

**IN THE DISTRICT COURT
AT DUNEDIN**

CIV-2009-012-000450

BETWEEN TRIUMPH MOTORCYCLES (NZ) LTD
Plaintiff

AND MARTIN KEOGH
TREVOR EDWIN LAING
Defendants

Hearing: 29 October 2009

Appearances: K Scott for the Plaintiff
J Guest for the Defendants

Judgment: 29 March 2010 at 4.40 pm

RESERVED JUDGMENT OF JUDGE P R KELLAR

Introduction

[1] The plaintiff, Triumph Motorcycles (NZ) Limited (“Triumph”), seeks by way of summary judgment an order that the defendants, the liquidators of Otago Motorcycles Limited (“Otago Motorcycles”) return six motorcycles or pay damages of \$107,230.

[2] Triumph supplied motorcycles and related goods to Otago Motorcycles from late August 2008 until the latter went into liquidation on 24 March 2009. When the company was placed in liquidation, it possessed six motorcycles, which Triumph had supplied. Triumph contends that it does not have a security interest in the motorcycles because the motorcycles were not supplied under either a commercial consignment or a consignment that secured payment or performance of an obligation.

[3] The liquidators of Otago Motorcycles contend that this is not an appropriate case for summary judgment because there are some unresolved factual issues. Further, they contend that Triumph supplied the motorcycles under either a commercial consignment or a consignment that secured performance of an obligation. Therefore, they contend that the agreement relating to the supply is a security interest that, being unregistered, would not have priority over the security interest of the debenture holder.

The issues

[4] The immediate issue is whether Triumph has established that the liquidators do not have an arguable defence and there are no unresolved factual issues that would stand in the way of summary judgment. The wider issue is whether the agreement between Triumph and Otago Motorcycles creates or evidences a security interest in terms of s 17 of the Personal Property Securities Act (all references are to that Act).

[5] The wider issue requires assessment as to whether Triumph supplied the goods under a commercial consignment in terms of s 16 or a consignment that secures payment or performance of an obligation. In assessing whether there is a security interest, the Act directs attention to the substance rather than form of the particular transaction in question. Section 17 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; 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.

[6] To determine the substance of a transaction the terms of the agreement and the conduct of the parties need to be analysed to assess whether the relationship between the parties is that of principal and agent (as Triumph contends) or of a secured credit sales arrangement (as the liquidators submit is arguable, at least).

Background

[7] On 28 August 2008 Triumph and Otago Motorcycles entered into an agreement titled "Dealer Agreement" relating to the supply of motorcycles and related goods. Much of the agreement relates to the sale and purchase of goods. Clause 23 describes the relationship of the parties in the following terms:

23. Dealer's Status

The relationship of the parties is that of buyer/seller pursuant to this agreement. The Dealer is in no way the legal representative, agent, partner or joint venture of the Company and is not authorized to transact business, incur obligations expressed or implied or charge out goods in the name of or for the account of the Company, nor on the Company's behalf to make any promise, warranty, or representation with respect to goods, authority or any other matter, and it is agreed that the Company shall not be bound by any act or conduct of the Dealer. Without prejudice in the foregoing the Dealer shall be entitled to convey to customers the provisions of the standard Factory Warranty in terms of clause 14(c) hereof.

[8] Other clauses provide for the terms of sale (clause 5); Triumph's rights if payment is not made (clause 4); and title in the goods until payment (clause 7). Clause 9 is titled "Consignment Stock". It provides:

9. Consignment Stock

Where the Dealer is desirous of obtaining additional Motorcycle products to display to the public and the Company is willing to display on the basis set out hereunder and otherwise in accordance with the Company's policy as established or varied at its sole discretion and subject to stock availability

then it is agreed that Motorcycle products whether new or used supplied by the Company in terms of this clause shall be termed consignment stock and held by the Dealer on the following terms:

