

**IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY**

**CIV-2010-409-001716  
[2012] NZHC 1022**

BETWEEN	GIBBSTON DOWNS WINES LIMITED AND RFD FINANCE NO 2 LIMITED Plaintiffs
AND	PERPETUAL TRUST LIMITED First Defendant
AND	J M LEONARD AND P G SARGISON Second Defendants

Hearing: 28 February 2012

Appearances: A J Forbes QC and K W Clay for Plaintiffs  
B A Vautier for First Defendant  
No Appearance for Second Defendants

Judgment: 28 May 2012

---

**JUDGMENT OF CHISHOLM J**

---

- A The plaintiffs' application for a declaration is dismissed.**
- B The first defendant is entitled to costs on the 2B scale.**
- 

**REASONS**

[1] This proceeding concerns the priority of competing security interests under the Personal Property Securities Act 1999 (PPSA). The plaintiffs seek a declaration that their security interest over the collateral of Anthem Holdings Limited (In Receivership) (Anthem) has priority over the first defendant's security interest concerning the same collateral. According to the first defendant its security interest

has priority. The second defendants, the receivers of Anthem, abide the decision of the Court.

## **Background**

[2] In March 2005 Propertyfinance Securities Limited (PFS) provided finance to Anthem pursuant to a general security agreement between those parties. Following registration of a financing statement under the PPSA on 31 May 2005, the securities register for Anthem recorded PFS as the first registered security holder, with an expiry date for the registration<sup>1</sup> of 31 March 2010.

[3] The following year additional finance was provided to Anthem by Capital + Merchant Finance Limited (C+M). A financing statement recording the interest of C+M under its general security agreement with Anthem was registered on 3 April 2006. At that time the PFS security interest, being first in time, had priority over the C+M security interest. However, C+M had provided the additional finance on the basis that it would hold a first ranking security interest.

[4] Shortly after C+M's security interest was registered its solicitor realised that there was already an existing registered security interest in favour of PFS. Ultimately PFS agreed to concede priority and a financing change statement confirming subordination of the PFS general security agreement was registered on 28 November 2006. Following registration the "subordination details" on the register included:

...	Date of subordination:	Expiry Date:
	28 Nov 2006	31 Mar 2010

While there is no issue that the PFS security interest was effectively subordinated in terms of s 70 of the PPSA, the plaintiffs contend that the subordination arrangement expired on 31 March 2010.

[5] On 29 November 2006 C+M assigned its interest in the general security agreement to the first defendant. About a year later PFS assigned its security

---

<sup>1</sup> In accordance with s 153 of the PPSA.

agreement to Propertyfinance Funding Nominees Limited and another company (collectively PFF). Except for the possible significance that the financing change statement recording the assignment to PFF shows the subordination agreement expiring on 31 March 2010, nothing turns on either of these assignments.

[6] Following default Anthem was placed in receivership by the first defendant on 28 August 2008. It is alleged by the first defendant, but denied by the plaintiffs, that the date of receivership represents the relevant date for determining the priority of the respective security interests. If the first defendant is right its security interest would have priority, and the alleged expiry date of 31 March 2010 (which post dated the appointment of the receivers) would be irrelevant.

[7] On 28 January 2010 PFF (now the owner of the PFS security interest) renewed the security interest for another five years. Again, the financing change statement recorded that the subordination agreement expired on 31 March 2010.

[8] Soon after this French J heard an application by the receivers for a declaration that Anthem had a property interest in some wine stocks. In a decision delivered on 27 April 2010 she made a declaration that specified vintages of wine were the personal property of Anthem and that the receivers were entitled to immediate possession of the wine or the proceeds of its disposal.<sup>2</sup>

[9] Finally, in July 2010 PFF assigned its interest in the general security agreement to the plaintiffs. Again nothing turns on this assignment. The plaintiffs issued this proceeding on 5 August 2010.

#### **Application for interim injunction**

[10] When the plaintiffs issued this proceeding they also sought an interim injunction to prevent the second defendants from selling the wine stocks French J had earlier found belonged to Anthem. The plaintiffs claimed, first, that the receivers were not conducting the sale of wine at a fair price; and secondly, that their

---

<sup>2</sup> *Sargison and Leonard v Anthem Wine Company Limited & Ors* HC Christchurch CIV-2009-409-001876, 27 April 2010.

security interest had priority over the first defendants' security interests and that they, not the receivers, were entitled to possession of the wine.

