IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-3797

UNDER	an application for an order under s 167 of the Personal Property Securities Act 1999
BETWEEN	TOYOTA FINANCE NEW ZEALAND LIMITED Applicant
AND	SEAN DALGLIESH CHRISTIE First Respondent
AND	STEVEN KHOV AND DAMIEN GRANT AS LIQUIDATORS OF GATEWAY CONTRACTS LIMITED (IN LIQUIDATION) Second Respondents

Hearing: 13 July 2009

Appearances: AP Neems for Applicant
No appearance for First Respondent
D Wong for Second Respondents

Judgment: 15 July 2009

JUDGMENT OF ASHER J

This judgment was delivered by me on 15 July 2009 at 4:30 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

……
Date

Solicitors:
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[1] This is an application for an order maintaining a security interest under the Personal Property Securities Act 1999 ("the PPSA"). The applicant, Toyota Finance New Zealand Limited ("Toyota"), obtained interim without notice orders from Wylie J on 25 June 2009, maintaining the interest until further order of the Court. It obtained such without notice orders because the strict statutory timeframes meant that there was insufficient time to hear the matter on notice, but on the basis that there could be an on notice hearing of the matter on Monday 13 July 2009.

[2] A notice of opposition has now been filed by Steven Khov and Damien Grant, the liquidators of Gateway Contractors Limited, the second respondents ("the liquidators").

[3] As is usual when without notice orders are made and there is then a hearing of the application for interim orders on notice, the onus of proof is on the original applicant, in this case Toyota: *Automatic Parking Coupons Limited v Time Ticket International Limited* (1996) 10 PRNZ 538 at 539.

Brief history

[4] The first respondent, Sean Dalgliesh Christie ("Mr Christie"), is the sole director and shareholder of Gateway Contracts Limited (In liquidation) ("Gateway"). Mr Christie is a builder, and incorporated Gateway on 9 October 2000 as his trading vehicle. It seems that he alone ran the company and oversaw all its business.

[5] On 9 August 2002 Gateway entered into a three-year finance agreement with Toyota in respect of a two-year-old Toyota Landcruiser motor vehicle. Mr Christie was the guarantor of that agreement. Gateway made the payments as required by that loan agreement. When the three years was about to expire, Gateway requested further finance for a further term of three years. A new loan was entered into on 10 August 2005. A new loan advance was made which was used to settle the earlier loan. Mr Christie again guaranteed this loan.

[6] In August 2008 the expiry of the second agreement loomed. On 10 August 2008 a further loan agreement was entered into ("the third finance agreement"). The amount of the loan was $38,681.00 and the proceeds of the advance were used to settle the earlier loan. However, Gateway was not the other party. The party in relation to this third loan was Mr Christie. The new loan was for a further term of three years.

[7] As had happened in relation to the two earlier finance agreements, Toyota registered a security interest in relation to the Landcruiser under the PPSA. On 13 March 2009 Gateway was placed in liquidation, and Messrs Khov and Grant appointed as liquidators. On 20 May 2009 the liquidators arranged for the repossession of the Toyota Landcruiser, asserting that it was the property of Gateway. The liquidators held the vehicle for a while, and then Toyota repossessed it. At present Toyota holds the vehicle.

[8] In relation to the third finance agreement Mr Christie has made all the payments, save for one outstanding payment not made since the repossession of the vehicle.

The issue

[9] The core issue is whether Gateway or Mr Christie owned the vehicle when the third finance agreement was entered into. If Mr Christie was the owner, then he was entitled to enter into a finance agreement with Toyota. If, however, he was not the owner of the vehicle and the owner was still Gateway, then Mr Christie personally had no right to deal with the vehicle. He had no title in the vehicle in respect of which he could give a security interest to Toyota. If that were so, Toyota would have no right to maintain the registration.

Approach under the Personal Property Securities Act 1999

[10] It is not in dispute that the third finance agreement was a security interest in terms of s 17 of the PPSA, or that the Landcruiser was collateral. Under s 40(1) a security interest attaches to collateral when "the debtor has rights in the collateral".

Therefore, if Mr Christie owned the Landcruiser, the security interest could attach to it.

[11] Part 10 of the Act sets out the procedure for registering a security interest. A party who seeks to challenge a security interest may give written demand to the secured party under s 162. A ground for giving written demand, stated at s 162(d) is, "No security agreement exists between the parties". This appears to be the ground relied upon by the liquidators in giving demand.