- (a) The Dealer will hold consignment stock in trust for the Company with title to such consignment stock remaining with the Company unless and until transferred as hereafter provided.
- (b) The Dealer will keep consignment stock on display to the public at the Dealer's present business address in the same good condition as supplied by the Company.
- (c) The Dealer will not use or permit the use of consignment stock for demonstration or other purposes nor remove identification marks or allow consignment stock to be moved from the Dealer's premises or changed unless authorized by the Company in writing.
- (d) The Company may at any time without notice enter upon the Dealer's premises and take an inventory of consignment stock. The Company may remove, inspect, or test consignment stock as it deems necessary.
- (e) The Dealer will punctually pay the rent on premises where consignment stock is held.
- (f) The Dealer's motorcycle accounts and parts accounts must be current and kept in that condition.
- (g) The Company may at any time retake possession of all or any consignment stock held by the Dealer pursuant to this clause without having to state any reason.
- (h) Provided it is not in default hereunder the Dealer may have the option to purchase the consignment stock either for its own use or if any customer of the Dealer shall offer to purchase any of the consignment stock. The Dealer will within 24 hours after completion of such sale immediately account to the Company for the Dealer cost of such consignment stock, which is the price ruling at the time of the retail sale. Until payment in full is made to the Company the Dealer will not be able to give good title to such consignment stock and title shall remain with the Company.
- (i) The Dealer will upon delivery and at all times while the consignment stock is in the Dealer's possession acknowledge that the consignment stock is held subject to the provisions herein and will not encumber, pledge, hire out or create any charge over such consignment stock and will inform any charge holder of the Dealer that such consignment stock is not subject to that charge.
- (j) The Dealer will ensure that a Company unit identification tag in the form specified by the Company is attached at all times to each consignment stock unit.
- (k) The Dealer will cause a stock-take to be made of all consignment stock supplied on the last day of each month or if so requested at any

time by the Company. This stock-take will be recorded on the Dealer's monthly Stock Return Form. Model and serial numbers must be included on the monthly Stock Return Form.

- (l) Consignment stock that is wetted, run, or used for demonstrations will be treated as bought by the Dealer and invoiced for immediate payment with no option to return it to the Company.
- (m) Any damage to consignment stock while on the Dealer's floor must be immediately rectified by the Dealer. Should the unit not be repaired when uplifted for return to the Company it will be invoiced for immediate payment by the Dealer.
- (n) The Company reserved the right to suspend to cease to supply and to vary the 'terms of supply' of consignment stock by notice in writing to the Dealer at any time but that will not affect any right accrued prior to such suspension or cessation of supply including the Company's right to retake possession of consignment stock and recover monies owing to the Company.
- (o) Where not inconsistent with the provisions of clause 9(a) to (n) hereof the parties rights and obligations under this agreement shall apply equally to consignment stock.

[9] Counsel for Triumph submits that although clause 9 is contained within the dealer agreement, it stands apart in terms of the relationship between the parties. Unlike the terms of the agreement that describe the relationship as one of buyer and seller, counsel for Triumph submits that clause 9 describes and evidences a relationship of principal and agent. Counsel for the liquidators submits that clause 9 creates or evidences a commercial consignment or a consignment securing the performance of obligations under the agreement.

[10] Between 19 August 2008 and 20 March 2009, Triumph supplied six motorcycles to Otago Motorcycles under the agreement "as consignment stock, for the sole purpose of being used as display models on Otago Motorcycles' shop floor" – [Robinson affidavit in support paragraph 9]. Each of the motorcycles was supplied with a battery, toolkits and a handbook/owner's manual.

[11] Clause 9(i) of the agreement requires Otago Motorcycles to sign and return a copy of the Consignment Motorcycle Rules upon delivery of any goods as consignment stock. Otago Motorcycles signed a copy of the Consignment Rules for all but the last motorcycle, which was supplied shortly before liquidation.

