IN THE COURT OF APPEAL OF NEW ZEALAND

CA168/2011
[2012] NZCA 451

BETWEEN	THE HEALY HOLMBERG TRADING PARTNERSHIP Appellant
AND	DAMIEN GRANT AND STEPHEN KHOV AS LIQUIDATORS OF LBD CIVIL LIMITED (IN LIQUIDATION) First Respondents
AND	RIGA INVESTMENTS LIMITED, 108 REDOUBT ROAD LIMITED AND DIANE MARIE RUDKIN Second Respondents

Hearing: 28 August 2012

Court: O'Regan P, Stevens and White JJ

Counsel: M J Radich and L P Radich for Appellant
D Wong for First Respondents
J Moss for Second Respondents

Judgment: 2 October 2012 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The Partnership must pay to the second respondents costs for a standard appeal on a band A basis and usual disbursements.

C The Partnership must pay the usual disbursements of the first respondents.

REASONS OF THE COURT

(Given by O'Regan P)

Table of Contents

Introduction

[1] The ultimate issue in this appeal is which of two competing security interests is the first ranking under the Personal Property Securities Act 1999 (PPSA).

[2] On 28 January 2005 the Healy Holmberg Trading Partnership (the Partnership) provided an advance to Landscape by Design Ltd (Landscape) to fund the purchase of a truck to be used in the course of the landscaping business undertaken by Landscape. Over the next two years it provided from time to time further advances to Landscape and its sister company, LBD Civil Ltd (LBD) to assist the purchase of further equipment. The Partnership took security over the items of equipment that were purchased. The assets of Landscape were subsequently transferred to LBD, subject to those securities, and the various loans were

consolidated into two separate loan arrangements, one for approximately $170,000 and the other for approximately $150,000. The Partnership decided that it would not seek the assistance of lawyers to document these loans and they were initially made without formal documentation, normally by the Partnership paying the supplier of the equipment directly, at the request of Landscape or LBD.

[3] On 20 January 2006, the Partnership registered financing statements under the PPSA in relation to a number of items of equipment that had been purchased with the finance it provided. The finance had been provided in various transactions between January 2005 and December 2005.[1]

[4] Subsequently LBD entered into a financing arrangement with the second respondents (whom we will call the Riga parties). LBD had granted a general security interest to the Riga parties over all its present and after-acquired property on 6 July 2006. The Riga parties registered a financing statement in respect of all present and after acquired property of LBD on 9 August 2007. LBD and the Riga parties entered into a loan agreement on 17 August 2007.

[5] On 3 March 2008, the Partnership registered a further financing statement in respect of one piece of equipment for which it had provided the finance to LBD, but which had not been included within the earlier financing statement.

[6] On 17 April 2008, LBD ceased trading and the shareholders resolved to appoint liquidators. The first respondents (whom we will call the Liquidators) were appointed as liquidators by the shareholders.

[7] A dispute broke out between Mr Healy, representing the Partnership and representatives of the Liquidators about the nature and validity of the security interests claimed by the Partnership as well as a number of other issues. This led the Partnership to seek orders under s 284 of the Companies Act 1993 in relation to a number of matters, most of which were dealt with in a judgment of Associate Judge

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[1] Although the loans were made to finance the purchase of equipment, the Partnership did not comply with the requirements to obtain a purchase money security interest.

Robinson in December 2009.[2] Subsequently the Liquidators applied to recall that judgment and that application was dealt with by Associate Judge Christiansen. The judgment was recalled and certain matters omitted from it.[3]

[8] In the recall judgment, Associate Judge Christiansen noted that one aspect of the original application under s 284 had not been dealt with, namely the application for an order that the Partnership was a secured creditor holding registered securities over various items of property owned by LBD at the time LBD was placed in liquidation.

[9] The hearing of that aspect of the case took place on 23 February 2011 and Associate Judge Christiansen delivered judgment the following day.[4] He dismissed the application. The Partnership appeals against that decision.