[12] Section 165(1) sets out the procedure following the giving of such a demand if the secured party fails to comply. It provides:

> **165. Procedure where non-compliance with demand and no court order in cases not involving security trust deed**
>
> (1) The person giving the demand under section 162 may enter in the register the financing change statement referred to in section 163 if the secured party—
>
> (a) Fails to comply with the demand within 15 working days after it is given; or
>
> (b) Fails, within 15 working days after the demand is given, to give to that person a court order maintaining the registration.
>
> (2) The Registrar must ensure that the secured party is given a notice stating that the financing change statement will be registered unless a court order maintaining the registration is served on the Registrar within 15 working days of the notice being given to the secured party.
>
> (3) The notice referred to in subsection (2) must be given to the secured party as soon as reasonably practicable after the financing change statement is entered in the register.

[13] Section 167 states what the secured party must do to preserve the registration of the security interest. It provides:

> **167 Secured party may obtain court order in cases not involving security trust deed**
>
> (1) At any time before the financing change statement referred to in section 163 is registered, the Court may, on application by the secured party, and if the Court is satisfied that none of the grounds for making a demand under section 162 exist, order that the registration—

(a) be maintained on any condition, and subject to sections 153 and 154, for any period of time; or

(b) be discharged or amended.

(2) The Court may make any other orders it thinks proper for the purpose of giving effect to an order under subsection (1).

(3) The Registrar must amend or discharge a registration of a financing statement in accordance with a court order made under subsection (1) as soon as reasonably practicable after receiving the order.

[14] The registration will only be maintained if the Court is satisfied that "none of the grounds for making a demand under s 162 exist." Section 162(d) states that a written demand can be given if "no security agreement exists between the parties". This is why, as discussed earlier, the issue is whether there is a valid security interest between Toyota and Mr Christie.

[15] There is, however, no indication as to the approach a Court must take when considering a demand. The Court must be "satisfied that none of the grounds for making a demand under s 162 exist", but to what degree must the Court be so satisfied? Should the Court in exercising its powers under s 167 make an order finally determinative of the issues in s 162, or should the Court approach such issues on a preliminary basis only? The issue arises here specifically as Ms Wong, counsel for the liquidators, submits that the Court should finally determine that Mr Christie has no interest in the vehicle, and that, therefore, Toyota no longer has an interest in it.

[16] Under s 167 a party seeks to maintain a registered interest and thereby have security and achieve priority over other unregistered interests. In this respect the procedure is similar to that invoked when an application is made to sustain a caveat under s 145A of the Land Transfer Act 1952. This similarity was noted by Winkelmann J in *Asset Traders Limited v Favas Sportscar World Limited* (2006) 3 NZCCLR 545 at [13], who applied the caveat approach. However, in *Jones v Auto Imports and Wholesale Ltd* HC WN CIV-2008-435-183 22 September 2008, Clifford J, the Court determined that no security interest existed on an apparently final basis (although the type of approach to be adopted was not argued)

[17] An application such as this is normally brought by way of originating application. Inevitably, given the time constraints, a hearing of a s 167 application will be the type of hearing that is best determined on the affidavits only. There may be third parties with an interest who have not been served. There may be disputed questions of fact and credibility issues. Such a hearing is not suited to a final determination of rights.

[18] I conclude that the tests that apply in respect of maintaining caveats under s 145A should where possible be applied where a party seeks to maintain registration, and the existence of a security interest is at issue. This means that:

a) The person seeking to maintain their registration has the onus of establishing a sufficient interest. This is the approach taken in caveat cases: *Castle Hill Run Limited v NZI Finance Limited* [1985] 2 NZLR 104 at 106.

b) The test is whether the person seeking to maintain the registration can establish a seriously arguable case that a security agreement exists between the relevant parties. The test of "reasonably arguable" is used in relation to caveat cases: *Sims v Lowe* [1988] 1 NZLR 656 at 660.

c) Such a summary procedure is unsuitable for the determination of disputed questions of fact. This is also the approach in relation to caveats: *Sims v Lowe* [1988] 1 NZLR 656 at 659-660.

d) The balance of convenience can be of relevance in exceptional cases, but does not have the same significance as it does in relation to an interim injunction hearing. As was stated in the caveat case of *Orams Marine (Auckland) Ltd v Ports of Auckland Ltd* (1984) 6 TCLR 88 at 92 (CA), after a review of the authorities:

> The appellant wishes to maintain its caveat. … The approach to this type of application has been settled by this Court in *Sims v Lowe*.

> Other cases in this Court … confirm that while consideration of the balance of convenience may be required in exceptional cases, once a reasonably arguable case has been established, justice will require the maintenance of the caveat.

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

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

Is there a security agreement between Toyota and Mr Christie?

