IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-1759

BETWEEN	GLENMORGAN FARM LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Plaintiff
AND	NEW ZEALAND BLOODSTOCK LEASING LIMITED, NEW ZEALAND BLOODSTOCK FINANCE LIMITED AND NEW ZEALAND BLOODSTOCK PROGENY LIMITED Defendant

Hearing: July 2010

Counsel: M C Black and S W Schin for the plaintiff
P J Morgan QC and R A Edwards for the defendants

Judgment: 27 September 2010

JUDGMENT OF POTTER J

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 3 p.m. on 27 September 2010.

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Introduction

[1] These proceedings concern the stallion, Generous, and the alleged consequences for the plaintiff of the failure by the defendants to register under the Personal Properties Securities Act 1999 ("the Act") certain security agreements relating to Generous. The plaintiff, Glenmorgan Farms Limited, now in liquidation, claims that because the defendants failed to register, they could not deliver clear and unencumbered title and possession of Generous to Glenmorgan which resulted in a total failure of consideration. The plaintiff seeks to recover all moneys paid or credited under the security agreements. Glenmorgan also claims that the defendants wrongfully repossessed Generous and seeks to recover from the defendants the value of Generous as damages for trespass and conversion.

[2] The defendants, while admitting they did not register under the Act, deny the plaintiff's claims. They counterclaim for the balance owing under the relevant security agreement.

Parties

[3] The plaintiff, Glenmorgan, previously carried on business at Auckland as a breeder of equine bloodstock and for this purpose obtained stallions and mares for the purpose of producing progeny for sale. The plaintiff is referred to in this judgment as "Glenmorgan".

[4] The defendants are all subsidiaries of New Zealand Bloodstock Holdings Limited who are in the business of leasing, financing, insuring, auctioneering and selling bloodstock, but do not own bloodstock. In this judgment they are referred to respectively as "NZB Leasing", "NZB Finance" and "NZB Progeny".

Background

[5] On 17 November 1999, before Generous came on the scene, Glenmorgan entered into a debenture in favour of SH Lock NZ Limited ("Lock") to secure advances. It was a floating charge registered under the Companies Act 1993 on 19 November 1999.

[6] In August 2001 Glenmorgan arranged with NZB Leasing and NZB Finance to purchase Generous from Japan Bloodhorse Breeders Association. Glenmorgan then entered a lease to purchase agreement dated 31 August 2001 with NZB Leasing ("LPA1"). LPA1 recited that Glenmorgan had agreed to lease Generous from NZB Leasing and then to purchase the stallion upon the terms and conditions set out in LPA1. The total rental payable, $3,110,710.23 amounts and dates for each rental payment and the residual value of $275,605 payable on 31 July 2004 when the lease terminated, were specified in the schedule to the LPA1. On payment of all money due under LPA1 title to Generous would become vested in Glenmorgan. Glenmorgan took possession of Generous.

[7] On 1 May 2002 the Act came into force.

[8] Glenmorgan did not meet the payments due under LPA1. On 28 June 2002 Glenmorgan and NZB Leasing entered into a second lease to purchase agreement ("LPA2"). The lease and residual payments under LPA1 were restructured under LPA2. The residual value of $335,869.00 was payable on the termination date, 28 March 2004.

[9] On the same date, 28 June 2002, NZB Leasing assigned to NZB Finance the rights, including rental payments, and obligations under LPA2 and assigned to NZB Progeny the right to receive the residual payment and all the benefits relating to title and ownership of Generous.

[10] The transitional provisions of the Act provided a period of six months from 1 May 2002 during which registration of LPA1/LPA2 could have been achieved to

perfect NZB Leasing's security interest in Generous, under the Act. The defendants did not register LPA1 or LPA2. Lock did re-register its debenture under the Act.

[11] Glenmorgan paid $1m of the payment of $1,372,795.78 due under LPA2 on 28 November 2002, but made no further payments under LPA2.

[12] On 22 August 2003 Glenmorgan entered into a Refinancing Agreement and a Contract for Current Advances with NZB Finance. The Refinancing Agreement recorded that the amount owing by Glenmorgan under LPA2 as at 22 August 2003 was $2,652,545.35. NZB Finance agreed to advance the shortfall in payments due under LPA2, plus interest and charges, upon the terms in the Contract for Current Advances. If such sums were advanced pursuant to the Contract for Current Advances "... then Glenmorgan undertakes to apply same to meeting its obligations under the lease to purchase agreement", and authorised NZB Finance to do so on its behalf.

[13] In addition to Generous, seven mares provided collateral under the Contract for Current Advances. Four guarantors by the name of Jenkins, shareholders or former shareholders of Glenmorgan, guaranteed the obligations of Glenmorgan under the Refinancing Agreement and the Contract for Current Advances.

[14] Pursuant to the agreements, advances were made and applied by NZB Finance and payments were completed under LPA2 on 28 March 2004. On completion of the payments, in terms of LPA2, title and property in Generous passed to Glenmorgan. (It appears the amount paid under LPA2 was $1,593 short of the total required. I refer to this aspect later in this judgment.)

[15] The Refinancing Agreement required instalment payments by Glenmorgan on 28 November 2003, 28 March 2004 and 28 November 2004 with the balance due under the Contract for Current Advances to be paid on 28 March 2005. Glenmorgan defaulted on the first two payments. On 25 June 2004 NZB Finance made demand on Glenmorgan for payments due. Payment was required to be made by 5 July 2004. Glenmorgan failed to make payment. On 6 July 2004 NZB Finance and NZB Leasing gave notice terminating the financing agreements. They advised that upon

termination all moneys under the agreements would become due and payable and that the amount owing as at 30 June 2004 was $2,400,251.97 exclusive of costs and expenses. They noted that penalty interest was accruing on that sum.

[16] On 7 July 2004 NZB Finance and NZB Leasing took possession of Generous overseas, and transported the stallion to the Westbury Stud in New Zealand.

[17] On 23 July 2004 Lock appointed receivers under its debenture.

[18] On 9 March 2005 liquidators of Glenmorgan were appointed.

[19] In June 2005 Generous was sold for the sum of $1,013,153.

Pleadings

First cause of action: Glenmorgan's claim to recovery of moneys paid upon the defendants' loss of title under the Hire Purchase Act 1971

[20] The plaintiff pleads in its amended statement of claim that:

- LPA1 and LPA2 constitute hire purchase agreements which are subject to the Hire Purchase Act 1971 ("HP Act");

- Under the implied statutory terms and conditions as to title and possession in the HP Act and also the express terms and conditions of LPA2 and the financing agreements (the Refinancing Agreement and the Contract for Current Advances) the plaintiff's right to title and possession in Generous would be obtained, preserved, perfected and provided to Glenmorgan when property was to pass to Glenmorgan, and that payments made by Glenmorgan would ensure that the defendants would have the right to pass title and property in Generous;

- It was a written term or condition in LPA2 that registration of a security interest under the Act in respect of Generous would be effected under the

Act to ensure that title, property and right to possession would be preserved, perfected and provided to Glenmorgan;

- The plaintiff made payments pursuant to the leasing and financing agreements on the express contractual, and/or implied statutory hire purchase provisions, that it would ultimately obtain title to Generous.