Issues on appeal

[10] The issues on appeal relate to the priority of the security interests held by the Partnership as against the general security interest of the Riga parties.

[11] The first issue is a factual issue. In the High Court, the Liquidators argued that the Partnership had not established that the security agreements on which it relied had been signed prior to the liquidation of LBD. The Associate Judge found that on the balance of probabilities the agreements had been signed after the liquidation of LBD. That factual finding is contested by the Partnership on appeal.

[12] The second issue is a legal issue. It arises for decision only if it is determined that the security agreements on which the Partnership relies were signed after the date on which the Riga parties perfected its security interest and prior to the date of liquidation of LBD. In that event, the Partnership would have perfected security interests in respect of which financing statements were registered before the date on which the Riga parties registered their financing statement, but in respect of which

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2 *The Healy Holmberg Trading Partnership v Grant* HC Auckland CIV-2009-404-2279, 15 December 2009.

3 *The Healy Holmberg Trading Partnership v Grant* HC Auckland CIV-2009-404-2279, 12 October 2010.

4 *The Healy Holmberg Trading Partnership v Grant* (2011) NZCLC 264,833 (HC).

the Riga parties' security interest would have been perfected prior to those of the Partnership.

[13] The Associate Judge found that in that situation the interests of the Riga parties would have had priority because they were the first to perfect their security interest. The Partnership argues that priority should have been determined by the first to register a financing statement, and on that test the Partnership's security interests would take priority over those of the Riga parties (with the exception of the security interest for which a financing statement was not filed until March 2008).[5] So the second issue is, in essence, whether the ranking of perfected security interests under the PPSA is determined by the first to register or the first to perfect?

Issue one: Date of signing of security agreements

Factual background

[14] We begin our consideration of this issue by setting out some additional details of the factual background.

[15] There are two security agreements that cover all the equipment over which the Partnership claims security. These are dated 29 December 2005 and 25 September 2006 respectively. There are also seven other "finance agreements" dated between December 2006–31 August 2007, which relate to other advances made by the Partnership to LBD, but which do not concern the equipment in issue in this appeal. There is dispute about the accuracy of the dates on all of these agreements.

[16] After LBD was placed into liquidation on 17 April 2008, an employee of a company associated with the Liquidators, Mr Kumar, requested paperwork from Mr Healy in order to document the Partnership's claim. On 5 May 2008, Mr Kumar emailed Mr Healy to ask "how the gathering of the information is going?", and to ask what Mr Healy would like Mr Kumar to do with the equipment over which the Partnership had security. Mr Healy replied that Mr Kumar could dispose of the

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5 See [5] above.

equipment, and that he understood that LBD had supplied Mr Kumar with details of the money lent by the Partnership and that it would be helpful if Mr Kumar could let him know what information he had in order to assist with the information gathering process.

[17] On 28 May 2008, Mr Healy sent Mr Kumar a schedule of the amounts that LBD owed the Partnership but without supporting documentation. Mr Kumar replied that day stating that he wanted copies of the security agreements between the Partnership and LBD. Mr Healy replied that he would not be able to locate the documents by the end of the day, but that he would get them to Mr Kumar as soon as possible. Mr Kumar replied that he wanted a "digital and a hard copy of the actual agreement". He told Mr Healy (incorrectly) that, if the Partnership did not have a written agreement, it had no security over the equipment referred to in its financing statements. On 29 May 2008 Mr Healy provided Mr Kumar with copies of nine "finance agreements", two of which were the relevant security agreements that are in issue.