[20] It is necessary to determine whether it is reasonably arguable that the third finance agreement created a security interest between Mr Christie and Toyota. There was no written agreement transferring ownership from Gateway to Mr Christie in 2008. Any agreement must, therefore, be only an oral agreement. However, there can be no doubt that an oral agreement for the transfer of a motor vehicle is valid. Section 5 of the Sale of Goods Act 1908 provides that a contract of sale of goods may be by way of word of mouth.

[21] When a shareholder of a company assumes ownership of an asset of that company when the company may be in financial difficulties, suspicion will immediately arise as to whether the transfer is bona fide, and whether in fact it may be either a sham or a transfer for the express purpose of defeating the interests of creditors.

[22] There was no evidence to support either assumption in relation to the transfer of the Landcruiser. The only valuation of the Landcruiser that is available indicates that by the time of the third finance agreement on 10 August 2008 it had depreciated to a value that was less than the amount of the Toyota advance. The “red book”

valuation that was produced by Toyota shows a value of $26,350.00 as a "good retail" price, whereas the amount owed was approximately $39,000.00.

[23] Mr Christie was examined under oath by the liquidators. Quite a number of questions, many of them leading, were put to him about the transfer of ownership. I do not propose going through an analysis of the exchange. On an overview, Mr Christie appears to have been labouring under the impression that in 2008 Toyota owned the motor vehicle, and that he was signing the agreement with Toyota directly as a lessee, rather than on behalf of the company to a finance agreement. This was to reflect the reality of the fact that as the guarantor he was the one who owed Toyota the money in any event.

[24] Mr Christie has since sworn an affidavit. In that affidavit he states on oath that there was a sale of Gateway's interest in the Landcruiser to him in his personal capacity. He says that a written sale and purchase agreement was not entered into, because that was never sought by Toyota. He also states, (and this does not appear to be in dispute), that he personally has made the monthly payments under the third finance agreement. He has also explained that the financial records of Gateway are poor, and that because of his involvement in a custody dispute, he allowed things to slip.

[25] The Court does not, of course, have to accept uncritically the assertions of a deponent in an application for interim relief such as this: *Eng Mee Yong v Letchumanan*[1980] AC 331 (PC). However, apart from the somewhat contradictory statements he made to the liquidators there was nothing inherently incredible or unbelievable about Mr Christie's statement. It may well have suited the parties better to have made him the principal debtor rather than the guarantor. Given the fact that there does not appear to have been any equity in the Landcruiser, no one was being cheated by the new arrangement. Indeed, if the liquidators succeed in their opposition to this application, it will be them and Gateway that achieve a windfall at the expense of Toyota, which is likely to lose the advance it has made.

[26] I conclude that it is seriously arguable that there is a security agreement between Mr Christie and Toyota.

[27] In relation to the balance of convenience, I note that it is clearly in favour of the maintenance of the registration. If it is not maintained the liquidators may take possession of the vehicle and may sell it. This may leave Toyota out of pocket and subsequent recovery could be difficult.

[28] I have no detailed financial information about the financial affairs of Gateway, or any undertaking offered by the liquidators. On the other hand, Toyota has filed of its own behest an undertaking as to damages in the form usually used for interim injunctions. This will mean that if Toyota fails, it will be liable for any loss suffered by the liquidators, should the Court subsequently be of the opinion that any loss has been sustained as a consequence of the granting of the order.

The way forward

[29] When the Court upholds a security interest, a Court will not invariably make an applicant issue substantive proceedings to prove its interest. On occasions where the Court has little doubt about the validity of a security interest, it might well be reluctant to require the secured party to take such an expensive step. Here, however, there is real doubt about the validity of that security interest. If Toyota had ensured that there was a written agreement transferring title to the Landcruiser from Gateway to Mr Christie before it entered the third finance agreement, no issue could have been taken with its interest. It did not. Here, in accordance with a practice that is common in relation to caveat cases, it is appropriate that an obligation be placed upon Toyota, that has the benefit of the maintenance of the registration, to issue proceedings so that the substantive issue can be determined.

[30] I therefore make the following orders:

a) The security interest in financing statement F7444SX1V4P9165D ("the financing statement") on the Personal Property Securities Register is maintained until further order of this Court.

b) The first and second respondents are to take no steps to attempt to discharge the financing statement until further order of this Court.

c) The orders are conditional on the applicant filing proceedings in this Court or the District Court within 14 days of the date hereof, seeking a declaration that a security agreement exists between Toyota and Mr Christie, as set out in the financing statement.

Costs

[31] Mr Christie's affidavit setting out his claim to an interest in the Landcruiser was only filed on the working day prior to the hearing. There is a serious question to be tried as to the validity of the security interest. In all the circumstances, I reserve costs.

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Asher J