- The defendants defaulted in their obligations to take the proper and necessary steps to obtain, perfect and register title of their security in Generous (and the other bloodstock) under the Act, and thus "lost or forfeited title, ownership and the right to possession of Generous" and accordingly were unable to provide title, property and possession in Generous to Glenmorgan. It is further pleaded that on 6 July 2004 the defendants wrongfully took possession and control of Generous when they had no title, property or legal right to possession of the stallion.

- The failure by the defendants to register under the Act, and preserve, maintain and perfect title to Generous "constituted a total failure of consideration of the security and financing agreements and hire purchase agreement and LPA2".

[21] The plaintiff claims it is entitled to recover all sums paid and received by the defendants for breach of contract and in *quasi-contract* and to the return of all moneys paid under LPA2 or the hire purchase agreement, being moneys that were paid on a consideration which has wholly failed. The total claimed is $5,988,035.80 which includes instalments actually paid by Glenmorgan ($1,547,334.68), instalments paid through advances made by NZB Finance under the Refinancing Agreement ($2,400,953.36), and interest on both sums at the Judicature Act rate of 7.5% to 30 June 2010.

Second cause of action: Trespass - Conversion

[22] Glenmorgan pleads that the taking by the defendants of possession of Generous on 6 July 2004 constituted a trespass and/or wrongful conversion of

Generous and Glenmorgan's right to possession of Generous, because the defendants had "lost or forfeited" to Lock right, title or interest in Generous by failing to register the security under the Act. The plaintiff claims loss or damage including the value of Generous ($3-4 million) and loss of past and future earnings.

Defence to first cause of action

[23] The defendants deny that any or all of the agreements were agreements under the HP Act. They say further that the obligations under LPA1 and LPA2 were performed and extinguished by payment of the amount owing under LPA2 on 28 March 2004, which discharged any liability of Glenmorgan to the defendants under LPA2. They say from that date NZB Finance had only a security interest established by the Contract for Current Advances. That security interest ranked behind the Lock debenture and accordingly any defect in Glenmorgan's title, property or ownership was due to the pre-existing debenture granted by Glenmorgan to Lock.

[24] They deny there was any express condition or implied statutory hire purchase provision which imposed on the defendants any obligation to register their security interest in Generous and the other bloodstock and deny that the failure to register had the consequences alleged by Glenmorgan.

[25] They say further that if there was an obligation to provide title to Generous to Glenmorgan, such obligation never arose as Glenmorgan had first to discharge its obligations under the leasing and financing agreements, which it failed to do.

Defence to second cause of action

[26] The defendants deny that Glenmorgan suffered any loss by the repossession. They say the Contract for Current Advances always ranked behind the Lock debenture under the Act, and the proceeds of sale of Generous and other bloodstock and all earnings of Generous were credited to the plaintiff.

Affirmative defences

[27] By way of affirmative defence, the defendants plead that pursuant to the terms of LPA2 and the Contract for Current Advances Glenmorgan covenanted that NZB Leasing would obtain good title to Generous (LPA2) and that it had good title to Generous free of prior encumbrances (Contract for Current Advances); that the plaintiff would not encumber Generous (LPA2) and that Generous was not subject to any security (Contract for Current Advances). It is pleaded that Glenmorgan breached those terms and has no claim against the defendants in those circumstances.

[28] By way of a further affirmative defence, the defendants plead that:

- LPA2 was extinguished by performance on 28 March 2004;
- The Contract for Current Advances was the only operative agreement from that date;
- The Contract for Current Advances was not a "purchase money security interest" ("pmsi") within the meaning of the Act;
- It ranked behind the prior security of Lock so that failure to register LPA2 and the Contract for Current Advances did not result in loss of priority;
- LPA1, LPA2, the Refinancing Agreement and the Contract for Current Advances were not so interconnected as to form one agreement or transaction.

[29] The defendants further plead issue estoppel arising from determinations in *New Zealand Bloodstock Finance Limited v Jenkins*[1] and *Jenkins v New Zealand Bloodstock Finance Ltd*[2] on the basis that Glenmorgan is privy to the Jenkins as

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1 *New Zealand Bloodstock Finance Ltd v Jenkins* HC Auckland CIV-2004-404-5795, 19 April 2007.

2 *Jenkins v New Zealand Bloodstock Finance Ltd* [2008] NZCA 413.

parties to that litigation and is estopped from claiming to the contrary in this litigation.

Alleged loss of title by the defendants under the Hire Purchase Act

[30] The following issues arise:

a) Is LPA2 a hire purchase agreement under the HP Act (with the statutory protections as to title implied by the HP Act)?

b) What is the effect of LPA2 being repaid on 28 March 2004? Did LPA2 remain operative or was it extinguished?

c) If LPA2 was extinguished, what were the contractual rights of Glenmorgan to title to Generous under the Refinancing Agreement and the Contract for Current Advances?

d) What was the effect of NZB Finance's failure to register LPA2 under the Act?

e) Did failure to register result in "loss of title" to Generous? If so, who got the title?

f) Did NZ Bloodstock's failure to register LPA2 under the Act result in a total failure of consideration as claimed by Glenmorgan?

a) ***Is LPA2 a hire purchase agreement under the HP Act?***

b) ***What was the effect of LPA2 being repaid on 28 March 2004? Did LPA2 remain operative or was it extinguished?***

[31] The plaintiff claims that LPA1 and LPA2 are hire purchase agreements under the HP Act. The plaintiff relies on the terms and conditions as to title and possession it says are implied by the HP Act and the Credit (Repossession) Act 1997, including that Generous would be free from any charge or encumbrance in favour of any third

party and that NZB Leasing would have the right to sell Generous at the time when property was to pass: s 11 HP Act.

[32] However, if the effect of LPA2 (which was in substitution for LPA1) being repaid on 28 March 2004 was to extinguish LPA2, the first issue becomes redundant. There is no dispute that the Refinancing Agreement and the Contract for Current Advances were not hire purchase agreements under the HP Act (nor is it disputed that the Refinancing Agreement and the Contract for Current Advances were not "purchase money security interests" which would be accorded super priority if registered under the Act, an aspect to which I will return).

[33] I propose therefore to first consider the second issue.

[34] The Refinancing Agreement dated 22 August 2003 was made between NZB Finance, Glenmorgan, and the Jenkins as guarantors. It recited that LPA2 has been assigned by NZB Leasing to NZB Finance, and that Glenmorgan is in arrears under LPA2 and may not be able to make future payments. It also recited that NZB Finance has agreed to assist upon Glenmorgan entering into the Refinancing Agreement and the Contract for Current Advances, and the guarantors guaranteeing Glenmorgan's obligations and confirming their guarantees of Glenmorgan's obligations under LPA2.

[35] The Refinancing Agreement provided that the parties confirmed LPA2 in every respect and their obligations thereunder, and also confirmed the amount owing under LPA2 at 22 August 2003 as $2,652,545.35.

[36] The Refinancing Agreement then stipulated for two future payments by Glenmorgan in reduction of its commitments:

a) $1m by 28 November 2003 (acknowledging that this would be a shortfall by $372,795.78 in the amount due under LPA2 on 28 November 2002).

b) $350,000 by 28 March 2004 (acknowledging a shortfall of $237,142 in the amount due of $587,142).

