IN THE COURT OF APPEAL OF NEW ZEALAND

CA442/2010
[2011] NZCA 188

	BETWEEN	TOLL LOGISTICS (NZ) LIMITED Appellant
	AND	ANDREW JOHN MCKAY AND JOHN JOSEPH CREGTEN Respondents

Hearing: 7 April 2011

Court: Arnold, Randerson and Harrison JJ

Counsel: B J Upton and L Barnard for Appellant
M R Bos and C L Clayton for Respondents

Judgment: 16 May 2011 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

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

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] This appeal raises issues about common law general liens and their priority in relation to general security agreements under the Personal Property Securities Act 1999 (the PPSA). The appellant (Toll) provided a range of logistical services to Scene 1 Entertainment Ltd (Scene 1). On 22 June 2009, ASB Bank Limited (ASB) appointed the respondents as Scene 1's receivers. ASB acted pursuant to a general security deed executed on 27 February 2008 under which Scene 1 granted ASB a security interest over all of Scene 1's present and after-acquired personal property. ASB registered its financing statement on the personal properties securities register under the PPSA on 4 March 2008.

[2] At the date of receivership, Scene 1 owed Toll $287,368.50. Toll was then holding in its warehouse on behalf of Scene 1 approximately 500,000 DVDs valued at approximately $2.6 million. Toll asserted a general packer's lien over the DVDs. Toll said it was entitled to the lien because part of the services it provided to Scene 1 involved the packing of the DVDs to the order of Scene 1's customers. Toll claimed that a lien arose either at common law or pursuant to contractual arrangements agreed with Scene 1 and recorded in a letter dated 5 June 2009.

[3] The receivers of Scene 1 (the receivers) concede that there is a contractual lien but contend there is no common law general lien for the services provided by Toll (ie a general lien which exists as a matter of law requiring no proof of custom). The receivers alternatively submit that if there is such a common law general lien, then it is excluded in the present case by the contractual arrangements between the parties.

[4] The receivers applied for directions under s 34 of the Receiverships Act 1993. The broad question before the High Court was whether the amount due to Toll had priority under the PPSA over the general security deed granted by Scene 1 to ASB, under which approximately $7 million was owed. In the judgment of Rodney Hansen J under appeal,[1] the Judge held that Toll did not have a security interest or other right in respect of the property of Scene 1 which ranked in priority to the security interest held by ASB. The reasons for the Judge's findings will be discussed further below but, for the purposes of understanding the issues on appeal, it is common ground that:

(a) If Toll has only a contractual lien, then the ASB general security deed has priority.[2]

(b) If Toll is entitled to a general lien at common law, it has priority over ASB pursuant to s 93 of the PPSA.

[5] Against that background, the issues for determination are:

(a) Whether the High Court was correct to hold that there was no common law general lien for the services provided by Toll.

(b) Whether, in any event, the application of any such lien is excluded by the contractual arrangements between Toll and Scene 1.

The facts in more detail

[6] Toll began to provide services for Scene 1 in May 2008. It did so using a distribution centre located in South Auckland. Scene 1 was an importer and distributor of DVDs which it acquired from an overseas company (VDL). Scene 1 directed the DVDs to be sent to Toll's distribution centre where they generally arrived on pallets directly from VDL. Upon arrival, the DVDs would be stacked at the distribution centre either on pallets or on shelves. Upon receipt of orders from

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1 *McKay v Toll Logistics (NZ) Ltd* [2010] 3 NZLR 700 (HC).

2 While a contractual lien was held to be a security interest in terms of s 17 of the PPSA which was not excluded by s 23, Toll's security interest was perfected under s 41(1)(b)(ii) after the ASB registered its financing statement. It followed that the ASB was entitled to priority by virtue of s 66(b) of the Act.

Scene 1's local customers, Toll would select the DVDs required to fulfil the order, pack them in cartons and arrange for delivery of the DVDs to Scene 1's customers.

[7] Prior to June 2009, Toll's services were undertaken without a formal agreement being in place. By 5 June 2009 there were outstanding invoices for Toll's services amounting to $243,374.34. A repayment programme was agreed between Toll and Scene 1. This was recorded in a letter from Toll to Scene 1 dated 5 June 2009. Relevantly, the letter concluded:

> 2. We note that there is currently no formal agreement in place between Toll and Scene 1 Entertainment. There is a signed letter of intent, but no binding contract was ever subsequently signed by the parties. To address this lack of formal terms Toll requires Toll's standard terms and conditions (see attached) to be agreed to by Scene 1 Entertainment and to apply to all services provided by Toll from the date of this letter. These terms and conditions have been modified to incorporate Schedule B of the signed letter of intent in order to articulate a description of the services that Toll has previously undertaken to provide to Scene 1 Entertainment and the terms and conditions applicable to those services.

[8] The terms and conditions attached with the letter included the following terms:

> **7. Lien**
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> 7.1 TOLL has a general lien on the Goods and on any other goods of the Sender or the person nominated by the Sender for all Charges due or which become due on any account whether for the Services concerning the Goods or any other goods or any other TOLL service.
>
> 7.2 If the Charges are not paid or the Sender or the person nominated by the Sender or Receiver fails to take delivery or return of the Goods, TOLL may without notice and, in the case of perishable or dangerous Goods immediately:
>
> 7.2.1 store the Goods as TOLL thinks fit at the Sender's or the person nominated by the Sender's risk and expense, or
>
> 7.2.2 open any package and sell all or any of the Goods as TOLL thinks fit and apply the proceeds to discharge the lien and costs of sale.
>
> 7.3 TOLL may deduct or set-off from any monies due from TOLL to the Sender or the person nominated by the Sender under any contract, debts and monies due from the Sender to TOLL under these conditions or any contract.
>
> …

> **9. Exclusions and Limitations**
>
> 9.1 Subject to 10, TOLL excludes from these conditions all conditions, warranties and terms implied by statute, general law or custom.