[18] Mr Kumar deposed that during this correspondence with Mr Healy he became suspicious about the authenticity of the written security agreements, and he advised the Liquidators of his concerns. The Liquidators later engaged Patricia James, a police document examiner, to examine original copies of the security agreements and non-original copies of the other seven finance agreements in order to determine the authenticity of the dates on those documents. Ms James deposed that her investigations showed that:

> (a) documents which bear the dates ranging between December 2005 and August 2007, are linked together by latent indentations. These indentations show the linked documents were physically together when the handwritten signatures and dates appearing in the indentations were completed;
>
> (b) physical evidence in the form of indentations and ink transference shows the document marked as *effective from* 28 December 2005 was signed on top of the document marked as *effective from* 28 September 2006. According to its date, the 2006 document would not have been [in] existence until nine months after the 2005 document;

(c) overall the physical evidence reveals dating inconsistencies which suggest the dates printed/written on the documents do not reliably reflect their actual date/s of production.

[19] In essence, Ms James' evidence suggested that the security agreements were signed together in a stack of documents, and that the dates printed on the documents did not accurately reflect their date of execution. If these documents were signed after the appointment of the liquidators, the directors would not have had power to sign them on behalf of LBD and so they would be ineffective.[6] That, in turn, would mean the security interest of the Partnership would not be enforceable against third parties, such as the Riga parties.

The Associate Judge's approach

[20] The Associate Judge found that, in light of Ms James' report, there was "no way of determining with certainty when the security agreements were executed".[7] However, the Associate Judge held that it was clear that they were executed on a date other than when they were signed. There were clearly no security agreements in place on 20 January 2006, as evidenced by email discussions taking place between the Partnership and LBD on that day.[8] A reasonable inference could be drawn from Ms James' affidavit that the earliest date that the security agreements could have been signed was 31 August 2007, with all the finance agreements being signed in a stack on that date (which was the date of the last agreement).[9]

[21] Ultimately, the Associate Judge found that "it is more probable than not that the documents in question were not completed before the date of liquidation".[10] This finding was based on the following factors:

(a) It was clear from Ms James' evidence that the agreements were backdated and the Partnership had not made any attempt to clarify the

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6 Companies Act 1993, s 248.
7 At [35].
8 At [39].
9 At [35] and [40].
10 At [56].

dating inconsistencies or give reasons for backdating the agreements.[11]

(b) Mr Healy did depose that some security documents were entered into subsequent to the advance of funds, but this did not take his argument very far as no further particulars were provided.[12]

(c) It was clear from the evidence that at least five months after the Partnership had registered the two financing statements, there was still no agreement with LBD as to the terms of the security agreements.[13]

(d) The evidence of one of the Liquidators, Mr Grant, was that at the time of liquidation, the director of LBD, Ms Prujean, and her partner Mr Cull, were unsure about whether any security arrangements existed. However, when Mr Kumar asked for copies of the security arrangements in May 2008, Mr Healy and Ms Prujean told him that copies of those documents were in Australia with Ms Prujean. The Partnership did not attempt to explain this inconsistency.[14]

The Partnership's grounds of appeal

[22] The Partnership made three key submissions on the factual issue:

(a) the allegation that the security agreements were signed after liquidation was never properly pleaded to enable the Partnership to respond to it;

(b) there was insufficient evidence for the Court to make the finding that the security agreements were signed after liquidation; and

(c) the process by which the Court reached its finding that the security agreements were signed after liquidation was unfair.

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11 At [45].
12 At [47].
13 At [48]–[52].
14 At [53]–[54].

[23] We will deal with each in turn.

Inadequate pleading?

[24] The Partnership's first ground is that the allegation that the security agreements were signed after liquidation was never properly pleaded. Counsel for the Partnership, Ms M Radich, argued that allegations involving intent to deceive must have a reasonable basis in fact, be clearly pleaded and properly particularised. She said that neither respondents properly advanced in their pleadings the allegation that the security agreements were entered into after liquidation.

[25] In response to this allegation, the Liquidators argued that it was clear to the Partnership that an issue in the proceeding would be the competing priorities of the security interests in favour of the Partnership and the Riga parties respectively. A pleading of dishonesty has not been made. All that is challenged is the date of the security agreements. It has always been clear that the date of execution of the agreements would be a key element in the proceeding. The Partnership chose not to respond to Ms James' affidavit, despite it being filed within the required timeframes.