[12] As clause 9(k) of the agreement stipulates, Otago Motorcycles carried out a stock take of consignment stock and completed an end of month stock report dated 27 February 2009. Only three of the six motorcycles Triumph consigned are listed as consignment stock (VIN numbers: 9377389, 9391857, and 9374953). One of the motorcycles Triumph consigned (VIN number 8327147) is listed as “Demo Unit” and a motorcycle listed as consignment stock (VIN number 9380726) does not appear to be amongst the stock Triumph consigned. Yet another (VIN number 35358355584) appears to be one listed as a “Demo Unit” but the last two digits are missing from the end of month stock report. One of the motorcycles listed as consignment stock (VIN 9380726) is not a motorcycle Triumph appears to have supplied on consignment.

[13] Of the six motorcycles in Otago Motorcycles’ possession, two remained in the crates in which they were shipped. The other four had been removed from their crates. The fact four of the motorcycles had been removed from their crates may be significant because clause 9(l) provides that “consignment stock that is wetted, run, or used for demonstrations will be treated as bought by the Dealer and invoiced for immediate payment with no option to return it to the company”.

[14] There is no direct evidence as to what the expression “wetted” means. Although “wetted” is a word in the English language, it seems to be a term of art in relation to motorcycles. The liquidators [Laing affidavit in opposition paragraph (11)] depose that as the uncrated motorcycles fall within the definition of “wetted, run, or used for demonstrations” they consider those four motorcycles form part of the stock of the company.

[15] Annexed to Mr Laing’s affidavit [Laing exhibit “I”] is an email from a solicitor for Triumph to the solicitors for the liquidators in which the solicitor states that “a bike is ‘wetted’ when a Pre-Delivery Inspection is performed on it, which includes charging the battery, checking/topping up oil, checking brake fluid and other steps required to ensure that the bike will pass a warrant of fitness when it has been sold and registered.” The evidence is inadmissible as expert opinion to prove what the expression “wetted” means. Whilst the statement contained within the email presumably came from Triumph’s instructions, the maker of the statement has

not stated his or her qualifications to express the opinion and it is impossible to assess whether the statement is reliable.

[16] The agreement provides for the consignment of motorcycles for display. Removal from their crates is necessary to fulfil that purpose. As a matter of logic, it does not follow from mere removal of the motorcycles from their crates that they have been “wetted, run, or used for demonstrations” and therefore form part of the Otago Motorcycles’ stock. Something more than mere removal from crates is likely to be required for the motorcycles to be “wetted”.

[17] There is no evidence as to which of the motorcycles were removed from their crates in relation to the end of month stock report. The end of month report lists two of the consigned motorcycles as “Demo Units”. Whilst it might be permissible to infer that those two motorcycles had been used for demonstrations, there is no admissible evidence as to whether any of the four motorcycles removed from their crates had been “wetted, run, or used for demonstrations”.

The application for summary judgment

[18] In an application for summary judgement, the applicant must prove that the respondent has no defence. The Court must be persuaded that “the plaintiff has established the necessary facts and legal basis for its claim and that there is no reasonably arguable defence available to the defendant” – *Jowada Holdings Ltd v Cullen Investments Limited* (CA 248/02, 5 June 2003). Where there are disputed issues of material fact or where material facts that cannot be ascertained with confidence need to be ascertained, summary judgment is inappropriate – *Westpac Banking Corp v M M Kembla NZ Ltd* (2000) 14 PRNZ 631.

[19] There are unresolved issues of fact as to which of the six motorcycles had been removed from their crates. Hence, no order could be made for return of specific motorcycles. There is no admissible evidence on the question of what the expression “wetted, run, or used for demonstrations” means, and there is no evidence as to whether any of the four motorcycles had been “wetted, run, or used for demonstrations”. The application for summary judgment must fail on this basis.

Does Triumph have a security interest in the motorcycles?