[11] On 25 August 2010 French J declined to grant an interim injunction.<sup>3</sup> She considered that a key issue at the substantive hearing was likely to be whether the subordination agreement expired on 31 March 2010. French J noted that she did not have the benefit of any evidence regarding the background or factual matrix of the subordination agreement and that there was no record of any agreement or understanding that the subordination would only subsist for a fixed period of time, or vice versa.

[12] Having referred to s 159 of PPSA<sup>4</sup> and noted that the regulations required an expiry date to be specified, French J stated:

[39] In the absence of evidence of any reasons why [C+M] would have agreed to a term of only four and a half years, I consider it highly unlikely they would have done so. In my view it is much more likely that it was intended and always understood by both parties that the subordination would endure. If that is the correct position then I consider the subordination agreement and its terms would be binding on the plaintiffs as the assignees of [PFS]. However, while I consider it unlikely there was an agreed expiry date of 31 March 2010, I accept on the basis of the material before me that it must undoubtedly be arguable...

Although French J concluded that there was a serious question to be tried, she decided that the balance of convenience favoured refusal of an interim injunction.

## Issues

[13] There is no dispute that both the PFS and C+M security interests attached to collateral belonging to Anthem in terms of s 40 of the PPSA. Similarly, there is no dispute that both security interests were perfected by registration of financing statements in terms of s 41(1)(b)(i) of the Act. Thus in terms of s 66(b)(i) of the Act the PFS security interest initially had priority over the C+M security interest because it had been registered first in time.

---

<sup>3</sup> *Gibbston Downs Wines Limited v Perpetual Trust Limited & Ors* HC Christchurch CIV-2010-409-001716, 25 August 2010.

<sup>4</sup> See [17] below where that section is quoted.

[14] The critical issue is the nature and effect of the subordination agreement between PFS and C+M, in particular the duration of the agreement. Was it, as contended by the plaintiffs, only to continue until 31 March 2010, or was it, as contended by the first defendant, to continue until the C+M security interest was satisfied or otherwise released? Depending on the answer to that question, the implications of the receivership might also have to be considered.

**What was the duration of the subordination agreement?**

[15] It is convenient to begin by reproducing those provisions of the PPSA and the Personal Property Securities Regulations 2011 that directly relate to the subordination of security interests.

[16] Section 70 of the PPSA provides:

**70 Voluntary subordination of security interests**

- (1) A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest.
- (2) An agreement to subordinate a security interest is effective according to its terms between the parties and may be enforced by a third party if the third party is the person, or 1 of a class of persons, for whose benefit the agreement is intended.
- (3) A security interest is not created only by an agreement or undertaking to postpone or subordinate the following:
  - (a) The right of a person to performance of all or any part of an obligation to the right of another person to the performance of all or any part of another obligation of the same debtor:
  - (b) All or any part of the rights of a secured party under a security agreement to all or any part of the rights of another secured party under another security agreement with the same debtor.

Subsections (1) and (2) are of particular significance in this case because they confirm that an agreement to subordinate is effective between the parties (and third parties for whose benefit the agreement is intended) without registration under the

Act.<sup>5</sup> As an assignee from C+M the first defendant comes within the category of a third party for whose benefit the agreement was intended.

[17] While a subordination agreement does not have to be registered, it can, nevertheless, be registered under the Act. When and how this can be achieved is provided by s 159:

**159 Registration of financing change statement in respect of subordinated security interest**

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

This section needs to be read in conjunction with s 153 which provides that registration of a financing statement under the Act is effective until the expiry of the term specified in the financing statement or five years, whichever is the earlier.

[18] Schedule 1, cl 19 of the Personal Property Securities Regulations 2001 is also relevant:

**19 Subordinations**

If a security interest is subordinated, the date that the effect of the subordination will cease if that date is before the expiry of the registration of either –

- (a) the financing statement relating to the security interest that is subordinated; or
- (b) the financing statement relating to the security interest to which the security interest referred to in paragraph (a) is subordinated.

This clause appears in Schedule 1, Part 2 of the Regulations which concerns “Financing Change Statement: Additional Provisions”. It therefore follows that the clause is only intended to apply once a subordination has been recorded on the register. It does not restrict the freedom of the parties to enter into a subordination agreement pursuant to s 70.

---

<sup>5</sup> See Barry Allan *Personal Property Securities Act 1999* (Brookers, Wellington, 2010) at 4.7.2 and Michael Gedye, Ronald CC Cumming QC and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at 159.1.