[9] A copy of Toll's letter was signed by the General Manager of Scene 1 on 14 June 2009, signifying Scene 1's agreement to the conditions. A few days later, on 22 June 2009, ASB appointed the receivers. During the period after 5 June 2009, Toll provided further services to Scene 1 of $43,994.16, the total sum due at the date of receivership being $287,368.50.

[10] Toll's New Zealand Business Manager, Mr A B Cox, explained in an affidavit that Toll's charges were based on a weekly fixed fee and a variable charge per unit. The fixed charge covered fixed costs and was invoiced weekly in arrears. The variable charge covered variable costs such as labour and overtime and these charges were invoiced weekly in arrears following despatch of the goods from Toll's distribution centre.

[11] A breakdown prepared by the receivers of the amount due by Scene 1 to Toll may be summarised as follows:

Fixed Charges	56,541.39
Transport and fuel costs	156,556.01
Variable charges for picking and packing	62,848.97
Packaging materials	11,422.09
Total [3]	**$287,368.47**

[12] By agreement between Toll and the receivers, the DVDs have been sold and a sum sufficient to meet Toll's claim is held in trust pending the resolution of the dispute over priority.

The judgment under appeal

[13] The Judge noted that Toll claimed it had a common law general lien for the sum of $243,374.31[4] owed in respect of services provided prior to 5 June 2009. Toll

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[3] There is a slight error in this total which is immaterial for present purposes.

[4] Later corrected to $243,374.34.

also claimed that it had both a contractual and a common law general lien for the sum of $43,994.16 owed to it for services provided after 5 June 2009.

[14] As to the central question of the existence or otherwise of the common law general lien, the Judge carefully reviewed the relevant authorities, paying particular attention to a judgment of the High Court of Australia in *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* [5] in which Stephen J discussed at length the way in which possessory liens have achieved recognition at common law. The Judge also reviewed the decision of the English Court of Appeal principally relied upon by Toll (*Re Witt*)[6] and other authorities, both in the United Kingdom and in New Zealand. The Judge then concluded:

> [23] As far as I am aware, there is no case in New Zealand or elsewhere in which a packers' lien has been found to exist without proof of usage. *In Re Witt* comes closest but ultimately involved the affirmation of a finding based on evidence of usage.
>
> [24] In my opinion, a packers' general lien has not become a part of the law in New Zealand by virtue of the process of judicial notice described by Stephens J in *Majeau*. It has an attenuated lineage, reliant on factual findings separated by more than a century, the last of which itself was made more than 130 years ago. Its pedigree cannot stand with the liens of callings such as bankers, insurance brokers and solicitors which unquestionably became "part of the law merchant". I would not be prepared to find a packers' general lien without proof of custom. I have not been provided with any evidence to show that a general lien is, or for that matter, ever has been part of the custom of packers in New Zealand. Toll is accordingly unable to assert a general common law lien.
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> [25] I should add that, even if I had accepted that a packers' lien had achieved the undisputed status of a bankers' or solicitors' lien, and established on proof of the relationship between the parties, I would have hesitated before finding it applied in this case. The packers' lien arose in the first instance when packers customarily acted as factors. That does not appear to have been part of the relationship between packer and merchant in *In Re Witt*. The services the packer provided in that case – warehousing, packing and despatching for shipment – were not greatly different from those supplied by Toll to Scene 1. That said, the passage of over a century has brought about radical changes to the conditions in which such services are rendered. I do not think it would be realistic to view Toll as simply the twenty-first century equivalent of a Victorian packer. Considerable caution is required before applying a rule derived solely from ancient usage to the very different conditions of contemporary commerce.

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5 *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 129 CLR 48 (HCA).

6 *Re Witt, ex parte Shubrook* (1876) 2 Ch 489 (CA).

[15] The Judge went on to consider the claim for a contractual lien, noting that it was common ground that the contractual lien created by the letter agreement of 5 June 2009 applied only to services performed after that date. (As we note below, the receivers have contended before us that the contractual lien also applied in respect of services rendered prior to 5 June 2009.) The Judge then considered the issue of the relative priority of a contractual lien over ASB's general security deed concluding that the priority of a lien under s 93 of the PPSA did not extend to contractual liens. Priority under that provision was limited to common law and maritime liens. As noted, the Judge's conclusion in that respect is accepted by Toll.

Is Toll entitled to a general lien at common law?

General liens

[16] Before embarking on a discussion of this issue, it may be useful to summarise briefly how a general lien at common law may arise and the general characteristics of such a lien. First, a general lien must be distinguished from a particular lien. The latter entitles the holder to a lien over the property retained for the amount of the debt in the transaction for which the right to the lien arises. Examples of particular liens recognised at common law include those for work done on chattels, the carrier's lien and the innkeeper's lien.[7] In contrast, a general lien entitles the person in possession of a chattel (or intangible security, as in the case of bankers) to retain it until all that person's claims against the owner of the chattel have been satisfied. The common law lien (whether particular or general) is a mere right to retain possession of the chattel and does not confer a power of sale.[8]

The Majeau decision

[17] The manner in which a general lien may arise at common law was discussed in considerable detail by Stephen J in *Majeau*. The High Court of Australia rejected a claim by the appellant (Majeau) that it was entitled to a general lien as a warehouseman over goods it was holding in order to secure the payment of cartage

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7 *Laws of New Zealand* Lien (online ed) at [2].

