**IN THE DISTRICT COURT**
**AT AUCKLAND**

**CIV 2006-004-3020**

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| BETWEEN | SEGARD MASUREL (NZ) LTD<br>Plaintiff |
| AND | COLIN NICOL, PETER ANDERSON AND KERRYN MARK AS RECEIVERS OF EXFTX LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) (FORMERLY KNOWN AS FELTEX CARPETS LIMITED)<br>Defendants |

Hearing: 21 February 2007

Appearances: T Lamb for Plaintiff
L A O'Gorman for Defendants

Judgment: 23 May 2007

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**DECISION OF JUDGE NICOLA MATHERS**

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**Background**

[1] This is an application by the plaintiff for summary judgment for damages of $180,983.31 from the defendants for conversion. The defendant opposes the summary judgment application.

[2] The basic facts are not in dispute and are as follows.

[3] On 27 June 2005 the plaintiff entered into a written wool supply contract with Feltex Carpets Limited (Feltex) to supply amounts of greasy wool to Feltex. Between August 2005 and September 2006 various amounts of wool were supplied





by the plaintiff in accordance with the written agreement. On 28 June 2006 the supply contract was rolled over for another three months.

[4] Clause 4 of the agreement provides interalia "payment will be made cash on delivery on the contracted date of delivery, or actual received date if delivery has been delayed, or receipt of invoice if invoice not received after delivery date."

[5] On 5 September 2006 the plaintiff supplied wool to the value of $360,658.43. The plaintiff did not receive payment from Feltex for the wool delivered. Mr Whiteman, the plaintiff's director, spoke to the financial controller of Feltex on 6 September querying the payment and was advised that payment had been temporarily delayed but would be made as soon as possible. Mr Whiteman was also advised that the wool would not be processed until payment was received.

[6] Payment for some of the wool delivered was received by the plaintiff on 15 September.

[7] On 22 September 2006 Feltex was placed into receivership by ANZ National Bank Limited and Australia and New Zealand Banking Group Limited and the defendants were appointed as receivers. On 25 September Mr Whiteman was advised by the receivers that they would be keeping possession of the wool that had been delivered. On 27 September 2006 the plaintiff's solicitors made demand of the defendants to pay for the wool or return it. On 28 September 2006 the plaintiff and the defendants came to an arrangement whereby the defendants would receive a credit in the sum of $179,675.12 leaving the present amount claimed outstanding.

[8] The defendants advised the plaintiff that the wool had been scoured and processed. The plaintiff made further demand for the payment of $180,983.31 but the defendants failed to pay it.

[9] The defendants, through their solicitors, advised the plaintiff's solicitors that ownership of the wool supplied to Feltex did not remain with the plaintiff and therefore the plaintiff became an unsecured creditor. They also advised that even if the plaintiff retained title to the wool, the supply of the wool by the plaintiff to Feltex

constituted a security interest for the purposes of the Personal Property Securities Act 1999 ("the PPS Act").

[10] The receivers of Feltex were appointed pursuant to a composite deed of debenture dated 9 May 2000 to ANZ National Bank Limited and Australia and New Zealand Bank Banking Group Limited. The debenture secures the due payment by Feltex of its secured indebtedness and performance of its secured obligations by way of charging and assigning in favour of ANZ National Bank and Australia and New Zealand Banking Group Limited all of Feltex's right, title and interest (present and future, legal and equitable) in, to, under or derived from its secured property.

[11] The deed of debenture defines "secured property" as being all Feltex's assets (whether situated in New Zealand or elsewhere) excluding any assets located in Australia. Both Australia and New Zealand Banking Group Limited and the ANZ National Bank have registered financing statements on the Personal Properties Securities Register in respect of the security interest created by the composite debenture.

**The plaintiff's argument**

[12] The plaintiff submits that title to its wool delivered on 5 September 2006 did not pass to Feltex and subsequently to the defendants. The plaintiff says that the clear intention of the parties' written agreement did not allow for title to pass until payment was received. The payment terms were "cash on delivery".

[13] The plaintiff argues that the Personal Properties Securities Act 1999 does not apply because the agreement is not a conditional sale agreement. Accordingly the two banks do not have a perfected security interest and therefore do not have priority over the plaintiff's claim for the wool or the value of the wool. In addition the plaintiff argues that a cash on delivery situation never allows title to pass and that any subsequent delay in payment or tacit agreement as to delay does not alter the cash on delivery terms.