*Plaintiffs' argument*

[19] It was agreed between PFS and C+M that there would be subordination by registration, and a financing change statement recording the subordination was registered by PFS accordingly. Apart from what was evidenced on the register, the subordination agreement did not have any express term as to when the subordination was to cease. Given that the loan by C+M to Anthem was only to be 12 months, the parties would not have contemplated that C+M's general security agreement would remain outstanding beyond 31 March 2010.

[20] In terms of the s 153 statutory expiry date the subordination in this case expired on 31 March 2010. This is reinforced by s 159 and cl 19. It reflects that the parties agreed that there would be subordination by registration. In the absence of any agreement extending the subordination beyond 31 March 2010, the subordination expired on that date.

[21] It is significant that the official website<sup>6</sup> relating to the register states:

Subordinations have their own term. They can last for the duration of the subordinating financing statement or a lesser period as mutually agreed. The expiry date must be the same as (or pre-date) the earlier of the two financing statement expiry dates.

Renewing financing statements does not automatically renew subordinations recorded on them. You need to remember to extend notice of the subordination by processing another subordination at the time you renew your financing statement.

Therefore, unless this has been previously agreed, both parties needed to consent to the renewal of the subordination once its registration had expired. That did not happen.

[22] In the absence of express agreement to the contrary and notwithstanding what is recorded on the register, it cannot be implied that a subordination agreement or arrangement will not expire until the release of the secured parties' security interest. Not only would that approach be seriously misleading for parties relying on the

---

<sup>6</sup> [www.ppsr.govt.nz](http://www.ppsr.govt.nz)

register, it would be contrary to the scheme of the Act, particularly ss 52, 70(2), 115, 159 and Schedule 1, cl 19 of the Regulations.

*Argument for first defendant*

[23] PFS agreed to subordinate its security interest in favour of the C+M interest. There is no evidence that the subordination was to be for a limited duration. In terms of the agreement between the parties the subordination continued until the C+M security interest was satisfied or otherwise discharged. If PFS required some modification of that arrangement it needed to spell out the modification. It did not do so.

[24] While subordinations by agreement are recognised by s 70 of the PPSA, they are not governed by it. Registration to disclose the existence of a subordination agreement is not mandatory, and failure to register does not have any effect on the validity of the subordination agreement. Nor does registration of the subordination notice override the contractual arrangements between the parties.

[25] Because the subordinating creditor (PFS) had the authority to carry out the registration, it was the party who registered the financing change statement. The superior creditor (C+M) had no right to amend the subordinating creditor's financing statement. It was therefore incumbent upon PFF to ensure that the subordination notice was refreshed when it renewed its financing statement in January 2010.

[26] There is no evidence to support the contention that these two secured parties agreed to limit their subordination agreement to a period expiring on 31 March 2010. It was not open to PFS to unilaterally impose such a term. Nor can such a term be implied. The Act simply provides a notice system which does not alter what has already been agreed between the parties.

*The evidence*

[27] The loan offer from C+M to Anthem involved a loan facility of up to \$675,000 for 12 months from the date of the first advance. It was to be secured by a



revolving credit facility agreement including a “first ranking security interest under a General Security Agreement over the Borrower”.

[28] When C+M’s solicitor realised that there was a registered security interest in favour of PFS he emailed the solicitor for Anthem on 3 April 2006:

I have just realized that there is a GSA<sup>7</sup> registered over Anthem’s PPSA register to Property Finance Securities Limited under financing statement FY34ME1YU0562699. It is registered ahead of our client’s GSA, whereas our client required its GSA to have first priority.

Please urgently advise whether you can get the Property Finance GSA removed or whether it will grant our client priority.

A few days later the solicitor for Anthem forwarded the email to Anthem with the suggestion that they talk to PFS about whether it would release its security interest or give C+M priority.

[29] For reasons that are not apparent it was not until 14 November 2006 that the issue of priorities between PFS and C+M was finally resolved. The evidence does not disclose what, if anything, was going on behind the scenes during the intervening months. But that is not a matter of significance because it is the agreement that was finally reached that counts.

[30] On 14 November 2006 the solicitor for Anthem emailed a Mr Knowles (who I understand is an accountant) and asked him to urgently contact PFS and advise if it would agree to its general security agreement becoming a second charge over the company. The email indicated that there was pressure on C+M’s solicitor to have this matter resolved quickly.