8 HG Beale and others *The Law of Personal Property* (Oxford University Press, Oxford, 2007) at [3.67]; *Larner v Fawcett* [1950] 2 All ER 727 (CA) at 729.

and storage charges due by the respondent. Alternatively, Majeau produced evidence which it claimed established there was a custom in the Brisbane area supporting the existence of a lien. Stephen J, with whom Menzies J concurred, held that Majeau was not entitled to the lien asserted, either by virtue of its occupation as a warehouseman or on the basis of the evidence adduced as to local custom. The third member of the Court, Gibbs J, did not find it necessary to determine the issue of whether the general lien existed since he was satisfied that any such lien was extinguished by Queensland legislation.

[18] Stephen J discussed the process by which general liens have come to be recognised by the courts:[9]

> In quite a large number of other occupations the law now recognises a right of general lien; instances are collected in *Bowstead on Agency*, 12th ed. (1959), p 155 et seq. These too are sometimes described as common law liens. They owe their origin to custom, principally to the custom of merchants, and have become part of the law by a process of judicial notice. Of one of these, the banker's general lien over his customer's securities in his possession, Lord Campbell said, in *Brandao v Barnett*, that it was "part of the law merchant" and held it to be a matter of judicial notice, saying that "when a general usage has been judicially ascertained and established it becomes a part of the law-merchant, which courts of justice are bound to know and recognise". Lord Lyndhurst spoke to the same effect. It is by such a process that the general liens of solicitors, stockbrokers, factors and insurance brokers have been established. The assertion of such a lien calls for no evidence but arises as a matter of law once the necessary relationship between the parties is shown to be that of a banker and customer, solicitor and client or otherwise as the case may be.
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> (Footnotes omitted.)

[19] As Stephen J later noted, difficulties can arise in determining whether a general lien has, by repeated decision of the courts, become a matter of law applicable to all members of the particular trade or occupation rather than a matter requiring proof of custom in each instance.[10] As we later observe, *Re Witt* illustrates such difficulties. Stephen J went on to conclude that the authorities relied upon by Majeau did not support the view that any judicial recognition had been accorded to the general lien claimed.[11] Although there had been, in some instances, evidence of certain customs in particular localities, none of the authorities had reached the stage

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9 At 54–55.
10 At 56.
11 At 59.

where, without evidence of custom and usage, a lien had been accorded judicial notice. He concluded that Majeau could not succeed except by satisfactory proof of some actual custom entitling it to such a lien.[12]

[20] Stephen J noted that the law did not favour general liens since they tended to give their holders an advantage over other creditors.[13] It is for that reason that rigorous proof is required to establish a general custom of trade. Evidence of general usage or custom must be shown to be certain, unambiguous, reasonable and of long standing.[14] We would add that any such custom must also be consistent with the general law.

The English authorities

[21] Mr Upton for Toll took us carefully through an analysis of the cases he relied upon. Almost all are of ancient origin. In chronological order, the first is *Ex parte Deeze*[15] in which the Lord Chancellor, Lord Hardwicke, held that a packer was entitled to retain goods until payment of the amount due by the owner of the goods, not only for the cost of packing but also for any other debt due by the owner of the goods. Deeze had made a loan to a merchant and had later received six bales of cloth to pack and press for the merchant. Upon the merchant's bankruptcy, part of the loan remained outstanding, as did the amount due for packing.

[22] Two matters are of significance in respect of this authority. First, as Lord Hardwicke later acknowledged in *Ex parte Ockenden*,[16] there was evidence that it was usual for packers to lend money to clothiers and for the cloths to be a pledge not only for the work done in packing, but for the loan of money as well. Secondly, proof of the custom relied upon was adduced.

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12 At 60.

13 Citing the observations of Lord Campbell in *Bock v Gorrissen* (1860) 2 De G, F & J 434 at 443, 45 ER 689 at 693 (CA), and Lord Ellenborough in *Rushforth v Hadfield* (1806) 7 East 224 at 228, 103 ER 86 at 8788 (KB).

14 At 61 per Stephen J. To similar effect, see *Laws of New Zealand* Lien (online edition) at [2].

15 *Ex parte Deeze* (1748) 1 Atk 228, 26 ER 146 (Ch).

16 *Ex parte Ockenden* (1754) 1 Atk 235, 26 ER 151.

[23] *Ex parte Ockenden* did not involve packers. Lord Hardwicke declined to recognise a general lien in favour of a miller. A particular lien was upheld, limited to the amount due for milling the wheat remaining in the possession of the miller at the date of the bankruptcy of the owner of the wheat.

[24] The next authority relied upon in point of time is *Green v Farmer.*[17] The plaintiffs sold goods to a merchant who delivered them to the defendants for dying to the merchant's account. The defendants refused to release the goods until they were paid a debt owed by the merchant for dying other goods in excess of what was owed for the dying of the subject consignment. The Chief Justice, Lord Mansfield, held that the plaintiffs were entitled only to a particular lien in respect of the price for the dying of the goods then remaining in their possession. Lord Mansfield reviewed the earlier decisions in *Ex parte Deeze* and *Ex parte Ockenden*. Lord Mansfield considered the two previous cases to be consistent with one another. In relation to *Ex parte Deeze*, Lord Mansfield stated, according to Blackstone's report, that:[18]

> A packer, according to the course of trade, is certainly entitled to a lien upon all goods in his hands, *being in the nature of a factor*.
>
> (Emphasis added.)

[25] By contrast, Lord Mansfield observed that, in *Ex parte Ockenden* case, no relationship as a factor or agent was involved. It followed that, in *Ex parte Ockenden*, the miller's lien was limited to the price of grinding and did not extend to other debts.[19] Lord Mansfield also noted:[20]

> … where one has acted as a factor for another, everything in his hands is construed to be a pledge.

[26] In *Green v Farmer*, Lord Mansfield noted that no factor or agent was involved; the only transaction was the process of dying. No general lien was therefore available.