[20] The parties agreed that the Court should make a finding as to whether Triumph has a security interest in the motorcycles in general terms. In any event, it is a safe inference that the two motorcycles which remained in their crates had not been “wetted, run, or used in demonstrations”. Therefore, clause 9(1) of the agreement would not apply to the motorcycles which were still in their crates. Hence, a determination is required to be made as to whether Triumph has a security interest in those two motorcycles – if they could be identified from the other four. As noted above, the evidence does not disclose which two of the six motorcycles remained in their crates.

[21] For the Act to apply there must be one or more “security interests” in property. The definition of “security interest” (see paragraph (5) above) means an interest in property that in substance secures payment or performance of an obligation. It includes a commercial consignment, whether or not the consignment secures payment or performance of an obligation. In s 17(1)(b) the word “commercial” is absent from the reference to “consignment” in parentheses. Counsel accepted that the consignment referred to must be a “commercial” consignment. I agree. No other conclusion could sensibly be drawn.

[22] The effect of s 17 is that a security interest includes a ‘commercial consignment’ whether or not the commercial consignment secures payment or performance of an obligation, and any other consignment that secures payment or performance of an obligation.

[23] Section 16 defines “commercial consignment” to mean:

Commercial consignment—

- (a) Means a consignment where—
 - (i) A consignor has reserved an interest in the goods that the consignor has delivered to the consignee for the purpose of sale, lease, or other disposition; and
 - (ii) Both the consignor and the consignee deal in the ordinary course of business in goods of that description; but

- (b) Does not include an agreement under which goods are delivered to an auctioneer for the purpose of sale:

[24] Two issues emerge: first, whether or not Triumph delivered the motorcycles to Otago Motorcycles “for the purpose of sale, lease or other disposition” in terms of the definition of commercial consignment in s 16; secondly, whether or not the consignment agreement secures “payment or performance of an obligation” in terms of s17(1)(a). It follows that if the agreement, and in particular clause 9, is not in substance a “commercial consignment” or a consignment that secures payment or performance of an obligation then Triumph does not have a security interest in the motorcycles and the Act has no application.

[25] To determine the substance of the agreement, the court will look both to the terms of the contract itself and the conduct of the parties in relation to that contract and determine whether the features of the relationship between the consignor and the consignee are preponderantly characteristics of a contract between principal and agent or of a secured credit sales arrangement. *Re Stephanian’s Persian Carpets Limited* (1980) 1 PPSAC 119; *Access Cash International Limited v Elliot Lake & North Shore Corp* (2000) 1 PPSAC (3d) 209.

[26] Counsel for Triumph submits that the relationship between Triumph and Otago Motorcycles possesses the following characteristics that indicate a true consignment:

- i. The merchant is the agent of the supplier: Clause 9(a) of the Agreement specifies that the consignment stock is to be held in trust by Otago Motorcycles for the plaintiff.
- ii. Title in the goods remains in the supplier: Clause 9(a) of the Agreement specifies that title to the consignment stock held in trust by Otago Motorcycles for the plaintiff is to remain with the plaintiff unless and until transferred.
- iii. Title passes directly from the supplier to the ultimate purchaser and does not pass through the merchant: The Agreement does not contain a clause to this effect.

- iv. The merchant has no obligation to pay for the goods until they are sold to a third party: Although the Motorcycles were supplied for the purpose of display to the public, the Agreement provided that Otago Motorcycles may purchase the consignment stock either for its own use or if any customer of Otago Motorcycles offered to purchase any of the consignment stock.
- v. Pursuant to clause 9(h) of the Agreement, Otago Motorcycles was to account to the plaintiff the costs of such consignment stock within 24 hours after completion of such sale. Therefore, there was no obligation to pay for the Motorcycles unless Otago Motorcycles elected to.
- vi. The supplier has the right to demand the return of the goods at any time: Clause 9(g) of the Agreement states that the plaintiff may any time retake possession of all or any consignment stock held by Otago Motorcycles without having to state any reason.
- vii. The merchant has the right to return unsold goods to the supplier. Whilst the Agreement does not explicitly state that Otago Motorcycles could return the Motorcycles to the plaintiff, it is implicit from the fact that there was no obligation on Otago Motorcycles to purchase or pay for the Motorcycles at any time and that they could similarly be returned to the plaintiff at any time.
- viii. The merchant is required to segregate the supplier's good from his own: Clause 9(i) of the Agreement requires Otago Motorcycles to inform any charge holder of Otago Motorcycles that the consignment stock is not subject to that charge.
- ix. Clause 9(j) of the Agreement requires Otago Motorcycles to ensure that a unit identification tag, identifying the unit as one belonging to the plaintiff is attached at all times to each consignment stock unit. The Agreement does not require stock which is provided as dealer stock to be identified in this regard.