[37] Subject to payment of these sums NZB Finance agreed to advance the shortfall plus interest and other charges upon the terms of the Contract for Current Advances. Glenmorgan undertook to apply any sums advanced under the Contract for Current Advances to meeting its obligations under LPA2 and authorised NZB Finance to do so on its behalf.

[38] NZB Finance agreed that provided the specified payments (being those due on 28 November 2003 and 28 March 2004 referred to above), $1m due by 28 November 2004 and the balance owing under the Contract for Current Advances due by 28 March 2005 were paid, it would not seek early repayment, despite the Contract for Current Advances being "upon demand". However, if Glenmorgan defaulted in any payment or under the agreements, the whole of the amount due under the Contract for Current Advances was to become forthwith due and payable and NZB Finance was entitled to exercise its rights under LPA2, the Contract for Current Advances, the Refinancing Agreement or at law.

[39] The Refinancing Agreement included various conditions relating to Generous for the 2004 and 2005 breeding seasons and provided for income derived to be applied to Glenmorgan's debt to NZB Finance.

[40] The Contract for Current Advances was made between the same parties and executed at the same time as the Refinancing Agreement. It provided for a credit (facility) limit of $1,900,000. Glenmorgan granted to NZB Finance a security interest under the Act in the collateral, which comprised Generous and seven mares described in the schedule to the Contract for Current Advances.

[41] The Contract for Current Advances further provided by clause 12(a):

> The Borrower undertakes that the whole of the moneys hereby advanced to it under this Facility will be used to pay arrears under or any moneys which from time to time be owing by the Borrower to NZB Leasing Limited under the Lease to Purchase Agreement relating to the horse "Generous (IRE)" between NZB Leasing and Glenmorgan Farm Limited dated the 28th day of June 2002 (the benefit of which contract has been subsequently assigned by

> NZB Leasing Limited to NZB Finance Limited) and the Borrower hereby authorises the creditor to apply all such moneys to this purpose.

[42] These agreements and the legal consequences of them were considered and determined by Winkelmann J in *New Zealand Bloodstock Leasing Ltd v Jenkins*[3]. In that case NZB Finance obtained judgment against the Jenkins as guarantors of the sums owing by Glenmorgan under the Contract for Current Advances. The Jenkins unsuccessfully counterclaimed for essentially the same damage for which Glenmorgan claims in this proceeding, although Glenmorgan was not a party to that proceeding.

[43] Winkelmann J analysed the situation as follows:

> [48] ... The Refinancing Agreement confirmed that LPA2 and the Leasing Guarantees remained in full force and effect, and it is clear that the refinancing did not immediately effect a repayment of the amounts outstanding under LPA2. Rather, NZB Finance progressively made advances to Glenmorgan to enable it to meet its obligations under LPA2. Mr Gwyn confirmed that NZB Finance appropriated the advances to repayment of the LPA2 debt as it was authorised to do. In reality this was done by way of accounting entry in the records of NZB Finance. As at 28 March 2004 Glenmorgan's debt under LPA2 was thereby extinguished, and replaced with a debt to NZB Finance under the Contract for Current Advances.
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> . . .
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> [52] ... the basic structure of the refinancing transaction [was]; the LPA2 debts were not immediately extinguished, over time NZB Finance would advance the money needed by Glenmorgan to meet its obligations under LPA2, and until full repayment was made the LPA2 obligations remained. Cross default provisions may be necessary where for a period of time multiple contracts remain on foot between the parties. As Mr Gwyn confirmed, NZB Finance would not wish to remain bound to perform its obligations under one contract, if Glenmorgan was in default under another. Clause 2(a) of the Contract for Current Advances provides that the financial accommodation is made on the terms and conditions set out in that agreement and subject to the terms of the Refinancing Agreement. The provisions of LPA2 are not incorporated into the refinancing transactions.
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> [53] The provisions relied upon by the defendants therefore do not evidence any intention on the part of the parties to merge the rights and obligations under the various agreements. I am satisfied that the refinancing took effect in accordance with the express provisions of

[3] *New Zealand Bloodstock Leasing Ltd v Jenkins* HC Auckland CIV-2004-404-5795, 19 April 2007.

the refinancing documentation. The Contract for Current Advances and Finance Guarantees created separate rights and obligations to those recorded in LPA2.

. . .

[55] ... the refinancing is not a simple restructuring of a loan. The advances made pursuant to the refinancing were intended to be, and were applied over time to performance of Glenmorgan's payment obligations under LPA2. Glenmorgan agreed to the provision of separate security for the advances made by reason of the refinancing. What was plainly envisaged was that LPA2 would proceed through to completion, Glenmorgan would acquire title in Generous, and NZB Finance would have a security interest in Glenmorgan's rights to Generous, securing the amounts outstanding under the Contract for Current Advances. I am satisfied that this negatives any intention to retain the LPA2 security interest after payment of all amounts outstanding under it with advances under the Contract for Current Advances. The LPA2 purchase money security interest was therefore extinguished by March 2004.

. . .

[60] The parties to the Contract for Current Advances clearly intended to grant a security interest in Generous as a security for the advances made under that contract, and I consider that the provisions of that contract were sufficient to do so, although not a purchase money security interest, and not a perfected security interest due to the absence of registration.

. . .

[85] (c) ... the security interest created by LPA2 was not extinguished by the refinancing, but on each draw down by Glenmorgan under the Contract for Current Advances, the extent of the security interest was pro tanto reduced. By March 2004, the effect of the refinancing was to extinguish the security interest under LPA2, which NZB Finance held in its capacity as assignee ...

(d) NZB Finance acquired a separate security interest in Generous, and perhaps in the Schedule Bloodstock. NZB Finance did not perfect those security interests by registration. Even if it had, S H Lock would still have had a prior ranking security interest in Generous and the Schedule Bloodstock ...

[86] It follows that it was NZB Leasing's failure to register the security interest created by LPA2 that resulted in the loss of priority for its security interest in Generous. NZB Finance, as assignee, simply took the security interest subject to its existing priority, but that security interest was in any event extinguished by repayment. NZB Finance did fail to register the security interest in Generous created by the Contract for Current Advances, but that did not result in any loss of priority. On the face of it, therefore, there was no failure by

> NZB Finance to maintain securities in relation to the refinancing that prejudiced the guarantors in any way.

[44] This issue was the subject of an appeal from the judgment of Winkelmann J. The Court of Appeal in *Jenkins v New Zealand Bloodstock Finance Ltd*[4] identified the fundamental issue on appeal as the scope and reach of a lease to purchase agreement entered into between NZB Finance and Glenmorgan for which the appellants were guarantors. The Court identified the competing contentions: for the appellants that the lease to purchase agreement was, and remained at all material times, an operative hire purchase agreement, thereby engaging the application of the HP Act; the respondents claiming that the agreement was extinguished and supplanted by the Refinancing Agreement and the Contract for Current Advances.