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17 *Green v Farmer* (1746–1779) 1 Black W 651, 96 ER 379; (1768) 4 Burr 2214, 98 ER 154 (KB).
18 At 654.
19 1 BlackW at 654.
20 At 653.

[27] In the Burroughs Report of *Green v Farmer*, Lord Mansfield stated in relation to *Ex parte Deeze* that:[21]

> If the usage there stated be true, the packer was in the nature of a factor; and, as such, had a lien for the general balance. It was settled, in 1755, "that a packer, being in the nature of factor, would be entitled to a lien."

[28] Mr Upton made much of Lord Mansfield's reference to the packer's lien as having been "settled in 1755". He submitted that this showed that Lord Mansfield considered the packer's lien and the factor's lien as cognate (deriving from the same origin). He noted that a factor's lien was not definitively recognised until Lord Hardwicke did so in *Kruger v Wilcox.*[22] This case was decided in 1755, some seven years after *Ex parte Deeze* was decided. Mr Upton further submitted that the report in *Kruger* made it clear that the factor's lien was a law merchant lien. It followed, in his submission, that if the packer's lien and the factor's lien were cognate, the packer's lien was similarly a law merchant lien.

[29] We must confess to having some difficulty in following this submission. Our review of the authorities to this point shows that any recognition of a packer's lien was clearly premised on the footing that the packer was also a factor engaging in moneylending. The goods supplied by the debtor were viewed as providing a pledge or security for the moneys loaned as well as for the charges incurred for the provision of packing services. There is nothing to suggest that the courts were prepared (at least up to this point) to recognise a general lien for packers independently of their dual function as moneylenders. This also emerges in *Ex parte Deeze.* A general lien for a dyer could not be recognised in the absence of evidence that the dyer was also engaged in factoring.

[30] It is evident that a cautious approach to the recognition of a general lien was adopted in the authorities, all of which depended on proof of the custom relied upon to establish the lien. We note that, even in *Kruger*, there was merchant evidence to support a general lien in relation to dealings between merchant and factor.

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21 At 2222 and 159.

22 *Kruger v Wilcox* (1755) Amb 252, 27 ER 168 (Ch).

[31] Mr Upton next relied on *Savill v Barchard*[23] in which Lord Kenyon held that the defendant dyers had a general lien on goods sent to them for dying. Lord Kenyon found that, in the case before him, there was strong evidence to prove a course and practice of the trade sufficient to establish a lien founded on that evidence.[24] Unlike the more cautious approach adopted by his predecessors, Lord Kenyon said:[25]

> … the Courts of Law and the understandings of people in general, had gone much in favour of liens: that it was established in the case of bankers, packers and wharfingers, that they were entitled to such lien.

[32] No authority was cited by Lord Kenyon for this proposition.

[33] Counsel also referred to *Houghton v Matthews.*[26] Reference is made to *Ex parte Deeze* in two of the judgments but we do not view the case as assisting the issue we have to decide.

[34] We come now to *Re Witt* which is the decision most heavily relied upon by Toll. The English Court of Appeal was considering an appeal from a registrar's decision in the bankruptcy jurisdiction. The bankrupt debtors had employed a firm of packers to pack goods for them for shipment abroad. The goods were sent by the debtors to the packer's warehouse where they were warehoused, packed and sent off for shipment as directed by the debtors. At the commencement of the liquidation of the debtors, the packers had in their warehouse various parcels of goods belonging to the debtors and the packers were owed a sum of money representing their charges for packing other goods for the debtors. The packers claimed a general lien on the goods for the full amount of the debt due. Affidavits were produced by persons engaged in the packers' trade to the effect that it was customary for a packer to have a general lien upon the goods of his customers in his possession for the amount of his charges, not only in respect of the particular goods but also in respect of any other goods of the customer. Despite some opposing evidence, the registrar was of the opinion that the lien claimed was established.

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23 *Savill v Barchard* (1801) 4 Esp 53, 170 ER 639 (KB).
24 At 53 and 640.
25 At 53 and 640.
26 *Houghton v Matthews* (1803) 3 Bos & Pull 486, 127 ER 263 (KB).

[35] The judgments of the members of the Court are brief and we set them out in full. James LJ said:[27]

> I think it is too late now to attempt to set aside that which has been considered law for so many years, and I must say I do not see the injustice of it. I agree with what Lord Hardwicke said in *Ex parte Deeze*; it seems to me to be very good sense and justice. A man has goods in his possession which he has received in the ordinary course of trading, and he is asked to deliver them up, and at the same time he has a claim against the person who asks him to deliver them up. I think he has a perfect right to keep them. Under the Judicature Acts, I think, if an action were brought for the goods in trover or detinue, by means of a counterclaim the whole matter might be settled in one action. I certainly think this law with regard to lien is a very proper one; it has been settled for a great many years, and I do not see why we should endeavour to limit the effect of the decisions. The Registrar's order must be affirmed.

[36] James LJ's views are very broadly expressed and must, we think, be read in the light of the factual context of *Ex parte Deeze* as we have noted above.[28]

[37] Mellish LJ said:[29]

> I am of the same opinion. From what Lord Mansfield said in *Green v Farmer*, and what was said by Lord Hardwicke in *Ex parte Deeze*, it seems to me clear that in the middle of the last century it was settled that a packer had a general lien. At that time packers were to a certain extent considered as factors; they used to make advances to their customers. But, it having been established that packers had a general lien at that time, I cannot think the circumstance that they do not now so frequently as they did then make advances should be sufficient to take away their right of general lien. It having been established that they had such a lien then, there can be little doubt that it would continue. Therefore, in the present case, if a single affidavit of the custom had been produced, that would have been sufficient evidence, if any evidence is required at all. If the existence of this lien is ever seriously to be contested, and it is sought to prove that by the present usage of trade packers have not a general lien, it must be done in quite a different way from merely bringing the customer himself to say that he never heard of the general lien. I think the determination of the Registrar was right.
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> (Footnotes omitted.)