[26] We accept that the initial pleading of the Liquidators was deficient because it said the Partnership did not have a registered security interest. That was wrong: it clearly did. That said, it must have been clear to the Partnership that the date on which the security agreements were signed would be a key issue in the case. Mr Kumar's and Mr Grant's affidavits made it apparent that the respondents doubted the accuracy of the dates on the security agreements. Ms James' affidavit put the existence of those concerns beyond doubt. Thus, it was clear that the dates on the face of the security agreements would be challenged and that the Court would not be able to rely on them in the absence of evidence from Mr Healy or Ms Prujean as to the actual date on which they were signed on behalf of LBD.

[27] The situation became even clearer when the Riga parties joined the litigation (admittedly at a late stage) and it was made clear that the Riga parties claimed priority for their security interest over that of the Partnership. The Riga parties openly challenged the date on which the security agreements were signed in their

application to be added as respondents in the High Court. Accordingly, we are satisfied that natural justice requirements were properly met.

[28] In light of these factors we reject the Partnership's contention that it was not put on notice of the need for evidence about the precise date on which the security agreements were signed.

Inadequate evidential basis for finding?

[29] The Partnership's second ground is that the Associate Judge's finding of fact that the security agreements were signed after liquidation was unjustified on the evidence. The Associate Judge's first reason for finding that the security agreements were signed after liquidation was that it was "of serious concern" that the security agreements were backdated. However, as Ms Radich made clear in argument, the Partnership never concealed that the agreements were backdated to reflect dates close to when the money was advanced. In Mr Healy's first affidavit he stated:

> In some cases the loans were documented contemporaneously with the advance of funds and in other cases subsequently.

[30] Ms Radich argued that the backdating of documents should not be a barrier to the recognition of securities if they were in fact signed before liquidation.

[31] The Associate Judge was also concerned that the Partnership had not rebutted the findings of Ms James' report. However, Ms Radich said it had always been the Partnership's position that priority of security interests is determined by order of registration. Therefore, the Partnership did not need to rebut Ms James' evidence because her evidence did not say that the documents were executed after liquidation. At most, Ms James' evidence showed that the security documents were signed at some point after 31 August 2007, but that date was some eight months before liquidation.

[32] Ms Radich said that there was no basis for the Court to impute dishonesty into the Partnership's conduct. There had been no underhand dealing on the part of the Partnership. The Partnership advanced sums of money to LBD with the clear

intention that those funds be used to purchase items of equipment. The Partnership then registered financing statements over those items and LBD began making repayments consistent with the debt it owed the Partnership. The second respondents later registered their general security interest, in the knowledge that the Partnership's security was registered. Mr Healy did not withhold documents. When Mr Kumar asked for copies of the security agreements on 28 May 2008, Mr Healy provided those agreements the following day. In September 2009, the Court ordered the Partnership to provide the first respondents with the original agreements that formed the basis of the security the Partnership claimed. Within a week, Mr Healy provided those documents, and further provided copies of seven other finance agreements relating to unsecured advances that the Partnership recognised it would never recover. If Mr Healy had conspired to concoct agreements after the liquidation, there is no reason why he would have done so with respect to the agreements relating to the unsecured loans that he knew would not be recovered.

[33] The Liquidators and the Riga parties supported the Associate Judge's approach. They said he made a finding of fact from the unchallenged affidavit evidence. This finding was open on the evidence. It is clear from the evidence that there were no security agreements in place as at 20 January 2006. The affidavit evidence of Mr Grant was that Ms Prujean and Mr Cull had both advised him that they were uncertain about whether security documents existed at the date of liquidation. In light of this evidence, the dating inconsistencies revealed by Ms James, and the lack of clarification from Mr Healy, Ms Prujean or Mr Cull, the Associate Judge was correct to have concerns about the validity of the security agreements.

[34] We share the Associate Judge's concern that the evidence on this issue is in a troubling state. There is a gap in the evidence that the Partnership has not filled. The situation is:

(a) The Partnership provided security agreements that on their face were signed before the date of liquidation.