[45] The Court of Appeal held:

> [52] In short, the RA [Refinancing Agreement] and the CCA [Contract for Current Advances] constituted a discrete refinancing arrangement, entered into so that Glenmorgan could meet its obligations under the LPA2. However, once those had been met, LPA2 ceased to have effect. We reject the submission that to distinguish the RA and the CCA from their progenitor agreement, LPA2, is to favour form over substance. Once LPA2 had been extinguished, the RA and CCA were not simply formally distinct from LPA2. They were substantively and functionally distinct, and intended to be so. That is not altered simply because they were entered into in order to facilitate payment of LPA2. Nor is it altered because the parties' solicitors in correspondence may have used language suggestive of an interlinking between LPA2 and the RA and CCA. Confusion or obfuscation on the part of legal advisors does not change the true nature of a contractual arrangement.
>
> [53] The waters in this case are somewhat muddied by the situation that existed in the interim period between August 2003, when the RA and CCA were signed, and 28 March 2004, when LPA2 was extinguished by Glenmorgan's final payment. We have noted that the cross-over period saw the co-existence of two apparently mutually exclusive ownership frameworks. Under LPA2, Generous was stated to be vested in the respondents until payment of the residual sum. Under the RA and CCA, Generous was stated to be the property of Glenmorgan, subject to financiers' security interests. There was therefore a "title-tension", from which it might be inferred that the two contractual arrangements were intended to be read together so as to avoid an absurd bundle of incompatible property interests.

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[4] *Jenkins v New Zealand Bloodstock Finance Ltd* [2008] NZCA 413.

> [54] However, even if between August 2003 and 28 March 2004 the character of LPA2 was that of a hire purchase agreement and that character was absorbed by the RA and CCA, we are satisfied that Winkelmann J was correct when she held that as of 28 March 2004 LPA2 was extinguished. From that date, the relatedness or otherwise of LPA2 to the RA and CCA during that interim period ceased to be relevant. From that date, the appellants' obligations to NZB Finance were governed solely by the refinancing agreements.
>
> . . .
>
> [56] Whatever consequences might have attached had there been a breakdown in relations between Glenmorgan and NZB Finance between August 2003 and March 2004, when both LPA2 and the refinancing agreements were in contemporaneous operation, evaporated once LPA2 was extinguished.
>
> [57] After 28 March 2004, Glenmorgan had title to Generous as a result of payment of the final instalment under LPA2.

[46] I agree with and adopt those determinations. They relate to the same documentation and transactions as are at issue in this case, albeit that in this proceeding Glenmorgan seeks to recover losses it claims to have suffered, while in the *Jenkins* proceedings NZB Leasing and NZB Finance were seeking to recover from the guarantors of Glenmorgan, their losses arising from the defaults of Glenmorgan.

[47] The lease to purchase arrangement evidenced by LPA1, which was substituted by LPA2, was in nature and intent separate and distinct from the loan contract entered into on 22 August 2003 after Glenmorgan defaulted under LPA2 and indicated inability to meet future payments. It would have been open to the parties to enter into a third lease to purchase agreement if they had intended to continue the lease to purchase arrangements evidenced by LPA1 and LPA2, but that they did not do. They entered into an entirely distinct security under which there was a facility limit of $1,900,000, and for the advances to be made, Generous, and in addition seven mares who were not involved in any way in the previous lease to purchase agreements, provided security and were accordingly listed in the schedule to the Contract for Current Advances. Glenmorgan already owned those brood mares so was in a position to offer them as additional security for the further facilities made available by NZB Finance in terms of the Contract for Current Advances. The Contract for Current Advances was an ordinary security interest. It

did not fall within the definition of a "purchase money security interest" under the Act which LPA2 did. That is common ground.

[48] The crossover or area of commonality between LPA2 and the Contract for Current Advances was the special condition recorded in the Contract for Current Advances, that advances made by NZB Finance under the Contract for Current Advances would be applied to reduce and repay the indebtedness of Glenmorgan under LPA2. That was done. LPA2 was repaid and Glenmorgan's debt under LPA2 was extinguished. Title in Generous passed to Glenmorgan but remained subject as security (along with the seven mares) under the Contract for Current Advances, until continuing defaults by Glenmorgan caused NZB Finance to make demand on 25 June 2004.

[49] The confirmation by the parties in the Refinancing Agreement of LPA2 "in every respect and their obligations thereunder" and their confirmation of the amount owing under LPA2 at 22 August 2003, is entirely consistent with the fact that LPA2 had a continuing existence and relevance until the amount owing under it was repaid in accordance with the terms, conditions and arrangements agreed in the Contract for Current Advances. But after the amount owing under LPA2 was repaid it had no continuing existence; it was discharged and extinguished.

[50] Thus, any rights Glenmorgan may have had under LPA2 by virtue of the HP Act ceased to have effect from and after 28 March 2004. Thereafter Glenmorgan was dependent on its rights and entitlements, and subject to the obligations under the Contract for Current Advances.

[51] I turn to consider the pleading of the plaintiff at paragraph 10(c) of the amended statement of claim that the amount confirmed by the parties in the Refinancing Agreement as at 22 August 2003 was $2,652,545.35 and that the amount paid by the plaintiff as at 28 March 2004 was $2,650,952 leaving a balance due under LPA2 of $1,593,000. The contention is that the amount owing under LPA2 was not paid and satisfied in full.

[52] Mr Ian Gwyn, the leasing and finance manager of New Zealand Bloodstock Limited, described how payments were advanced by NZB Finance under the Contract for Current Advances to make good shortfalls in payments due by Glenmorgan under LPA2. He said there was a final instalment due on 28 March 2004 of $251,273 and a residual payment due on that date of $335,869. He said that no money was paid by Glenmorgan so NZB Finance advanced those funds to Glenmorgan "... which then paid out all money owing under LPA2". He said that all these transactions were reflected in the NZB Finance statements regularly produced and sent to Glenmorgan.

[53] Mr Gerald Rea, one of the liquidators of Glenmorgan, set out in his witness statement the instalments paid by Glenmorgan and the instalments funded pursuant to the Refinancing Agreement. He said the total of all the instalments so paid, repaid LPA2.

[54] The payments he records are consistent with those identified by Mr Gwyn. It seems clear that, as at 28 March 2004, both parties regarded the full amount owing under LPA2 to have been repaid and Glenmorgan's liability under LPA2 to have been discharged. On the evidence, there was accord and satisfaction. In any event, if there was a discrepancy of $1,593,000, in the overall scheme of things I regard it, as did the Court of Appeal, as "immaterial".[5]

[55] I also reject the plaintiff's submission that the defendants are estopped from contending that LPA2 was extinguished because NZB Leasing continued to assert that it had title over Generous.

[56] The plaintiff submits that "as an aid to the interpretation and application of both the Refinancing Agreement and LPA2" an estoppel operates against the defendants in arguing that LPA2 was extinguished. The estoppel is said to arise because NZB Leasing continued to assert that it had title over Generous after repayment of LPA2, its conduct following its repossession of Generous, and its reliance on LPA2 in the *Waller v NZ Bloodstock Ltd*[6] proceedings.

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5 *Jenkins v New Zealand Bloodstock Finance Ltd* [2008] NZCA 413 at [61].
6 *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629.