- x. The merchant is required to maintain separate books and records in respect of the supplier's goods: Clause 9(k) of the Agreement requires Otago Motorcycles to carry out a stock-take of all consignment stock supplied by Triumph on the last day of each month and provide Triumph with an end of month stock report. The end of month stock report clearly shows which of the units held by Otago Motorcycles were supplied as consignment stock, dealer stock and demo units.
- xi. The merchant is required to hold sales proceeds in trust for the supplier: Clause 9(h) requires that following the sale of any consignment stock, Otago Motorcycles is to account to Triumph for the proceeds of the sale within 24 hours of the completion of the sale.
- xii. The supplier has the right to stipulate a fixed price or a floor price for the goods: This is not provided for in the Agreement.
- xiii. The merchant has the right to inspect the goods and the premises in which they are stored: Clause 9(d) of the Agreement provides that Triumph may at any time without notice enter upon Otago Motorcycles' premises and take an inventory of consignment stock and may remove, inspect or test consignment stock as it deems necessary.
- xiv. The goods are shown as assets in the supplier's records and are not shown as assets in the merchant's records: As set out above, the stock return form clearly sets out the classification of each of the units held by Otago Motorcycles.
- xv. The shipping documents refer to the goods as consigned: Upon delivery of any consignment stock, Otago Motorcycles was required to sign and return a copy of the Consignment Motorcycle Rules which were provided to Otago Motorcycles at the time of delivery.
- xvi. The supplier maintains insurance on the goods after they are delivered to the merchant: This is not provided for in the Agreement.

xvii. It is apparent from the merchant's dealings with others that the goods belong to the supplier rather than the merchant: As set out above, Otago Motorcycles was required to ensure that a unit identification tag was attached at all times to each consignment stock unit (clause 9(j)).

Agency or trust

[27] Clause 9(h) confers on the dealer an "option to purchase the consignment stock either for its own use or if any customer of the Dealer shall offer to purchase any of the consignment stock". Counsel for the liquidators submits clause 9 does not create a trust or agency in substance because clause 9(h) permits Triumph to profit from sale of the goods.

[28] Although clause 9(h) refers to the dealer having an option to purchase, in substance the dealer has the right to sell to a customer and to retain any profit. The clause provides that the "dealer" "will, within 24 hours after completion of such sale, immediately account to the Company for the Dealer cost of such consignment stock, which is the price ruling at the time of the retail sale". Clause 9(a) states that the "dealer will hold consignment stock in trust (emphasis added) for the Company with title to such consignment stock remaining with the Company unless and until transferred...".

[29] One of the core duties that arises in respect of many, if not all, fiduciary relationships is a duty to avoid unauthorised personal profit or benefit from the relationship. However, as Mason J observed in *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41:

The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

[30] Hence, a right of an agent or trustee to profit on sale of the property of the principal or beneficiary is not inimical to the existence of an agency or trust.

[31] Counsel for the liquidators submits that clause 23 confirms that the relationship between Triumph and Otago Motorcycles in substance is that of buyer and seller. Clause 23 provides that “the relationship of the parties is that of buyer/seller...The Dealer is in no way the legal representative, agent, partner or joint venture of the Company...”.