(b) The respondents provided evidence that shows that the security agreements were not signed on the dates that are written on the security agreements.

(c) The Partnership has provided evidence confirming the backdating but has not provided evidence about when the security agreements were actually signed, the circumstances in which they were signed, or why they were backdated.

[35] The upshot of this is that there is no evidence as to when the security agreements were actually signed. In those circumstances, we accept the Partnership's position that there was insufficient evidence on which to make a positive finding that the agreements were signed after the date of liquidation. Such a finding has serious implications for Mr Healy because it effectively says he has acted dishonestly and has tried to deceive the Liquidators. We do not consider the state of the evidence is such that such a serious finding against Mr Healy is justified.

[36] In our view, the resolution of the case turns on the burden of proof. Normally the Court would be justified in relying on a date on the face of a document. However, where the Liquidators have shown that the dates on the documents cannot be relied on, it is up to the Partnership to provide evidence of when the document was signed if the Partnership wants to rely on that document. One would expect the Partnership to give fuller evidence to allay concerns about when the security agreements were signed.

[37] In light of Ms James' evidence, no party now seriously contends that the security documents were signed before 31 August 2007. The issue is whether the documents were signed in the eight month gap between 31 August 2007 and 17 April 2008, being the date that LBD was placed into liquidation. The Partnership has not provided any compelling evidence about whether the security agreements were signed during this period. This should have been a fairly easy exercise considering that Mr Healy has signed all of the security agreements and the other finance arrangements and the signatory for LBD, Ms Prujean, has also sworn an affidavit. The affidavits of Mr Healy and Ms Prujean deal with a number of matters relating to

the security agreements but are conspicuously silent on the date of signing of the agreements.

[38] We accept that Ms Prujean did depose in her affidavit that she had all of the loan documentation with her in Australia when the Liquidators requested the documents from her. However, this needs to be balanced against the evidence of Mr Grant that Ms Prujean and Mr Cull told him that they were not sure whether security agreements existed at the date of liquidation.

[39] The affidavit filed by Mr Healy after Mr Kumar's and Mr Grant's affidavits had questioned the authenticity of the security agreements explained when each loan was advanced and the purpose of each loan. It set out when the Partnership registered the financing statements. It explained why there was some delay in providing the Liquidators with security documents: Mr Healy's partner, Ms Holmberg, had managed the Partnership's paperwork and she had just died, leaving Mr Healy in a distressed state. However, despite going into detail about when funds were advanced, why they were advanced, who they were advanced to, and the difficult circumstances surrounding Ms Holmberg's death, Mr Healy did not address the circumstances in which the security arrangements were signed, which was by then the key factual issue in the case.

[40] In addition, the Partnership filed no response to Ms James' affidavit. While it is true that Ms James' evidence does not prove that the security agreements were signed after liquidation, it does prove that the security agreements were not signed on the dates they were dated. With the evidence placing so much doubt on the reliability of the security agreements, one would expect an explanation from the Partnership, particularly when the knowledge of precisely when the agreements were signed lay with Mr Healy and possibly Ms Prujean.

[41] The dictum of Lord Mansfield from *Blatch v Archer* is relevant:[15]

> It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted.

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[15] *Blatch v Archer* (1774) 1 Cowp 63, 98 ER 969 at 970.

The Partnership could have easily produced evidence about when the security agreements were signed but chose not to. The Court is entitled to weigh the evidence in light of this choice. There is a gap in the evidence that the Partnership had the ability and opportunity to fill. It was up to the Partnership to show that it has an enforceable written security agreement, and it has failed to do so. As the Judicial Committee of the Privy Council noted in *Robins v National Trust Co Ltd*, "onus is always on a person who asserts a proposition or fact which is not self evident."[16] In the absence of evidence about the date and circumstances of the signing of the security agreements, the Court cannot determine whether the agreements were signed before or after the date of liquidation.[17]