[57] It is true the letter the solicitor for the defendants sent on 6 July 2004 to Glenmorgan giving notice of the termination of the financing agreements and repossession of Generous, referred to the Refinancing Agreement and the Contract for Current Advances, and also to LPA2. Other correspondence referred in a similar manner to the three agreements, including LPA2, at around this time. It is also correct that in the *Waller* proceedings, which determined the priorities in security interests between Lock and the defendants, reliance was placed by the defendants on claimed rights to possession of Generous under LPA2. However, there has been a lot of water under the bridge since those positions were taken. The subsequent proceedings in the *Jenkins* litigation, both in the High Court and the Court of Appeal, determined the legal consequences of the documentation entered into by Glenmorgan with the defendants. As I have previously concluded, the legal consequences are clear from the written agreements voluntarily entered into by the parties. Consequently the alleged estoppel is not an aid to the interpretation of LPA2, the Refinancing Agreement and the Contract for Current Advances. The intention of the parties is clear from the documentation itself. In *Vector Gas Ltd v Bay of Plenty Energy Ltd*[7] McGrath J said in relation to the standard required to establish an estoppel such as that alleged here by the plaintiff:[8]

> I accept that where lawyers are involved in framing contractual terms, strong and unequivocal evidence is required to warrant an inference of a common understanding that is inconsistent with what is expressly recorded in their contract.

[58] He continued:[9]

> ... the Court should I believe go beyond the contract itself only to resolve a relevant ambiguity or for the purpose of addressing issues of commercial sense or estoppel. To do so in other situations is not only unnecessary but also undesirable because it may, through the introduction of extrinsic material, create uncertainty in the interpretation of a contract which is intrinsically unambiguous.

[59] That is precisely the situation here. As Winkelmann J said in *Jenkins:*[10]

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7 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 at [96].
8 At [96].
9 At [127].
10 *New Zealand Bloodstock Leasing Ltd v Jenkins* HC Auckland CIV-2004-404-5795, 19 April 2007 at [93].

> There can be no doubt that there has been a significant degree of confusion on the part of the legal advisors involved in the enforcement phase, both for NZB Finance and the guarantors, as to the effect of the various transactions. However, the fact that correspondence and pleadings include reference to LPA2 cannot revive that agreement.

She rejected the argument that NZB Finance was precluded by prior conduct, from pursuing its claim relying on the Contract for Current Advances and the guarantees of Glenmorgan's obligations under that agreement.

[60] The significant degree of confusion that reigned at the enforcement phase relating to the legal consequences of the various agreements, falls well short of providing "strong and unequivocal evidence" to support a finding there was a common understanding that LPA2 continued in effect to govern the rights and obligations of the parties beyond 28 March 2004. I reject the plaintiff's submission on this aspect.

[61] Having held that LPA2 was effectively extinguished upon repayment on 28 March 2004, it is unnecessary for me to determine whether it was a hire purchase agreement. As the Court of Appeal held in *Jenkins*,[11] from the time of LPA2's discharge, any hire purchase element disappeared from the remaining contractual arrangements.

(c) ***If LPA2 was extinguished, what were the contractual rights of Glenmorgan to title to Generous under the Refinancing Agreement and the Contract for Current Advances?***

[62] Once the amount due under LPA2 was repaid title to Generous passed to Glenmorgan pursuant to LPA2. For three years Glenmorgan had enjoyed possession of Generous and had derived income from standing the stallion. As at 28 March 2004 Glenmorgan obtained title in Generous, but Generous was secured first to Lock under the 1999 debenture and by a subsequent charge to NZB Finance under the Contract for Current Advances. (NZB Finance could have reversed the priorities by registering the Contract for Current Advances under the Act, but failed to do so.) If Glenmorgan had repaid NZB Finance in accordance with the terms and conditions of

[11] At [44].

the Contract for Current Advances then title to Generous would have been free of the NZB Finance security, but Lock would have remained as a secured creditor with a first charge over Generous. However, Glenmorgan defaulted under both securities resulting in enforcement action by Lock and NZB Finance.

[63] And by reason of the prior debenture granted to Lock, Glenmorgan was in breach of clauses 8(b) and 8(h) of the Contract for Current Advances which provided:

> (b) The Borrower (Glenmorgan) owns possesses and has rights to all Collateral presently held and will lawfully own possess and have rights to property to be acquired and which is or to be the subject of the security interest hereby created and has good title thereto free of all prior security interests, charges, encumbrances and liens save as are consented to in writing by the Creditor and the Borrower has fully and accurately disclosed to the Creditor the locations, business operations and records of the Collateral and the Borrower.
>
> (h) The Borrower warrants that the bloodstock outlined in the Schedule as amended from time to time are not subject to any debenture, mortgage, charge or other security of any kind whatsoever other than as disclosed to and approved by the Creditor in writing in advance.

[64] When it entered into the Contract for Current Advances and charged Generous and the seven brood mares listed in the schedule, Glenmorgan was not in a position to give the representations and warranties in clauses 8(b) and 8(h) of the Contract for Current Advances to NZB Finance, because of the prior debenture to Lock.

(d) ***What was the effect of NZB Finance's failure to register LPA2 under the Act?***

[65] NZB Finance did not register LPA2 under the Act. It could have done so and thereby perfected its security and obtained priority over the Lock debenture. The Act came into force on 1 May 2002. At that point LPA1 was in existence. LPA2 came into existence on 28 June 2002. The transitional provisions under the Act in s 198 provided a period of six months to enable registration to perfect an unperfected security interest.

[66] It is common ground that LPA1 and LPA2 each constituted a purchase money security interest ("pmsi") under the Act being in terms of the definition of pmsi:

> (3) The interest of a lessor of goods under a lease for a term of not more than 1 year.

[67] Had NZB Finance registered LPA2, or successively LPA1 and LPA2, it would have obtained the priority accorded by the Act for a pmsi perfected as a security interest, but by failing to register it lost priority to Lock. This was the effect of the judgment in *Waller v New Zealand Bloodstock Ltd*.[12] The Court of Appeal, confirming the High Court judgment, held that while apart from the provisions of the Act, in particular s 40(3), Glenmorgan had no rights in Generous under LPA2:[13]

> With effect from that date s 40(3) created new "rights in goods" in favour of Glenmorgan. So Glenmorgan's rights did not remain the same. Such "rights" in our view fall clearly within the scope of the charging clause [in the Lock debenture], which embraces that part of Glenmorgan's "business undertaking" comprising the leasehold interest in the stallion as a revenue source which constitutes "after-acquired property". It would be difficult to find language more apt to embrace whatever security may be available than that contained in the charging clause. Since that leasehold interest constitutes "rights in goods", Lock's security interest attaches to the stallion (s 40(1)).

[68] Although LPA2 provided for title and property in Generous to remain with NZB Finance until payment was completed in terms of the lease to purchase agreement, with effect from 1 May 2002 when the Act came into force, Glenmorgan acquired rights in Generous by virtue of s 40(3). This bundle of rights was after-acquired property which was charged to Lock under the Lock debenture. The Lock debenture took priority over the NZB Finance security interest because Lock had registered the debenture whereas NZB Finance failed to perfect its security interest by registration.

[69] The effect of registration of LPA1/LPA2 by NZB Leasing/NZB Finance concerned competing priorities. Prior to the Act coming into force Lock held a first charge and NZB Leasing/NZB Finance held a subsequent charge. With the passage

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[12] *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629.
[13] At [64].

of the Act, NZB Leasing/NZB Finance could have changed that priority by registration. Because it failed to register, the priorities remained the same; they never changed. NZB Finance did not have the opportunity to achieve a change in priorities by registration of the Contract for Current Advances. It is common ground that it was not a pmsi that would have been accorded by the Act super priority status on registration. The Contract for Current Advances was simply a security which ranked behind the prior security interest of Lock under its debenture.