[31] The same day Mr Knowles responded by email to the effect that he had spoken to Mr Queen (the managing director of PFS) “who is fine to move to 2nd GSA – please forward him necessary docs”. The solicitor for Anthem then sent an email to the solicitor for C+M advising that PFS was willing “to become second security holder behind [C+M]”. The solicitor for C+M was asked to forward the necessary documents.

---

<sup>7</sup> General security agreement.

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

I understand that Grant Smith of Cousins and Associates [Anthem's solicitor] has apprised you of the request of our client Capital + Merchant Finance Limited in respect of Anthem Holdings Limited, that Property Finance Securities Limited's existing GSA registered under financing statement FY34ME1YU0562699 be subordinated to Capital + Merchant Finance Limited's GSA registered under financing statement FM2AU7906XS91756. Grant has advised that Property Finance Securities Limited has no objection to that.

It seems to me that the simplest way to do this is by Property Finance Securities Limited registering a financing change statement on Anthem's PPSA register, subordinating its financing statement FY34ME1YU0562699 to Capital + Merchant Finance Limited's financing statement FM2AU7906XS91756. In a discussion with Grant, he was of the same view that this is the simplest way to do this, although you may wish to confirm that with him...

Three days later a verification statement confirming subordination of the PFS security in favour of the C+M security was registered by PFS. As already mentioned,<sup>8</sup> the subordination details show an expiry date of 31 March 2010.

[33] Six affidavits have been filed, of which three have been sworn by Mr Henderson who is the sole director of both plaintiff companies (he was also a guarantor of the PFS and C+M advances to Anthem). Apart from exhibiting relevant documentation, his affidavits do not provide any further insight into the subordination agreement. Mr Queen's affidavit is in a similar category.

[34] The remaining two affidavits were sworn by the solicitor who was acting for C+M (Mr Girven) and the solicitor who was acting for Anthem (Mr Smith).

[35] Having referred to the email correspondence between himself and Mr Smith, Mr Girven deposes:

...C+M's security was to have first ranking priority and the corollary of that was that C+M would retain priority until its loan was repaid in full or its security interest was otherwise satisfied. There was never any discussion or agreement that C+M's priority arrangement would expire or terminate prior to the security having been repaid or satisfied.

---

<sup>8</sup> At [4] above.

He confirms that arrangements were made for PFS to register a financing change statement to record that its security was subordinated to that of C+M.

[36] Mr Smith has exhibited his file relating to the subordination. He does not recall any discussion with Mr Girven and there are no file notes relating to any such discussion. Although he accepts that he had a telephone discussion with Mr Queen of PFS, he does not recall precisely what it was about and he has no file note. In response to Mr Girven's affidavit he states:

...I know there was no discussion between us that C+M would retain priority until its loan was repaid in full or its security interest was otherwise satisfied. There was no discussion about the expiry date.

*Discussion*

[37] It is clear that PFS agreed to subordinate its security interest to that of C+M. In fact that was the extent of the agreement because it achieved the commercial outcome that both parties were seeking, namely, that as between those two creditors C+M would have the first ranking security interest and PFS would be second. Nothing more needed to be said. In terms of s 70 of the PPSA the agreement was effective between those two parties and their assigns.

[38] Both solicitors confirm that there was no discussion about expiry dates. This reflects that it was inherent in the agreement that the C+M security interest would have priority until its advance was repaid or its security interest otherwise satisfied. Again no discussion was necessary. While the C+M advance was only for a year, the commercial reality was that it might not be repaid on due date or that it might be rolled over. C+M had no reason to limit the duration of its priority and this would have been understood by PFS.

[39] The email exchanges about the agreement to subordinate are brief for the very good reason that both parties knew what was being sought and granted. C+M wanted priority over the Anthem collateral and PFS agreed without qualification. Had PFS wanted the subordination to be limited in duration it would have said so. The solicitors have confirmed that there was no such requirement.

[40] Once agreement had been reached that the C+M security interest was to have priority, it was left to the solicitors to decide how the agreement would be recorded. Rightly or wrongly they decided that it should be registered under the PPSA. But that was not a term of the agreement and the decision of the solicitors was not intended to, and did not, undo or alter the agreement that had already been reached between the two finance companies.

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

[42] It follows that the priority arrangement did not expire on 31 March 2010 and the declarations sought by the plaintiffs cannot be made. However, before dismissing the application I will briefly comment on the other primary issue.

### **Implications of the receivership**

[43] Had it been necessary I would have reached the same conclusion on the basis that on the particular facts of this case the competing priorities fell to be determined when the receivers were appointed. That occurred at a point in time when the C+M security interest unquestionably had priority over the PFS interest.