[38] Baggallay JA did not deliver a separate judgment but agreed with James LJ.

[39] In analysing the effect of *Re Witt*, Rodney Hansen J first referred to comments made by Stephen J in *Majeau* in which Stephen J had observed that it

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27 At 491–492.
28 At [21].
29 At 491–492.

clearly emerged from the judgment of Mellish LJ in *Re Witt* that the lien was established only by proof of custom and not as a matter of law.

[40] With reference to Stephen J's remarks, Rodney Hansen J stated:[30]

> I find the analysis and reasoning of Stephen J compelling. I respectfully agree with the way in which he characterised the decision in *In Re Witt*. It is clear from the report in *In Re Witt* that the Registrar who made the decision under appeal based his finding on evidence that by the custom of trade, a packer had a general lien upon the goods of customers in his possession. There was also evidence in opposition by one of the debtors which asserted that neither he nor his co-debtor knew of any such custom of trade. Mellish LJ plainly took the view that in light of the authorities, scant evidence (if any) to support the existence of the custom would be required. But in leaving open the possibility of a future challenge to the existence of the lien by proof that it was no longer supported by general usage, he appears to acknowledge that a packers' lien had yet to become part of the law by the process of judicial notice described by Stephens J.

[41] In general, we agree with Rodney Hansen J's analysis. We think the important matters to emerge from *Re Witt* are first that the decision under appeal was, as Rodney Hansen J found, based on evidence of trade custom. Secondly, Mellish LJ acknowledged that, at the time of the 18th century authorities referred to, packers were considered as factors, making advances to their customers. While, by the time *Re Witt* was decided, Mellish LJ said this did not occur so frequently as in the past we do not view his comments as confirming that packers no longer engaged in moneylending at all. While suggesting that little, if any, evidence of custom might be necessary, Mellish LJ was not unequivocal in that respect.

[42] Mr Upton went on to submit that, at least from the time when Lord Mansfield came to the bench at the end of 1756, once a considered judgment accepting a mercantile custom had been given, custom did not have to be pleaded in any future litigation and no proof of it would be required thereafter. The custom would become part of the common law and the courts were obliged to take judicial notice of it.[31] It followed, in counsel's submission, that since a packer's lien was established as a general lien of common law in England, repeated proof by evidence of custom was not required after 1755.

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30 At [20].

31 Citing, for example, WJV Windeyer *Lectures on Legal History* (2nd revised ed, The Law Book Company of Australasia, 1957) at 177 and 236–237; and *Brandao v Barnett* (1846) 12 Cl Fin 787, 8 ER 1622 at 805 and 1629 (HL) per Lord Campbell.

[43] Counsel submitted finally that the packer's common law lien was received into New Zealand as part of the laws of England existing at 14 January 1840 so far as they were applicable to the circumstances of New Zealand.[32] There was no reason to exclude the introduction of such a custom into New Zealand. English common law applied unless the situation in question did not exist in New Zealand or was unlikely to arise.[33]

The New Zealand cases

[44] Mr Upton referred to two New Zealand authorities which, he submitted, supported the continuing recognition of the packer's general lien at common law in New Zealand. In *Provost Lefebvre Export Ltd v E Lichtenstein & Co Ltd*,[34] Gault J was concerned with a series of contracts for the sale and purchase of scoured wool, the property in which had passed amongst the three parties to the proceedings. The first defendant, Lichtenstein, claimed a general lien over the bales of wool which remained in its possession at the date of receivership of the second defendant. Lichtenstein's business operations encompassed a range of activities involving buying greasy wool, scouring and packing the wool and then selling it. Secondly, it was a wool trader. In that capacity, Lichtenstein had sold two lots of wool to the plaintiff and then, on behalf of the plaintiff, on-sold them to the second defendant. However, the second defendant was placed into receivership before delivery occurred. A dispute ensued as to whether title had passed to the second defendant before receivership.

[45] Gault J said that *Re Witt* and *Ex parte Deeze* "clearly indicated that a packer is entitled to a general lien".[35] However, he saw a difficulty in identifying the scope of such a general lien and its availability in the circumstances of the case before him. Given the various business activities undertaken by the first defendant, the Judge concluded that Lichtenstein did not have possession of the wool in its capacity as a packer. Noting the cautious approach normally taken to a finding of a general lien,

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32 Citing the English Laws Act 1858; the English Laws Act 1908; and s 5 of the Imperial Laws Application Act 1988.

33 *Falkner v Gisborne District Council* [1995] 3 NZLR 622 at 626 (HC).

34 *Provost Lefebvre Export Ltd v E Lichtenstein & Co Ltd* HC Auckland CL 56/87, 4 March 1988.

35 At 24.

the Judge observed that no evidence was called to show any custom or usage establishing a general lien or its extent.[36] There had been no indication of any prior claim to a general lien even though the monies claimed had been owing for a substantial period. In any event, the plaintiff had offered to pay the outstanding sum which, the Judge found, must result in the loss of any lien established.

[46] Counsel also referred to an oral judgment of Barker J in *Turners & Growers Exports Ltd v Henderson.*[37] The plaintiff kiwifruit exporter sued the receivers of a coolstore business. In declining to enter summary judgment, Barker J found that there were at least two defences which required findings of fact. One of these related to a defence by the receivers that the exporter had no right to possession of the relevant goods as the coolstore operator had a packer's lien. In that respect, Barker J observed:[38]

> The case of *Re Witt* (1876) 2 Ch.D. 489, although of some antiquity is authority for the proposition that a packer is entitled to a general lien on the goods of a customer which are in his hands. The report is not terribly specific as to what the goods were but Mellish LJ at 491 said:
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> > ... it seems to me clear that in the middle of the last century it was settled that a packer had a general lien.
>
> Whilst the learned Lord Justice may not however have heard of kiwifruit, the principle seems still appropriate today.