[70] It was not an express or implied term of LPA1 or LPA2 that NZB Leasing/NZB Finance would obtain, preserve, perfect and provide to Glenmorgan title and property to Generous (and any other bloodstock) as claimed by Glenmorgan. Not only was there no express or implied obligation, but the possibility to do so was put beyond the control of NZB Leasing/NZB Finance by the prior charge created by Glenmorgan in favour of Lock. Again I endorse and adopt the findings of Winkelmann J in the *Jenkins* case:[14]

> [108] It cannot be seriously argued however that NZB Leasing owed Glenmorgan a contractual duty to perfect its security interest in Generous to prevent Glenmorgan creating a prior ranking security interest in it. Title was retained by NZB Leasing to provide it with security, not to constitute it custodian of title for the benefit of Glenmorgan and with the task of preventing Glenmorgan itself encumbering the asset. If the parties had been asked at the time of entering into LPA1 or LPA2, "does NZB Leasing have a duty to prevent Glenmorgan creating prior ranking charges over Generous?" they would most certainly both have replied no, although acknowledging a contractual duty on Glenmorgan to refrain from encumbering the horse. Indeed, by clause 5(v) of LPA2, Glenmorgan expressly covenanted not to:
>
> > Mortgage charge or encumber the Animal without the prior consent of the Lessor … and not to assign mortgage charge or encumber the Lessee's interest as Lessee hereunder.
>
> [109] The implication of such a term was therefore not necessary to provide NZB Leasing with the security it had contracted for. The implication of such a term was also not necessary to enable NZB Leasing to convey title at the end of the agreement. At the end of LPA2, on performance by Glenmorgan of all its obligations, NZB Leasing was in a position to convey title, as it was contractually

[14] *New Zealand Bloodstock Leasing Ltd v* Jenkins HC Auckland CIV-2004-404-5795, 19 April 2007 at [108]-[109].

> obliged to do, notwithstanding the failure to register. Although the title conveyed was or would have been subject to any other security interests that Glenmorgan had created, that was always going to be the case, irrespective of any actions NZB Leasing might have taken. Registration of NZB Leasing's security interest would have preserved its priority but would not have prevented S H Lock also having a security interest under the terms of the Act.

[71] In relation to the Contract for Current Advances Winkelmann J held:[15]

> [112] ... The Contract for Current Advances was a separate transaction, involving no more than the provision of finance, and the associated taking of security for that finance. NZB Finance had no obligation under the contract to pass title to Generous to Glenmorgan. Although Glenmorgan agreed to grant a security interest in Generous and the Schedule Bloodstock to NZB Finance, that provision was clearly included for the benefit of NZB Finance. NZB Finance undertook no obligation to perfect its security interest.

(e) ***Did failure to register result in "loss of title" to Generous? If so, who got the title?***

[72] As I have held in response to the previous question, the effect of the failure by NZB Leasing/NZB Finance to register LPA1/LPA2 was to give priority to Lock's security interest which had been perfected by registration under the Act on 1 May 2002 over NZB Leasing's interests. Failure to register placed NZB Leasing/NZB Finance at risk but it did not change anything as far as Glenmorgan was concerned. Had Glenmorgan completed payments under the Contract for Current Advances, Generous would have been released from the charge, but would still have been subject to the security in favour of Lock granted by Glenmorgan. Glenmorgan's inability to obtain unencumbered title to Generous was the result of its own actions in successively charging the stallion to Lock and then to NZB Finance. As the Court of Appeal said in *Waller* the issue of registration was "for the limited purpose of priority of securities".[16] It had nothing to do with the ability of NZB Leasing/NZB Finance to give title to Glenmorgan. By virtue of s 40(3) of the Act, Glenmorgan's contractual rights to obtain title to Generous under LPA1/LPA2 on completion of the lease to purchase agreement were converted to statutory rights, but those rights were attached by Lock's debenture, as the Court of Appeal held in *Waller*.

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[15] At [112].

[16] *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 at [51](a) and [54].

(f) ***Did NZB Finance's failure to register LPA2 under the Act result in a total failure of consideration as claimed by Glenmorgan?***

[73] Although there was considerable argument addressed to this issue I propose to consider it only briefly. The simple fact is that Glenmorgan got what it contracted for. Under LPA1 and LPA2 it obtained possession of Generous and received the income from the stallion from the time it took possession in August 2001. The income included stud fees and ownership of any progeny from Generous, which were critical for Glenmorgan. Likewise it received the proceeds of sale of the mares which formed part of the collateral under the Contract for Current Advances.

[74] When payments under LPA2 were completed on 28 March 2004, pursuant to the terms of that contract, title in Generous passed to Glenmorgan. But by the Refinancing Agreement and the Contract for Current Advances Generous was charged to NZB Finance. This was despite the stallion being subject to the prior charge to Lock, and the fact that Glenmorgan was not in a position to give the warranties as to title it purported to give under LPA1, LPA2 and the Contract for Current Advances.

[75] Generous was eventually sold in June 2005 for NZ$1,013,153 and the sale proceeds passed to Lock as prior charge holder. In that way Glenmorgan received the benefit of the sale proceeds by way of reduction of its indebtedness to Lock.

Conclusion

[76] There was no failure of consideration for Glenmorgan. NZB Finance's failure to register resulted in loss of priority it could have gained over Lock, but Glenmorgan got nothing less than it had contracted for.

[77] The first cause of action fails.

Trespass – conversion

[78] In the second cause of action, Glenmorgan claims that repossession of Generous by the defendants amounted to a trespass or conversion of Glenmorgan's rights. It seeks to recover the full value of Generous, which it claims at between $3m and $4m plus loss of earnings.

[79] The following issues arise:

a) Did Glenmorgan have the right to possession of Generous, such that repossession of Generous by NZB Leasing/NZB Finance was wrongful?

b) If so, how should the loss or damage be quantified?

a) ***Did Glenmorgan have the right to possession of Generous?***

[80] The date of repossession of Generous by NZB Leasing/NZB Finance was 7 July 2004. Generous was overseas for the northern hemisphere breeding season. The defendants took possession of Generous and returned her to the Westbury Stud in New Zealand.

[81] At the time of repossession Glenmorgan was significantly in default to NZB Finance under the Contract for Current Advances, in the sum of some $2.4m.

[82] In the *Jenkins* case in the High Court, Winkelmann J reasoned that because by the time of the repossession of Generous by NZB Finance, LPA2 was at an end, NZB Finance could not exercise its enforcement rights as assignee under LPA2 to repossess Generous.[17] She held that NZB Finance had to rely upon its rights under the refinancing agreements. She referred to clause 10(a) of the Contract for Current Advances which provides:

[17] At [152].

> (a) If the Borrower shall fail to pay any moneys owing by the Borrower to the Creditor or if there is any breach of the terms hereof, then this Agreement shall forthwith be terminated and the Creditor shall have all the rights available at law including if applicable those under the Personal Property Securities Act 1999 relating to the security interest in the collateral.

