submits that neither the appellants nor Perpetual are bound by the subordination. First, he submits that assignees do not come within the category set out in s 70(2) of "persons for whose benefit the agreement is intended". Second, he submits that there is no evidence that either the appellants or Perpetual had notice of the subordination. Mr Forbes argues that the appellants should be treated as purchasers for value, able to take that security interest relying on the face of the Register. Here the Register showed that the subordination expired on 31 March 2010 and the appellants took the transfer of the security interest from PFF on 16 July 2010.

[51] There are two relevant transfers: the assignment by C+M to Perpetual in November 2006 and the assignment by PFF to the appellants in July 2010. The appellants did not challenge the validity of either assignment. Rather the argument centred on their effect on the assignees in question.

The C+M assignment to Perpetual

[52] It transpires the relevant documentation for the assignment from C+M to Perpetual is no longer available. What is clear, however, is that on 29 November 2006 Perpetual registered a financing change statement recording its newly acquired security interest.

[53] Generally, this situation would be governed by s 130(1) of the Property Law Act 1952.[28] That section provides:

> Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal or equitable thing in action, of which express notice in writing has been given

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[27] At [37].

[28] At the time this assignment was entered into, the Property Law Act 1952 was still in force. That legislation was replaced by the Property Law Act 2007 from 1 January 2008.

> to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or thing in action, shall be and be deemed to have been effectual in law (subject to all equities that would have been entitled to priority over the right of the assignee if this Act had not been passed) to *pass and transfer the legal or equitable right to that debt or thing in action from the date of the notice, and all legal or equitable and other remedies for the same*, and the power to give a good discharge for the same, without the concurrence of the assignor.
>
> (Emphasis added.)

[54] In the absence of any documentation, it is not possible to state with certainty whether the requirements of s 130 (involving both a written assignment and express notice in writing) have been met. Instead, we are required to make an objective assessment of what the parties intended would be the subject matter of this assignment.[29] Plainly, it was intended that the benefit of the general security agreement would be assigned. This was recorded on the Register. We are satisfied that the parties also intended to assign the benefit of the subordination agreement. That is because the benefit of that agreement was inherently tied-up in the value of the general security agreement. Significantly, the general security agreement expressly provided that C+M was to hold a first-ranking security interest. Moreover, at the time of this assignment, the subordination was noted on the Register. In these circumstances, the conclusion that C+M and Perpetual intended to assign the benefit of the subordination agreement is inescapable.

[55] This conclusion is strengthened by consideration of s 69 of the Act, which provides that a security interest that is transferred has the same priority as it had at the time of the transfer.[30] At the time of the assignment to Perpetual, C+M had a

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[29] No particular formalities are required for an equitable assignment provided there is an intention to assign: see *Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 (HL) at 462 and *Elders Pastoral Ltd v Bank of New Zealand* [1991] 1 NZLR 385 (CA) at 387.

[30] See above at [19]. Equivalent provisions are found in the Australian and Canadian personal property security acts: see Personal Property Securities Act 2009 (Cth), s 61; Personal Property Security Act RSBC 1996 c 359, s 23(2); Personal Property Security Act RSA 2000 c P-7, s 23(2); Personal Property Security Act 1993 SS c P-6.2, s 23(2); Personal Property Security Act CCSM 1993 c P35, s 23(2); Personal Property Security Act RSO 1990 c P.10, s 21(2); Personal Property Security Act SNB 1993 c P-7.1, s 23(2); Personal Property Security Act SNS 1995-96 c 13, s 24(2); Personal Property Security Act RSPEI 1988 c P-3.1 s 23(2); Personal Property Security Act SNL 1998 c P-7.1, s 24(2); Personal Property Security Act RSY 2002 c 169, s 21(2); Personal Property Security Act SNWT 1994 c 8, s 23(2); Personal Property Security Act SNu 1994 c 8, 23(2). See also Richard H McLaren *Secured Transactions in Personal Property in Canada* (3rd ed, Carswell, Toronto, 2013) at 5-59. For an example of the application of s 69 in New Zealand, see *New Zealand Bloodstock Leasing Ltd v Jenkins* (2007) NZCCLR 811 (HC) at [44].

first-ranking security interest as a result of the subordination agreement. Accordingly, it follows that the security interest assigned to Perpetual also had first-ranking status.