[47] Barker J went on to find that the terms and conditions on which the kiwifruit were stored were unclear, as was the method by which the packing charges and warehousing charges were calculated. In those circumstances, he considered there might be some argument as to the applicability of a lien.

[48] There is nothing in either of these authorities to suggest that the existence or otherwise of a packer's general lien was the subject of argument. While in each case the presiding judge appeared to accept the existence of such a lien, in neither case was the existence of the lien essential to the disposition of the case.

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36 At 25.
37 *Turners & Growers Exports Ltd v Henderson* HC Auckland CP1727/89, 28 November 1989.
38 At 8–9.

Texts and commentaries

[49] Mr Upton submitted that the packer's lien continued to be noted as a judicially recognised lien in the leading English texts, citing *Palmer on Bailment*.[39] Listed in the general lien category are packers, factors, insurance brokers, stockbrokers and solicitors. Similarly, in *Halsbury's Laws of England* the volume on bailment states that "by implication of law, wharfingers, packers and possibly warehousemen, have a general lien for their charges upon the chattels of their bailers ...".[40] A packer's lien is also referred to in *Chitty on Contracts*.[41] In all these cases, *Re Witt* is cited as authority.

[50] On the other hand, in *Halsbury's* volume on liens, factors are referred to as being entitled to a general lien but not packers.[42] A footnote states that packers, being in the nature of factors, have a general lien, citing *Green v Farmer, Ex parte Deeze* and *Re Witt*.[43] In the *Laws of New Zealand*,[44] it is said that general liens are recognised "... in occupations such as bankers, mercantile agents, brokers and solicitors". Further, in *Garrow & Fenton's Law of Personal Property in New Zealand* general liens are said to have been recognised for at least bankers, shareholders, solicitors, factors and marine brokers.[45] The most comprehensive Canadian text likewise does not include packers within its list of liens arising at common law, simply noting that such liens include those of solicitors, bankers, carriers, auctioneers, wharfingers and stockholders.[46]

[51] Mr Bos for the receivers referred us to *Bowstead & Reynolds on Agency* which contains the following passage in relation to possessory liens:[47]

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39 Norman Palmer *Palmer on Bailment* (3rd ed, Sweet & Maxwell, London, 2009) at [14-103].
40 Halsbury's Laws of England (4th ed, reissue, 2005) vol 3(1) Bailment at [48].
41 H G Beale (ed) *Chitty on Contracts* (30th ed, Sweet & Maxwell, London, 2008) vol 2 at [33-054], n 290.
42 *Halsbury's Laws of England* (5th ed, 2008) vol 68 Lien at [828].
43 At [828], n 6.
44 *Laws of New Zealand* Lien (online ed) at [2].
45 Roger Fenton *Garrow & Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) vol 1 at [7.6].
46 Richard H McLaren *Secured Transations in Personal Property in Canada* (looseleaf ed, Carswell) at [5.05[2][a]].
47 *Bowstead & Reynolds on Agency* (19th ed, Sweet & Maxwell, London, 2010) at [7.081].

> **General liens.** Factors, marine insurance brokers, stockbrokers, solicitors, bankers, wharfingers and packers are among those who have been held to have a general lien by implication from custom. On the other hand it has been held that a confirming house was not a modern version of the factor, and had no such lien; and the old cases on the packer's lien were based on the packer being to some extent a factor and again may not avail those who conduct for different sorts of business in a modern context, e.g. a freight forwarder or a consolidator in the absence of proof of custom. Further details should be sought in specialised works.
>
> (Footnotes omitted.)

[52] The learned authors of *Bowstead & Reynolds* cite *Re Witt* as authority for the proposition that packers have a general lien. The reference to freight-forwarders and consolidators illustrates the practical difficulties which may arise in differentiating a packer from others involved in receiving, warehousing and distributing goods in the 21st century business context. The authorities cited in *Bowstead & Reynolds* in relation to consolidators and freight-forwarders do not provide any material assistance in relation to the existence or otherwise of a packer's lien.[48]

Modification of a common law rule in this context

[53] Counsel for Toll submitted finally that a mere change in practice or circumstances does not serve to abrogate a common law rule. It was submitted that once a custom has been judicially recognised and becomes part of the common law, it does not lapse by mere disuse and is not modified merely by inconsistent practice. Rather, it was submitted that any change in practice or circumstance must be so significant that the old rule has become repugnant. The authorities cited in support of these propositions were *Neville v London Express Ltd,*[49] *Winchester v Fleming,*[50] *Edie v East India Co*[51] and *Goodwin v Robarts*.[52]

[54] Counsel also referred to *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd.*[53] At first instance, Donaldson J spoke of the law merchant being "far from immutable"

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48 *Langley, Beldon & Gaunt Ltd v Morley* [1965] 1 Lloyd's Rep 297 (QB); and *Chellaram & Sons (London) Ltd v Butlers Warehousing and Distribution Ltd* [1978] 2 Lloyd's Rep 412 (CA).

49 *Neville v London Express Ltd* [1919] AC 368 (HL) at 414.

50 *Winchester v Fleming* [1938] 1 QB 259.

51 *Edie v East India Co* (1761) 2 Burr 1216, 97 ER 797 (KB).

52 *Goodwin v Robarts* (1875) LR 10 Ex 337 (Exch).