[42] The proceeding before the Court was the Partnership's application for an order that it held perfected security agreements. While a security interest without a written security agreement would have been enforceable against the Liquidators in the absence of a competing security interest from a third party,[18] it was clear by the time of the hearing that the real issue was the existence or otherwise of a security interest that could outrank that of the Riga parties. The question of whether the security agreements were signed by the director of LBD while she was still in control of LBD (ie before liquidation) was the key issue. In order to make out its case for the order it sought in the face of the evidence of Mr Kumar, Mr Grant and, especially, Ms James, the Partnership needed to adduce evidence establishing that the security agreements were signed before the date of liquidation. In the absence of such evidence, the case for the order was not made out.

Unfair process

[43] In light of our earlier analysis, it is not necessary to address this ground separately. We do, however, note that no application was made to adduce evidence in support of the appeal to fill the gap identified in the evidence in the High Court. If the reason for the failure to adduce evidence in the High Court relating to the time and circumstances of the signing of the security agreements was the unfairness of the

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16 *Robins v National Trust Co Ltd* [1927] 1 AC 515 (UKPC) at 520.
17 *Morris v London Iron and Steel Co Ltd* [1988] QB 493 (CA) at 504.
18 Personal Property Securities Act 1999, s 40(1); *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602.

High Court process, we would have expected this step to be taken. We do not say such an application would have succeeded, given that the evidence would not have been fresh, but that may have been a response to deal with any unfairness, if any such unfairness had been established.

Conclusion

[44] We disagree with the Associate Judge that a positive finding that the security agreements were signed after liquidation was available on the evidence. However, we are unable to find that the security agreements were signed before liquidation. There is simply a gap in the evidence. The Partnership must show that it has an enforceable written security agreement in order to establish the enforceability of its security agreement against that of the Riga parties. It has failed to adduce sufficient evidence to prove its case. Therefore the appeal fails.

Issue two: Ranking of competing security interests

[45] Our finding on the first issue means that the second issue is not determinative. We did, however, hear argument on it, though counsel for the Riga parties did not resist the reversal of the High Court decision on this aspect of the case. As it is an issue of some practical significance, we will set out our views.

[46] The factual assumptions underpinning the dispute were as follows:

(a) The Partnership registered a financing statement in relation to its security interests on 20 January 2006. At that point, the Partnership had already advanced the amount secured by the security interest referred to in the financing statement but there was no written security agreement, so LBD had not assented in writing to the granting of a security interest.

(b) The Riga parties had a perfected security interest in all of the present and after acquired personal property of LBD on 17 August 2007, because LBD had entered into a general security agreement on 6 July

2006, the Riga parties had registered a financing statement on 9 August 2007, and the Riga parties provided finance to LBD on 17 August 2007 pursuant to a term loan agreement entered into on that day.

(c) The Partnership and LBD entered into written security agreements some time after 17 August 2007 but before the date of liquidation of LBD.

[47] If that factual scenario were correct, then the Partnership was first to register a financing statement in relation to its security interest but the Riga parties were the first to perfect their security interest. The Partnership and the Riga parties would have competing perfected security interests.

[48] Section 66 of the PPSA sets out what is known as the residual priority rule (that is, the priority rule that applies where no other priority rule applies). Section 66 provides:

> **66 Priority of security interests in same collateral when Act provides no other way of determining priority**
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> If this Act provides no other way of determining priority between security interests in the same collateral,—
>
> (a) A perfected security interest has priority over an unperfected security interest in the same collateral:
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> ...
>
> (b) Priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest:
>
> (i) The registration of a financing statement:
>
> (ii) The secured party, or another person on the secured party's behalf, taking possession of the collateral (except where possession is a result of seizure or repossession):
>
> (iii) The temporary perfection of the security interest in accordance with this Act:
>
> ...

(c) Priority between unperfected security interests in the same collateral is to be determined by the order of attachment of the security interests.

...