[32] The issue is whether clause 9 stands apart from the remainder of the agreement and creates the relationship of principal and agent or trustee and beneficiary in respect of display stock despite the provisions of clause 23 and the overall terms of the agreement and relationship of the parties. Two features of the agreement indicate that the parties intended to create two distinct relationships in relation to the supply of goods. First, clause 9 is headed “Consignment Stock” and the clause opens with the words:

Where the Dealer is desirous of obtaining additional Motorcycle products to display to the public and the Company is willing to display ...then it is agreed that Motorcycle products whether new or used supplied by the Company in terms of this clause shall be termed consignment stock and held by the Dealer on the following terms.

[33] Secondly, clause 9(o) provides that: “where not inconsistent with the provisions of clause 9(a) to (n) hereof the parties’ rights and obligations under this agreement shall apply equally to consignment stock”. The use of the terms “Dealer” and “company” in clause 9 is infelicitous if the parties intended to create two distinct relationships. Nonetheless, it is the substance rather than the form of the agreement that needs to be assessed. I consider that the parties intended to create two relationships relating to the supply of goods: that of buyer and seller; and consignor and consignee.

Title

[34] Clause 9(a) provides that “...title to such consignment stock remaining with the Company unless and until transferred as hereafter provided”. Clause 9(h) confers on Otago Motorcycles the right to sell motorcycles either to itself or a customer. Where Otago Motorcycles sells a “consignment” motorcycle, it is required to account to Triumph for the “dealer cost” of the motorcycle within 24

hours of the completion of the sale. Clause 9 provides that: “until payment in full is made to the Company, the Dealer will not be able to give good title to such consignment stock and title shall remain with the Company”. This latter provision runs counter to s 27 of the Sale of Goods Act 1908 pursuant to which a buyer in possession of the goods will obtain good title, absent a lack of good faith or notice of Triumph’s title in the goods. Where Otago Motorcycles sold display stock to a retail customer who bought in good faith without notice of Triumph’s title in the display stock, the customer would obtain good title. It follows that in such a situation Triumph would be deprived of its interest in the motorcycles. There is no evidence in the present case of any sales of the display stock to retail customers. Hence, the issue does not arise in this case.

[35] Until Otago Motorcycles sold display stock to a retail customer who bought in good faith without notice of Triumph’s interest, title in the goods remained in Triumph by virtue of clause 9(a). Clause 9(d) (right to remove display stock) and 9(g) (right to retake possession at any time without reasons) reinforce the view that Triumph retained “ownership”.

Other features of the agreement

[36] The agreement requires Otago Motorcycles to acknowledge that the display stock is consignment stock and to inform any charge holder that the display stock is not subject to the charge - clause 9(i). The agreement also requires the dealer to ensure Triumph’s identification tag remains attached to the display stock – clause 9(j). The agreement does not impose that requirement in respect of other stock. It also requires Otago Motorcycles to keep a stock-take of consignment stock – clause 9(k).

[37] All of the above factors support the view that Triumph did not deliver display stock to Otago Motorcycles “for the purpose of sale, lease, or other disposition” within the meaning of “commercial consignment” – s 16. The predominant purpose for delivery of the stock was display. It does not detract from that predominant purpose that Otago Motorcycles had a right to sell the goods and account to Triumph for the “dealer cost”; nor that in certain circumstances (clause 9(l)) “wetted, run or

used for demonstrations” or clause 9(m) damaged goods not repaired) Otago Motorcycles had an obligation to pay for the goods.

Does the consignment secure an obligation?

[38] Counsel for the liquidators contends that the consignment is a security interest because the transaction secures a number of obligations. They include an obligation to keep consignment stock on display to the public in good condition, to punctually pay rent on the premises where the consignment stock is held, the obligation to pay for consignment stock that is “wetted, run, or used for demonstrations”, and to pay in the event of a sale.

[39] The issue is whether in substance the transaction secures payment or performance of an obligation. The Act has been thoroughly considered in *Graham & others v Portacom New Zealand Limited* [2004] 2 NZLR 528, and *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629. Both cases concerned whether security interests were created by leases.