53 *Teheran-Europe Co Ltd v S T Belton (Tractors) Ltd* [1968] 2 QB 53; aff'd in part [1968] 2 QB 545 (CA).

and said it was open for any court to find on the basis of evidence that it had changed. Counsel submitted that Donaldson J had confused trade usage with the law merchant. This was, counsel submitted, recognised by Diplock LJ on appeal who agreed with Donaldson J that commercial *usages* were far from immutable.[54]

Packer's lien – discussion

[55] We agree with the conclusion reached by Rodney Hansen J that the courts in New Zealand do not recognise a packer's general lien without proof of custom to support such a lien. Our reasons can be briefly stated.

[56] The origins of the packer's lien recognised in the early English cases are firmly grounded in the customary engagement of packers in those times in the business of moneylending. The cases demonstrate that packers would lend money to their customers and the goods entrusted to their care were treated as a pledge or security for the advances made as well as for the charges made in respect of the packing services. In this respect, the packer's lien recognised in the English cases was closely aligned to the factor's lien later settled in *Kruger*.[55] This linkage was clearly recognised in *Green v Farmer*. We do not view *Re Witt* as establishing unambiguously the existence of a general packer's lien independently of the packer's complementary role as a factor. Nor do we regard *Re Witt* as confirming unequivocally that a general packer's lien may be recognised without proof of custom. As it happens, in every case relied upon by Toll, evidence from merchants of customary usage supporting the lien claimed was adduced and relied upon.

[57] In the intervening period from 1876 (when *Re Witt* was decided) until today, no authority has been cited to us to support the continued existence of the lien claimed except the two New Zealand cases we have discussed. In those cases the existence of the packer's lien does not appear to have been argued and, in any case, was not essential to the decision. It is possible, of course, that the absence of authorities since *Re Witt* reflects the fact that the existence of the packer's lien has

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54 At 558.

55 The banker's lien has also been regarded as closely aligned to the factor's lien: *Barnett v Brandao* (1843) 6 Man & G 665 at 666 per Lord Denman CJ.

been, and continues to be, judicially recognised. However, we would prefer to draw the inference that the absence of subsequent authority is more likely to illustrate that the packer's lien has not been judicially recognised in the absence of custom and that no such custom continues to exist.

[58] However that may be, there is no suggestion in the present case that Toll was engaging in moneylending such as to enable it to take advantage of the ancient packer's lien recognised in *Re Witt*. And, of course, no evidence of custom supporting such a lien was adduced in this case.

[59] We add that if the general lien relied upon were to be imported into the law of New Zealand by the legislation relied upon by Toll, it would need to have become part of the common law of England by 1840.[56] For the reasons already given, we are not persuaded that the packer's lien had been judicially recognised by that date without proof of custom.

[60] Our conclusion is consistent with the cautious approach traditionally taken to the recognition of common law liens. We think too that an expansive approach to the recognition of liens would be inconsistent with the intentions of Parliament in enacting the PPSA. The Select Committee reported that the Bill was needed because the existing law relating to personal property securities was "overly complex, inconsistent and inaccessible".[57] The law was not integrated nor was there a comprehensive single register. In response, the proposed Act was designed to create certainty and thereby reduce commercial costs. This objective was to be achieved "by setting out priority rules for determining disputes between holders of competing interests and creating a single register of security interests in personal property."[58] Section 93 of the PPSA may be viewed as a limited exception to the broad intention to codify the law of security interests in personal property. While the existence of common law liens was accepted by s 93 as an exception to this general intention, anything other than a cautious approach to the recognition of common law liens is not justified.

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56 See n 28.
57 Personal Property Securities Bill 1998 (251–2) (select committee report) at i.
58 At ii.

[61] We also have concerns about the scope of any such lien even if it were established. The potential difficulties in determining the capacity in which goods are received and the nature and extent of any such lien were recognised in both the New Zealand cases cited by counsel. It is also illustrated in the fine distinctions which may be drawn in the modern context between a packer simpliciter and the widespread existence of freight forwarders and consolidators. How is the line to be drawn, for example, between the packing of individual products into other containers and, say, removing pallet loads of goods in cartons from a large container and packing the cartons into smaller containers for onward transport? And what distinction is to be drawn between packing (strictly so called) and the warehousing and distribution of such goods which may constitute different elements of a much wider process? The latter difficulty is illustrated in the present case in which more than half the total amount claimed relates to transport and fuel costs connected with the distribution of the goods to Scene 1's customers.[59]

[62] The potential breadth of application of the packer's lien contended for by Toll is illustrated by an example postulated by Mr Upton. He submitted that a general packer's lien would be available to someone receiving another's olive oil in bulk and putting it into smaller containers so the owner could sell at retail. One only has to state this proposition to appreciate the extent to which the broad intention of the PPSA would be undermined if a general packer's lien were to be recognised in New Zealand as Toll submitted.

[63] We conclude that a common law general packer's lien ought not to be recognised in New Zealand in the absence of satisfactory proof of a custom supporting such a lien. In view of that conclusion, we do not need to consider whether such a lien (if recognised) could be lost through disuse or change of practice.

Whether, in any event, the application of a general packer's lien is excluded by the contractual arrangements between Toll and Scene 1

[64] Mr Bos submitted that if, contrary to his submission, there was a general packer's lien as asserted by Toll, then any such lien was excluded by cls 7 and 9.1 of

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[59] See [11] above.

the conditions of sale agreed in June 2009. Mr Bos also submitted that the judgment of the High Court had incorrectly recorded that it was common ground that the contractual lien contained in the standard terms and conditions related only to services performed after 5 June 2009. Accordingly, the receivers sought to argue as an additional ground in support of the judgment that the contractual lien applied to all amounts claimed by Toll, whether before or after 5 June 2009.

[65] Mr Bos also contended that a right to a common law lien will be lost when by agreement (express or implied), or by a course of dealing, the application of a common law lien is excluded or waived.[60] He referred to *A J Hollander (NZ) Ltd v Owens Coolair*,[61] in which Henry J held that contractual provisions defining the respective rights and obligations of the parties in relation to a contract of storage were such as to supersede any such rights or obligations which might arise at common law.