[83] She then referred to s 109 of the Act which, as it then stood, gave the right to a secured party "with priority over all other secured parties" to take possession of and sell the collateral when the debtor was in default under the security agreement.[18] She concluded that NZB Finance was not "a secured party with priority over all other secured parties" and therefore did not have a right under s 109 to take possession of and sell Generous.[19]

[84] Winkelmann J was critical that s 109 as it then stood, gave the right of repossession and sale to the party with the first ranking security interest in Generous. (No doubt as a result of the Judge's criticism and other criticism directed at s 109, the words "with priority over all other secured parties" were deleted from s 109 with effect from 1 January 2008.)

[85] Winkelmann J concluded that NZB Finance did not have the statutory right to take possession of Generous because Lock had a prior right. (It appears the situation was resolved by the competing creditors. While NZB Finance had repossessed Generous, Lock subsequently sold the stallion and applied the sale proceeds in reduction of Glenmorgan's indebtedness under the first debenture.)

[86] The Judge then considered whether the guarantors, the Jenkins, could rely on the wrongful act of NZB Finance in repossessing Generous to plead a set off or counterclaim, when Glenmorgan was not a party to the proceeding. She held that joinder of the principal debtor, Glenmorgan, was a pre-requisite.

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[18] At [153].
[19] At [155].

[87] The Judge went on to consider whether Glenmorgan would have a claim to recover any loss from NZB Finance from the wrongful act of repossession. She said this issue raised a further "obvious and fundamental obstacle in the way of such a counterclaim". It was by reason of Glenmorgan's breach of contract in having granted a prior security interest that NZB Finance did not have the enforcement rights it had contracted for.[20]

[88] She found that any claim by Glenmorgan based on wrongful repossession by NZB Finance would fail on at least two bases. Any claim by Glenmorgan for damages for conversion could be met with a counterclaim by NZB Finance for breach of contract under clause 8 of the Contract for Current Advances. Secondly, such a claim could be met with a plea that Glenmorgan cannot rely upon its own wrong (breach of contract) to found a claim: *New Zealand Shipping Company Ltd v Société des Ateliers et Chantiers de France*.[21] She found that Glenmorgan would not have been able to bring a claim against NZB Finance for wrongful repossession.[22] Therefore, nor could the guarantors.

[89] I agree with and adopt the reasoning of Winkelmann J as to Glenmorgan's position in relation to the alleged unlawful repossession of Generous by the defendants.

[90] To be successful in a claim for conversion against NZB Leasing/NZB Finance, Glenmorgan would have to be able to show that at the time of the conversion it had possession, or a right to immediate possession of Generous. However, it was seriously in default under the Contract for Current Advances. Not only had it breached clause 8(b) and clause 8(h) (refer [63] above) by granting the prior security interest to Lock, but it had defaulted in making the payments due to NZB Finance. Under clause 5(b) of the Refinancing Agreement if Glenmorgan failed to make payments on due date (which it indisputably did) the whole of the amount due under the Contract for Current Advances forthwith became due and

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[20] At [165].
[21] *New Zealand Shipping Company Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1 (HL).
[22] At [167].

payable and NZB Finance was entitled to exercise any or all of its rights at its discretion under LPA2, the Contract for Current Advances, the Refinancing Agreement or at law. And under clause 10(a) of the Contract for Current Advances, the agreement was terminated.

[91] Glenmorgan had no continuing rights to possession of Generous. *Harris v Lombard New Zealand Limited,*[23] *Aubit Industries Ltd v Cable Price Corp Ltd*[24] are both hire purchase cases where it was held that the debtor could not sustain a claim of conversion against the creditor when at the time of repossession it was in default of payments due under the hire purchase agreement.

[92] While the repossession of Generous by NZB Leasing/NZB Finance was unlawful as against Lock because of the provisions of s 109 as it then stood, it was not wrongful as against Glenmorgan.

[93] The second issue therefore does not require consideration. But Glenmorgan could not establish that it has suffered loss as the result of the repossession by NZB Leasing/NZB Finance. Glenmorgan had received the benefit of the sale proceeds of Generous and any earnings derived from the northern hemisphere breeding season by these amounts being credited against its indebtedness to Lock or NZB Finance. I do not need, therefore, to consider the evidence of Mr Beamish and Mr Perry as to the value of Generous at the relevant time.

[94] Nor do I accept the suggestions made by Glenmorgan that the repossession of Generous was premature and precipitated the appointment of receivers by Lock. These suggestions were premised against the background that there were ongoing negotiations with Turnaround Management Limited which could rescue the situation. But implementation of the Turnaround Management plan would have involved both the secured creditors, Lock, and NZB Leasing/NZB Finance, agreeing to compromise their respective positions as security holders and receiving less than their entitlement. Neither of them was willing to do so. Mr Van Tilborg, a director of Lock, said in answer to cross-examination that Lock had lost confidence in

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[23] *Harris v Lombard New Zealand Ltd* [1974] 2 NZLR 161 (SC).
[24] *Aubit Industries Ltd v Cable Price Corp Ltd* (1994) 5 NZBLC 103,395 (CA).

Glenmorgan. The events that precipitated the receivership were the defaults by Glenmorgan, notwithstanding that over a period of almost three years the defendants had entered into successive arrangements pursuant to LPA1, LPA2 and the Refinancing Agreement and Contract for Current Advances to try to accommodate the continuing defaults.

Conclusion

[95] The second cause of action also fails.

Bailment

[96] Although not pleaded as a separate cause of action, a point taken by Mr Morgan, Glenmorgan also argued that it is entitled to recover as bailee the same amounts as are claimed in damages and for consequential loss under the cause of action in trespass and conversion. I propose to consider the issue because it was raised by the plaintiff in both written and oral submissions and responded to by Mr Morgan in his closing submissions. It arises from the same factual basis as the claim in trespass and conversion and raises no prejudice for the defendants.

[97] The plaintiff relies on LPA1, LPA2 and the Refinancing Agreement as being contracts of bailment irrespective of whether they were also hire purchase agreements as pleaded by the plaintiff. It was submitted that as bailors under a contract of bailment, the defendants were unable to provide unencumbered title and the right to possession of Generous, because by failing to register under the Act, the defendants put it out of their power to perform the obligation to pass unencumbered title and the right to possession of Generous to Glenmorgan.

[98] It was further submitted that if, as was held in *Jenkins*, LPA2 was repaid as at 28 March 2004, Glenmorgan had acquired all available proprietary rights in Generous and was a former bailee who no longer had a bailor. Therefore it followed that the defendants had no right to repossess Generous.

[99] However, as is said in *Palmer on Bailment:*[25]

> A bailee who is wrongfully dispossessed of goods by his bailor ... can also of course sue in conversion or trespass for the incursion of his interest. In that event, however, he is restricted to the value of his outstanding interest in the goods and/or his other personal loss.

[100] Even assuming that there was a contract of bailment in existence at the time Generous was repossessed on 7 July 2004, Glenmorgan suffered no loss by the repossession of Generous for the same reasons as are given in the previous section of this judgment in respect of the claim in trespass and conversion. Glenmorgan had defaulted under LPA2 and under the Refinancing Agreement and the Contract for Current Advances. It had no interest in Generous that was enforceable against NZB Finance. In any event, were it able to recover as a bailee it would have been obliged to account to NZB Finance as bailor for any amount recovered in excess of the value of its interest in Generous, and the value of any interest Glenmorgan might have had in Generous had been rendered nugatory by its defaults under each and every one of the financing agreements.