[56] It was not suggested that the assignment to Perpetual was anything other than absolute, in the sense that it transferred the entire interest of C+M without conditions. Accordingly, at the time of the assignment Perpetual acquired the ability to bring an action in respect of the subordination agreement in its own name.[31] For this reason s 70(2), which deals with questions of privity, is not relevant.[32] Perpetual, as assignee of the benefit of the subordination agreement, can now rely upon or enforce that agreement; it does not need to establish that it is "the person, or 1 of a class of persons, for whose benefit the agreement is intended."

[57] This outcome is broadly consistent with the Canadian position. There is authority from that jurisdiction dealing with assignment following subordination: *1662254 Ontario Inc v Coby's Cookies Inc*.[33] The Ontario Superior Court of Justice held that the terms of the subordination agreement continued to apply where the secured creditor had assigned its debt to another party. The *Coby's Cookies* case is not directly on point because it concerned a subordination agreement which was specifically stated to bind successors and assigns. In his commentary on the case, however, Richard H McLaren observes that in a case where the language of a subordination agreement did not contain a specific allowance for the benefits of the subordination agreement to pass to an assignee, it is expected that a court would rule similarly unless the subordination agreement stated that assignment would void the subordination.[34]

[58] We are satisfied that Perpetual acquired the benefit of and may sue on, the subordination agreement. This ground of appeal fails.

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31 See *Cator v Croydon Canal Co* (1841) 4 Y & C Ex 593; *Three Rivers District Council v Bank of England* [1996] QB 292 (CA); and *Mountain Road (No 9) Ltd v Michael Edgley Corp Pty Ltd* [1999] 1 NZLR 335 (CA) at 342. No question of notice of the assignment arises in the present case.

32 See above at [19].

33 *1662254 Ontario Inc v Coby's Cookies Inc* (2008) 12 PPSAC (3d) 150 (ORCJ).

34 See also McLaren, above n 30, at 7-80–7-81.

The PFF assignment to the appellants

[59] The assignment of PFF's interests to the appellants was effected by way of an Agreement for Sale and Purchase of Loan and GSA Rights dated 16 July 2010. Clause 2.1 of that agreement provides:

> **2.1** **Assignment:** Subject to the satisfaction of the conditions precedent set out in clause 2.2, in consideration of the payment by the Purchasers of the Purchase Price to the Vendor, the Vendor will assign and transfer to the Purchasers on a non-recourse basis, all of the Vendor's rights, title, interest, benefits and obligations as lender under the Loan Agreement and GSA.

[60] Anthem was notified of this assignment by way of letter dated 21 July 2010. On the same day, the appellants registered a financing change statement recording the assignment.

[61] Section 50 of the Property Law Act 2007 applies to this assignment. Subsection (1) of that section provides:

> The absolute assignment in writing of a legal or equitable thing in action, signed by the assignor, passes to the assignee—
>
> (a) all the rights of the assignor in relation to the thing in action; and
>
> (b) all the remedies of the assignor in relation to the thing in action; and
>
> (c) the power to give a good discharge to the debtor.

[62] Because the assignment of PFF's interest constituted an absolute assignment in writing, s 50(1) applies and all rights and remedies of PFF in relation to the general security agreement passed to the appellants. We are satisfied that this includes PFF's obligations under the subordination agreement. Accordingly, the appellants are now bound by the subordination agreement. This is consistent with cl 2.1 of the Agreement for Sale and Purchase, which assigns "all of [PFF's] rights, title, interest, benefits and obligations as lender".

[63] This conclusion is further strengthened by consideration of s 69 of the Act. At the time of the PFF assignment, PFF had a second-ranking security interest as a result of the subordination agreement; it therefore follows that the security interest received by the appellants must also have second-ranking status.

[64] Furthermore, we are satisfied that the appellants had notice of the subordination. That is because the same individuals who were involved in the assignment to the appellants were also involved in PFS's decision to subordinate. Specifically, the appellant companies are owned by FTG Trustee Services Ltd,[35] a company of which David Ian Henderson is the sole shareholder. Mr Henderson was directly involved in the negotiation of the subordination agreement. He was also the sole director of Anthem and a signatory to, and guarantor of, the loan agreements between Anthem and C+M and PFS. Anthem and Mr Henderson knew of the fundamental requirement of C+M in April 2006 that it must hold a first ranking security interest.