[40] In *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 the primary issues were whether a lease of a stallion amounted to a security interest and whether the stallion was subject to a charge. The Court was satisfied, at paragraph [65], that the charge of:

“...all [the lessee’s] present and future assets as continuing security for the payment of secured money and the performance of all other obligations of the Company to the Debenture holder’

As well as extending to [the lessee’s] ‘rights in [the stallion] gives rise to:

‘An interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation (s 17(1)(a))

And constitutes:

‘A statement that a security interest is taken in all the debtor’s present and after-acquired property (s 36(1)(b)(ii))’

[41] In the present case, the Bank of New Zealand registered a security interest on 29 June 2004. There is no evidence as to whether the Bank’s charge creates a

security interest in the motorcycles. In terms of s 36 the Bank's security agreement is enforceable against a third party (Triumph in the present case) in respect of particular collateral only if specified conditions exist. Those matters include (for the purposes of this case) a statement that a security interest is taken in all of the debtor's (Otago Motorcycles') present and after-acquired property or that the statement contained an adequate description of the six motorcycles by item or kind that enables them to be identified in terms of s 36(1)(b)(i). In *Waller v New Zealand Bloodstock Ltd* [supra] the Court of Appeal held (at paragraph [65]) that the charge constituted a statement that a security interest is taken in the debtor's after-acquired property and that included the debtor's interest in the stallion.

[42] For the purposes of this proceeding, it may be assumed that the Bank's charge contains a statement that a security interest is taken in all of the debtor's present and after-acquired property. As in *Waller v New Zealand Bloodstock Ltd* [supra] it was held in *Graham & others v Portacom New Zealand Limited* [supra] that the charge incorporated the debtor's present and after-acquired property.

[43] Neither of the above authorities considered the matter at issue in this case, namely whether the transaction in substance secures payment or performance of an obligation. Although the dealer is required to buy goods in specified circumstances, including when the dealer has sold the display goods to itself or a retail customer; the motorcycles had been "wetted"; or the dealer had failed to repair damage that occurred while the goods were on the dealer's floor, the consignment agreement does not secure payment in respect of display stock. When those circumstances arise, the relationship between the parties changes from that of consignor and consignee to that of buyer and seller.

[44] The agreement does not create an interest in property that in substance "secures" performance of obligations including an obligation to pay rent or to keep the motorcycles in good condition. Those are obligations the dealer is required to perform under the consignment. It is not the performance of obligations of itself that gives rise to a security interest: a security interest arises where the transaction creates an interest in property that in substance "secures (emphasis added) payment or

performance of an obligation”. Otherwise, no true consignment containing any obligations could exist without the consignment being deemed a security transaction.

[45] I have also considered whether the agreement constitutes a “lease for a term of more than 1 year”. Section 17(1)(b) provides that a security interest includes “a lease for a term of more than 1 year ... whether or not the ...lease ...secures payment or performance of an obligation”. The question arises as to whether the agreement creates a “lease for a term of more than 1 year” because the definition (s 16) includes a bailment and a lease for an indefinite term.

[46] There is nothing to indicate that the parties intended to create a lease of the display stock. The arrangement between the parties in respect of display stock is a bailment. Only a bailment of goods for a term of more than 1 year is deemed to be a security interest. This contemplates that a bailment for less than one year that does not create an interest in personal property that in substance secures payment or performance of an obligation and is not a “commercial consignment” is not deemed to be a security interest.

Decision

[47] The consignment agreement contained within clause 9 of the Dealer Agreement is not a security interest in terms of the Act in that in substance it is neither a consignment that secures payment or performance of an obligation nor a “commercial consignment”.

[48] The application for summary judgment fails for reasons outlined above.

Costs

[49] Costs are reserved.

P R Kellar
District Court Judge

Signed at _____ am/pm on _____ 2010