[49] If s 66 governs the situation, then, under s 66(b)(i), the Partnership's security interest would rank ahead of that of the Riga parties in relation to the equipment listed in the Partnership's first financing statement because the Partnership registered that financing statement before the Riga parties registered a financing statement in relation to their security interest.

[50] However, in the High Court, Associate Judge Christiansen held that s 36 of the PPSA took precedence over the residual priority rule in s 66. Section 36 provides as follows:

36 Enforceability of security agreements against third parties

(1) A security agreement is enforceable against a third party in respect of particular collateral only if—

(a) The collateral is in the possession of the secured party; or

(b) The debtor has signed, or has assented to by letter, telegram, cable, telex message, facsimile, electronic mail, or other similar means of communication, a security agreement that contains—

(i) An adequate description of the collateral by item or kind that enables the collateral to be identified; or

(ii) A statement that a security interest is taken in all of the debtor's present and after-acquired property; or

(iii) A statement that a security interest is taken in all of the debtor's present and after-acquired property except for specified items or kinds of personal property.

(2) To avoid doubt, a security agreement may be enforceable against a third party in respect of particular collateral even though the security agreement is not enforceable against a third party in respect of other collateral to which the security agreement relates.

...

[51] Section 36, on its face, deals with enforceability of security interests against third parties, rather than priority between secured parties. The key component of s 36 in the present case is the requirement in s 36(1)(b) that the debtor must have

signed (or assented to in writing) a security agreement containing an adequate description of the collateral.

[52] In essence, the Associate Judge considered that s 36 set out a "way of determining priority between security interests in the same collateral" for the purposes of s 66, and therefore the priority determined under s 36 applied in preference to the residual priority rule set out in s 66. In other words, s 36 was a priority rule, rather than simply a rule determining enforceability. On the Associate Judge's view, the security interest of the secured party that first perfected its interest has priority even though, in this case, the other secured party registered its financing statement first. He held that "first to perfect" determines priority rather than "first to register".

[53] The Associate Judge appears to have gained support for his view that s 36 is a priority rule that takes precedence over the residual priority rule in s 66 from the following passage in Gedye Cuming and Wood, *Personal Property Securities in New Zealand*:[19]

> While s 66 gives priority on the basis of a first to register rule, the opening words of the section make it clear that this rule is subject to other priority rules in the Act and, it can be argued, s 36 is such an "other priority rule". If the writing requirement of s 36 can come into existence after an intervening interest has arisen, what purpose does it serve? The writing requirement is arguably designed to disclose to third parties the existence and key features of a security agreement and to help the third party assess the risk of dealing with the debtor. If this is so, there is little value in making the information available after the interest of the third party has been acquired.

[54] However, in the paragraph that immediately follows the one set out above, the alternative view is stated in the same text in these terms:

> On the other hand, it can be argued that s 36 does not qualify the general priority rule... The general priority rule in s 66 makes it clear that where a security interest is perfected by registration, priority is based on the time of registration, not the time of attachment or perfection. It is clear that a financing statement may be registered in anticipation of entering into a security agreement and that in such cases priority will still be based on the time of registration. If a later security interest can in this way take priority over an earlier created security interest, why should it be any different where a security interest has been orally created before, but not documented until

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[19] Michael Gedye, Ronald C C Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at 143.

> after, a competing security agreement has been documented? Logically there should not be any difference.

[55] The Associate Judge's decision has been the subject of a critical article by Professor Gedye in which he argues strongly in favour of the first to register approach and against the first to perfect approach.[20] Professor Gedye's view is supported by Dr Fenton's view outlined in his text.[21]

[56] We agree with Professor Gedye that the determinative of priority is, in a situation where both parties have perfected by registration, the time of registration not the time of perfection. In that respect we disagree with the Associate Judge and prefer Professor Gedye's analysis to that of his co-authors. We consider that this approach is consistent with the plain wording of s 36, which deals with enforceability of security interests against third parties, not with priority. Section 36 does not set out any priority rule, and thus does not have any effect on the application of s 66(b) in circumstances such as the present case.