[44] The Act does not specify the time at which a dispute as to priorities is to be determined. The authors of *Personal Property Securities in New Zealand* state at 66.5 that:<sup>9</sup>

...the matter would generally seem to be resolved as at the date a secured party enforces its security. This will usually be the date at which it can be

---

<sup>9</sup> Michael Gedy, Ronald CC Cumming QC and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002).

said the parties' respective security interests came into conflict and therefore will be the date it is necessary to determine which secured party is entitled to the collateral.

Reference is then made to *Sperry Inc v Canadian Imperial Bank of Commerce and Thorne Riddell Inc*.<sup>10</sup> This decision arose from the Canadian equivalent of the New Zealand PPSA.

[45] In *Sperry* both the plaintiff and defendant (a bank) originally held registered security interests, the plaintiff's being first in time. However, both registrations had lapsed. The defendant appointed a receiver. Three days later the plaintiff attempted to remove inventory belonging to the debtor company but was prevented from doing so by the receiver. Following that the plaintiff registered its security interest and then commenced an action against the bank and the receivers.

[46] At first instance the plaintiff succeeded on the ground that the defendant's security interest did not extend to the inventory covered by the plaintiff's security agreement. That conclusion was overturned by the Ontario Court of Appeal. Nevertheless, the appeal was dismissed because the Court of Appeal held that the plaintiff's security interest had attached to the inventory before the defendant's security interest and the plaintiff was thereby entitled to priority under the Canadian equivalent of s 66(c).<sup>11</sup>

[47] For present purposes the significance of the Court of Appeal decision lies in its comment that the same conclusion could have been reached on the basis that:

[37] ...it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interests come into conflict. This would appear to be 14 March 1980 [the date on which the defendant appointed the receiver] when the bank sought to enforce its interest against collateral in which Sperry claimed a superior interest...

The Court reasoned that as at the time the receiver was appointed the defendant did not have the right, as against the plaintiff, to enforce its security because the plaintiff

---

<sup>10</sup> *Sperry Inc v Canadian Imperial Bank of Commerce and Thorne Riddell Inc* (1985) 17 DLR (4<sup>th</sup>) 236.

<sup>11</sup> Section 66(c) provides that priority between unperfected security interests in the same collateral is to be determined by the order of attachment of the security interests.

had the superior security in terms of the Canadian equivalent of s 66(c).

[48] In my view it is logical and in accord with principle to resolve the priority issue in this case as at the time that the competing interests came into conflict. Whether or not that coincides with the appointment of the receivers will depend on all the circumstances, particularly the provisions in the relevant general security agreements.

[49] Although the PFS general security agreement document has been lost, that company's instructions to Anthem's solicitor to prepare the necessary security documents are before the Court. Those instructions were that the general security agreement was to be the Auckland District Law Society form 6301. A copy of that form of security agreement is before the Court and I am satisfied that this was the form of general security agreement that was used to secure the PFS advance.

[50] The following conclusions can be reached in relation to the appointment of the receivers in this case:

- (a) The receivers were appointed by C+M because Anthem was in default under the C+M general security agreement, which immediately indicates that Anthem was in financial trouble.
- (b) Appointment of the receivers by C+M constitutes a default under the PFS general security agreement: see cl 19(f)(iii).
- (c) A default having occurred under its security agreement, PFS was then entitled to immediately call up the balance of the monies secured under the agreement and to enter into possession of the collateral: see cl 20(a) and 24.

Under those circumstances appointment of the receivers undoubtedly gave rise to a conflict about which security interest should prevail because there was clearly insufficient collateral to satisfy both claims.

[51] For reasons already given, it is beyond argument that the agreement to subordinate was still in force when the receivers were appointed. Thus the defendant's interest prevailed.

### **Result**

[52] Given that the plaintiffs' security interest did not have priority over the first defendant's security interest, the declarations sought by the plaintiffs cannot be made. The application is dismissed accordingly. The first defendant is entitled to costs on the 2B scale against the plaintiff, together with disbursements.



**Solicitors:**

Austin Forbes QC, Christchurch, [afortbes@clear.net.nz](mailto:afortbes@clear.net.nz)

Kevin Clay, Christchurch, [kwc@claychambers.co.nz](mailto:kwc@claychambers.co.nz)

Glaister Ennor, Auckland, [brett.vautier@glaisterennor.co.nz](mailto:brett.vautier@glaisterennor.co.nz)

Copy to Second Defendants