Issue estoppel

[101] The defendants submit that the issues raised in the *Jenkins* proceedings and those that are determinative of these proceedings, are the same. They all hinge on the legal consequences of the contractual documents entered into by the plaintiff and the defendants. The documents are the same, the evidence is the same and the financial transactions are the same. The defendants submit that the plaintiff is estopped from raising any issues which were, or should and could have been, determined in the *Jenkins* proceeding.

[102] They submit that the claims advanced in these proceedings by Glenmorgan to recover payments made under LPA2 and the Contract for Current Advances were advanced by Glenmorgan's guarantors, the Jenkins, in the *Jenkins* proceedings and disallowed by the High Court on the grounds that Glenmorgan was not joined, and

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[25] Norman Palmer *Palmer on Bailment* (3rd ed, Sweet and Maxwell, London 2009) at [4-097].

also on the merits.[26] The defendants say there is no reason why Glenmorgan could not have been joined in those proceedings and the plaintiff is estopped from raising issues which were or should have been raised as part of the *Jenkins* proceedings.

[103] The plaintiff says that Glenmorgan was not a party to the *Jenkins* proceedings and submits that Glenmorgan has entirely different rights as the purchasing party to whom obligations as to title and possession were specifically owed, as the purchaser and as bailee. Only Glenmorgan, and not the Jenkins, have rights to sue in conversion and trespass. There is no mutuality. The plaintiff brings these proceedings in the interests of all the creditors, secured and unsecured, and is therefore pursuing entirely different interests and rights on behalf of the creditors from the interests and claims involving the Jenkins in the *Jenkins* proceedings.

[104] Mr Morgan in his written submissions and in opening submitted that the plaintiff is estopped from raising any issues which were or should and could have been determined in the *Jenkins* proceedings, six of which he detailed at paragraph 2.12 of his written submissions. However, he suggested in the course of his oral closing submissions that issue estoppel was perhaps a "red herring" because the issues resolved themselves on the basis of the evidence and argument before the Court in this proceeding. I have chosen to approach the issues in this case in that way. Of course I have carefully considered the findings of the High Court and the Court of Appeal in the *Jenkins* proceedings and also, to the extent they are relevant, in the *Waller* proceedings. The same factual background underpins the findings in these cases and in this proceeding. Where I have found myself in agreement with judicial findings made in the other proceedings I have adopted them, concluding that there is no basis upon which to disagree with those findings.

Counterclaim

[105] In its statement of defence and setoff and counterclaim dated 2 May 2008 NZB Finance claims judgment for the sum of $3,497,209.50, being the amount due

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[26] *New Zealand Bloodstock Leasing Ltd v Jenkins* HC Auckland CIV-2004-404-5795, 19 April 2007 at [164]168].

and owing by the plaintiff to NZB Finance under the Refinancing Agreement and the Contract for Current Advances with respect to the stallion Generous as at 30 July 2006, together with interest from that date, and costs.

[106] By its amended statement of defence to counterclaim dated 22 June 2010 the plaintiff admits the advances were made but denies there are further moneys due or owing by the plaintiff to the defendants pursuant to LPA1, LPA2 or any other agreement, and pleads that the plaintiff is entitled to recover all moneys paid pursuant to those agreements. The grounds pleaded are essentially those pleaded in the amended statement of claim: failure by the defendants to provide unencumbered title to Generous resulting in a total failure of consideration and wrongful cancellation and repossession of Generous. I have rejected those claims.

[107] The plaintiff also claims relief under the Credit (Repossession) Act 1997 and the Credit Contracts Act but as those provisions would apply only if the relevant financing agreements were hire purchase agreements, they have no application. Nor does s 310 of the Companies Act 1993 (which relates to mutual credit and set-off in the liquidation of a company) have application.

[108] The plaintiff further pleads that the counterclaim includes interest "and possibly other charges" to which it is not entitled of $1,269,959. The plaintiff says the maximum amount claimable at the date of liquidation could only be $2,227,250.

[109] Mr Gwyn gave evidence of the amount owing at the date of liquidation, 9 March 2005. He supported his evidence by reference to a statement prepared by NZB Finance as at that date, which he said had been sent to Glenmorgan. The statement is detailed, showing debits, credits and interest charges under LPA2 and the Contract for Current Advances for the period 1 November 2002 to 9 March 2005. The balance owing as at 9 March 2005 is shown as $2,221,796.14. Mr Gwyn was not challenged on that aspect of his evidence. The balance figure takes into account the defendants' acceptance that claims for interest post the date of liquidation, are not allowable.

Conclusion

[110] Accordingly there will be judgment for the defendants on the counterclaim in the sum of $2,221,796.14.

Overview

[111] The failure by NZB Leasing/NZB Finance to register its pmsi in Generous under the Act has given rise to much litigation, each proceeding concerning the interests of particular parties which have been, or may have been, affected by that omission. It is regrettable that essentially the same issues have had to be determined from the perspective of different parties, though the factual background and the central issues have much commonality.

[112] Glenmorgan received advances from NZB Leasing/NZB Finance exceeding $2.5m to finance the purchase of Generous, but it did not pay for the stallion. It defaulted in payment of every instalment required to be paid in terms of LPA1, LPA2, the Refinancing Agreement and the Contract for Current Advances. While it paid between 1 November 2002 and 3 March 2004 a total of approximately $1.5m, NZB Finance advanced in excess of $2.5m under the Refinancing Agreement to remedy prior defaults by Glenmorgan. Glenmorgan continued to default in payments due under the Refinancing Agreement and the Contract for Current Advances. Eventually after continuing defaults over a period of nearly three years, NZB Finance exercised its rights against the security provided by Generous under the Contract for Current Advances. At that point, NZB Finance was owed some $2.4m by Glenmorgan.

[113] NZB Leasing/NZB Finance failed to protect and perfect its security interest by registering LPA1/LPA2. That failure resulted in loss of priority to the first debenture holder, Lock, in respect of the security provided by Generous and the mares secured by the Contract for Current Advances.

[114] There is still a balance owing to Lock of approximately $1m. Any recoveries by Glenmorgan would therefore in the first instance have to be credited to Lock.

The essence of the situation is that while the failure of NZB Leasing/NZB Finance to register under the Act cost it dearly because it had to surrender priority to Lock, the failure to register had no adverse implications as far as Glenmorgan is concerned, it being indebted to both secured creditors at all relevant times.

[115] Glenmorgan's own defaults under the various financing agreements, and its own default in entering into financing agreements with NZB Leasing/NZB Finance which charged Generous and other assets, when it had previously charged all its assets and undertakings to Lock, ultimately resulted in its losses. There is no basis upon which Glenmorgan could succeed in its claims against the defendants.

[116] **Summary of conclusions**

a) The plaintiff's claims fail.

b) Judgment for the defendants on the counterclaim in the sum of $2,221,796.14.

Costs

[117] The defendants are entitled to costs and usual disbursements. If costs cannot be agreed, memoranda may be filed.