[57] It is worth noting that, while s 66 is clear that priority between perfected security interests is determined by registration, not perfection, some overseas legislation is even clearer:

(a) In the Ontario PPSA, the equivalent section to s 66 provides that priority between competing perfected security interests "shall be determined by the order of registration *regardless of the order of perfection*".[22]

(b) In the Australian PPSA, the equivalent section to s 66 states that priority between perfected security interests is determined by the "registration time for the collateral".[23] But to make it clear that this residual priority rule is not subject to the equivalent to s 36, or other rules about attachment or enforceability, the residual priority rule sets

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20 Mike Gedye "First to Perfect?" [2011] NZLJ 123.

21 Roger Fenton *Garrow & Fenton's Law Personal Property in New Zealand* (7th ed, Lexis Nexis, Wellington, 2010) at Vol 2, 425–426 and 562–564. See also Barry Allen *Personal Property Securities Act 1999: Act and Analysis* (Thomson Reuters, Wellington, 2010) at 105–106.

22 Personal Property Security Act RSO 1990 c P-10, s 30(1) (emphasis added).

23 Personal Property Securities Act 2009 (Cth), s 55(5)(a).

out the other rules about priorities to which the residual rule is subject.[24] The provision makes it clear that the residual priority rule is not subject to the s 36 equivalent.

[58] The predictability and simplicity of the PPSA regime would be compromised by taking the first to perfect approach. That would mean that a search of the register would not provide an answer in a priority dispute, and there would then need to be the obtaining of evidence from the parties as to the exact time at which the steps necessary to perfect the security interest took place.

[59] The present case is a good example. The Riga parties ought to have searched the PPSA register before making their advances to LBD, and if they had done so they would have realised that they could not claim a prior ranking security interest over the items of equipment referred to in the financing statement that had been filed earlier by the Partnership. If they then went ahead and made the advance in those circumstances, they could not complain about the outcome of the application of the first to register rule. If they did not search the register, they could not complain either, as that is a basic due diligence step that all providers of secured finance can be expected to take. The first to register rule gives certainty and clarity and allows parties to determine their relative priority positions before they commit themselves to the provision of finance.

[60] If it had been determinative, therefore, we would have allowed the appeal on this aspect of the case.

Result

[61] In light of our conclusion on the first issue, we dismiss the appeal.

Costs

[62] The procedural route by which this case came before the High Court was less than optimal for the resolution of the dispute that has been dealt with in this

[24] Section 55(1).

judgment. Because the Riga parties have a general security agreement covering all of the personal property of LBD, the only parties with a financial interest in the outcome of the dispute were the Partnership and the Riga parties. Yet the case has been the subject of full argument by the Liquidators in both the High Court and the Court of Appeal. We recognise that the Riga parties became involved in the High Court proceeding only at the eleventh hour. Before then, the Liquidators were dealing with the Partnership's application for directions because many of the directions affected the interest of the Liquidators.

[63] Ideally a process akin to the interpleader application in which the Liquidators simply facilitated the competing claims of the Partnership and the Riga parties ought to have been used. The Liquidators could have sought directions under s 284 of the Companies Act to initiate such a process. In such a proceeding, each secured party would be required to provide sufficient evidence to justify its claim.[25] The Liquidators would not have had to take any active role. But we do not criticise the Liquidators because it was not they who commenced the High Court proceeding and they did have a legitimate interest in aspects of the proceeding as it was originally cast. However, we consider that, once the matter had reached this Court, and the Riga parties were involved, there was no need for any active participation by the Liquidators because there was nothing for them to gain out of the outcome either in favour of the Partnership or in favour of the Riga parties.

[64] In those circumstances, we award costs to the Riga parties but not to the Liquidators. The Partnership must pay costs to the Riga parties for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Radich Law, Blenheim for Appellant
Queen City Law, Auckland for First Respondents
SPM Law Limited, Howick for Second Respondents

[25] See High Court Rules, r 4.62.