[66] We are satisfied that the standard terms and conditions agreed by exchange of letters in June 2009 are such as to exclude the existence of any common law packer's lien as asserted by Toll. First, we accept the submission made by Mr Bos that cl 7 provides for a general contractual lien which the parties must have intended to displace or supersede any common law lien. We reach that conclusion principally on the basis that cl 7 contained detailed provisions conferring rights and powers in favour of Toll which extend well beyond the rights which would otherwise be available to Toll if the general packer's lien was available. In particular, a power of sale, not available at common law, is conferred by cl 7.2.

[67] Mr Bos also relied on cl 9.1, submitting that this provision excluded any common law lien on the basis that it was a term implied by custom.[62] Mr Upton submitted that cl 9.1 did not apply because a lien is a right conferred by law. Clause 9.1 is limited to implied contractual terms. On this point, we accept Toll's submission. It is well established that a lien is a right conferred by law and not by

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60 *Palmer on Bailment* at [15–074]; Beale *The Law of Personal Property Security* at [3.65].

61 *A J Hollander (NZ) Ltd v Owens Coolair Services Ltd* (1991) 3 NZBLC 102,053 (HC).

62 We note that cl 9.1 is subject to cl 10 but cl 10 has no application in the present circumstances.

contract.[63] The distinction between a right conferred by law and an implied contractual term is captured in the following passage from the judgment of Diplock LJ in *Tappenden v Artus*:[64]

> The common law lien of an artificer is of very ancient origin, dating from a time when remedies by action upon contracts not under seal were still at an early and imperfect stage of development: see the old authorities cited by Lord Ellenborough C.J. in *Chase* v. *Westmore. Because it arises in consequence of a contract, it is tempting to a twentieth-century lawyer to think of a common law lien as possessing the characteristics of a contractual right, express or implied, created by mutual agreement between the parties to the contract. But this would be to mistake its legal nature. Like a right of action for damages, it is a remedy for breach of contract which the common law confers upon an artificer to whom the possession of goods is lawfully given for the purpose of his doing work upon them in consideration of a money payment.* If, pursuant to the contract, the artificer does his work, he is entitled to retain possession of the goods so long as his charges, whether agreed in advance or (if not so agreed) payable upon a quantum meruit, are satisfied. The remedy can be excluded by the terms of the contract made with the artificer either expressly or by necessary implication from other terms which are inconsistent with the exercise of a possessory lien; cf. *Forth v. Simpson*, in the same way as the common law remedy for damages for breach of contract may be excluded or modified by the terms of the contract itself. But this does not mean that the remedy of lien, any more than the remedy in damages, is the result of an implied term in the contract to which what we may call the *Moorcock* criteria relevant to implying terms in a contract apply. The test whether or not the remedy exists is not whether or not its existence is necessary to give business efficacy to the contract. Judged by this test there would in modern times never be an artificer's lien.
>
> (Emphasis added.)

[68] To the extent that there may be any suggestion to the contrary in the 1809 English case of *Cowell v Simpson*,[65] it is contrary to the well-established distinction we have identified.

[69] We are not persuaded by the proposition advanced by Mr Bos that cl 9.1 is sufficiently widely expressed to include a term implied by custom. In context, cl 9.1 applies to contractual terms, not to rights conferred by the common law which do not depend on the agreement (express or implied) of the parties. Since cl 9.1 is an exclusion clause, it is proper to construe it strictly in accordance with its terms. Notwithstanding our view in relation to cl 9.1, we are satisfied that any common law

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63 *Halsbury's Laws of England* (5th ed, 2008) vol 68 Lien at [802]; *Laws of New Zealand* Lien (online ed) at [10]. See also *A J Hollander (NZ) Ltd* above.

64 *Tappenden v Artus* [1964] 2 QB 165 (CA) at 194–195.

65 *Cowell v Simpson* 16 Ves Jun 275 at 280.

lien is excluded in any event by cl 7, at least in relation to services provided after 5 June 2009.

[70] The remaining point is whether, as Mr Bos submitted, the contractual lien conferred by cl 7 of the conditions of contract was intended to apply in relation to services undertaken by Toll prior to 5 June 2009 as well as after that date. Mr Bos relied on the terms of cl 7.1 which refers to the lien as applying to all charges "due or which become due on any account ...". Prima facie, the general lien was to apply both prospectively and retrospectively. However, we consider that the standard terms must be interpreted in light of the overall context of the dealings between the parties as at 5 June. A substantial debt had been incurred up to that point and a repayment programme was agreed. There being no formal agreement in place between the parties at that stage, paragraph 2 of the letter of 5 June[66] clearly contemplates that the standard terms and conditions were to apply "to all services provided by Toll *from the date of this letter*". (Emphasis added.)

[71] Mr Bos submitted that the retrospective application of cl 7 was demonstrated by the reference to the modification of the terms and conditions to incorporate Schedule B of the earlier letter of intent "in order to articulate a description of the services that Toll has previously undertaken to provide … and the terms and conditions applicable to those services". However, the conditions specified in Schedule B are in the nature of performance standards and do not touch upon issues of payment or liens. In context, we are satisfied that the parties intended that Schedule B (performance standard) conditions would apply to both past and future services rendered by Toll but that the new payment and lien arrangements were to apply only in respect of services after that date.

Conclusion

[72] In summary, we conclude that:

(a) The Judge was correct to find that Toll was not entitled to a general packer's lien without proof of custom.

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[66] Recited above at [7].

(b) In any event, the contractual lien agreed to between the parties in June 2009 excluded the application of any such lien in respect of services rendered by Toll to Scene 1 after 5 June 2009, but not before that date.

[73] For the reasons given, we dismiss the appeal. The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

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