[65] For these reasons, we are satisfied that the challenge to the PFF assignment also fails. Both parties to this appeal are bound by the subordination agreement.

Issue three: What is the appropriate date for determining the priority of the respective security interests?

[66] As noted above,[36] Chisholm J concluded that the appropriate date for determining the priority of the respective security interests was the date that the interests came into conflict. In this case, that date was 28 August 2008, when Anthem was placed into receivership.

[67] On appeal the appellants submit that Chisholm J's approach constitutes an unwarranted gloss on the statutory scheme, and that the comments in *Sperry Inc v Canadian Imperial Bank of Commerce* were obiter dicta. They say that there is no warrant for priorities to be determined as at the date the interests came into conflict, as priorities can be determined under the Act at any time. Further, Chisholm J's findings on this issue have been the subject of criticism by academic commentators. An example is in the text of *Heath and Whale on Insolvency*, which states:[37]

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35 RFD is owned by FTG Trustee Services Ltd. Gibbston is owned by Anthem Ltd, which is owned by FTG Trustee Services Ltd.

36 At [25]–[26].

37 Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [25.11]. See also Mike Gedye and Steve Flynn "Personal Property Securities Act: Recent developments you need to know about" (paper presented to Auckland District Law Society, April 2013).

> The High Court's decision, that priority is to be determined at the point two or more security interests come into conflict, has been the subject of some debate. Arguments against the decision include the following points. The Act permits registration and provides for benefits that flow from registration. The Court, in its obiter comments in the *Gibbston* case, is reading into the legislation a time limit on registration where none is provided for expressly. The scheme of the Act is that priority rules are generally precise and transparent, and a rule that determines priority according to events and circumstances that may not be known to one or more parties is inconsistent with that general scheme. For example, the point at which the collateral is insufficient to satisfy all secured creditors will not easily be identified in most cases. Further, the conclusion in *Gibbston*, if allowed to stand, increases the likelihood of disputes between unperfected security interests, and the Act contains no way of resolving priority disputes between two unperfected security interests that attached at the same time.
>
> It might be thought that the need to register or correct a financing statement after an enforcement step would rarely arise in practice because any prudent secured party will have completed a perfecting step prior to, or at the time of, giving credit and certainly well before enforcement steps are taken. But the New Zealand registration regime imposes rigorous standards on registering parties and it will not be uncommon for one or more competing registrations to be technically deficient and potentially invalid. Prudence dictates that a secured party should check and remedy a potentially defective registration before taking any steps, including the appointment of a receiver, to enforce its security interest.

[68] Perpetual submits that it is logical and practical to determine priority of interests as at the date a security holder is entitled to enforce its security (here, the date of receivership). Any other approach will create inconsistency as receivers "will be looking to implement realisation of assets within artificial timeframes".

[69] Apart from the observations of Chisholm J, this important question has not previously been dealt with by the Courts. We are satisfied that it is not necessary to determine this issue in the context of the present appeal. We have upheld the finding in the High Court that the subordination agreement did not expire on 31 March 2010. Thus the subordination agreement continued until the C+M loan was repaid or until its security interest was otherwise satisfied. Hence the position as at the date of the receivership in August 2008 is strictly irrelevant.

[70] That said, the view expressed by Chisholm J that the appropriate time to determine priorities as between the holders of the security interests is the date of receivership has much to commend it in the particular circumstances applicable here. It is true that the Act does not state the correct time for assessing priorities and in

some future case it may be necessary to determine this question. That task must wait until it is necessary to decide the point. We note that this Court in *Strategic Finance Ltd (in rec and in liq) v Bridgman* was not required to decide the point.[38] The Court observed that, while the Act does not explicitly specify the date, the date on which a receiver or liquidator is appointed is generally adopted as the relevant date in other legislation.

Result

[71] The appellants have failed on all grounds. The appeal is dismissed.

[72] The appellants must pay the first respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Canterbury Legal Services Limited, Christchurch for Appellants
Glaister Ennor, Auckland for First Respondent
Keegan Alexander, Auckland for Second Respondents

[38] *Strategic Finance Ltd (in rec and in liq) v Bridgman* [2013] NZCA 357, [2013] NZCCLR 19 at [86].