[14] In essence the plaintiff refers me to s19 and s20 of the Sale of goods Act and



and to the intention of the parties. The written wool supply agreement states:

> "Payment will be made cash on delivery on the contracted date of delivery, or actual received date if delivery has been delayed, or receipt of invoice if invoice not received until after delivery date."

[15] Mr Lamb, for the plaintiff submits that nothing turns on the fixed words of the agreement as the parties never utilised this term. I was then referred to a number of North American commercial cases which essentially say that title does not pass until payment is received. There is also American authority for the proposition that if immediate payment is not made on delivery, then the consignee holds the goods in trust until payment is made.

[16] Then the plaintiff argues that in any event the Wool Supply Contract is not a conditional sale agreement. In particular the plaintiff submits that all the examples listed in s 17(3) Personal Properties Securities Act 1999 relate to a credit arrangement whereas "cash on delivery" cannot be a credit arrangement and therefore the other provisions of the Act cannot apply.

[17] Conversion is also pleaded and the plaintiff refers me to the evidence of Mr Whiteman that he instructed the plaintiff's solicitors to demand the return of the goods or payment. By this failure it is said that a conversion took place.

**The defendants' argument**

[18] The defendants have helpfully set out what they believe are the three issues for determination in this summary judgment:

a) First as to whether title in the goods passed on delivery on 5 September 2006 and whether the plaintiff was merely an unsecured creditor;

b) Secondly that if title did not pass, whether the plaintiff's retained interest in the goods constituted a security interest in terms of the PPS Act for determining priorities;

c) Thirdly, as to whom had priority.

[19] The defendants argue that in accordance with s 20 of the Sale of Goods Act and Rule 5, together with s 50 that if title is not reserved pursuant to s 21 then title passes. Such agreements for reservation of title were, I agree, commonly known as Romalpa clauses.

[20] Ms O'Gorman for the defendants argues however that even if there was a reservation of title in the nature of a Romalpa clause, that the PPS Act abrogates in particular any security interest. It is then submitted that under the PPS Act a security interest can be created in assets not owned in the traditional sense.

**Discussion**

[21] In essence the plaintiff's argument that the wool supply contract is not a conditional sale agreement relies upon a finding that "cash on delivery" cannot be a credit arrangement and therefore the PPS Act does not apply. The trouble with this is that what I expect had started out as a cash on delivery arrangement turned out at the time not to be that. Payment was not made on delivery. By tacit agreement or actual agreement credit was effectively given to the company. There is no dispute that this in fact occurred, although of course the plaintiff argues that the cash on delivery arrangements still remain the intention of the parties. I have difficulty with that proposition because of what in fact happened and what is acknowledged to have happened.

[22] Romalpa clauses were introduced and effectively precluded title and delivered goods from passing to the buyer until fulfilment of the usual payment conditions. This avoided the creation of a charge or security over the goods.

[23] In my view the PPS Act has substantially changed the law in relation to Romalpa clauses. It is apt to refer to what is now commonly referred to as "what's



yours is mine". I agree that it is fundamental to the PPS Act that there is an ability to create security interests in assets not owned in the traditional sense. In my view the agreement reached by the parties subsequently as to their course of trading was in the nature of a conditional sale agreement.

[24] The plaintiff argues that the two banks in question did not obtain a perfected security interest. I cannot agree with that. While I agree that a true cash on delivery situation never allows title to pass, that is not in my view what actually happened here. While I understand the logic behind the American cases cited to me, the whole philosophy of the PPS Act has in my view overriden those cases. What might have been protected by a Romalpa clause is no longer protected. It seems to me that allowing credit to be given on a regular basis brings the situation to a position where there is a security interest which could have been registered.

[25] It seems to me also that if the plaintiff is right in its argument than the PPS Act could be avoided by a simple agreement in each case, that delivered goods are held in trust for the vendor until payment. That is really what a Romalpa clause did and that has been avoided by the PPS Act.

[26] In my view by deeming a retention of title clause to be a security interest, the asset in question is effectively vested in the debtor. Once this occurs the Act provides for the determination of priorities. It is trite to say that an unregistered security interest is defeated by a registered interest. If indeed an unregistered security can in fact be a security interest.

[27] I consider that in terms of s 17(1) PPS Act the supply of goods in this case created a security interest. Section 17(3) includes a conditional sale agreement as a security interest.

[28] There is little dispute between the parties as to the operation of priorities under the Act, provided of course that the Act applies.

[29] I agree with the defendant that Clause 4 of the supply contract contemplates that payment could be made other than on a cash on delivery basis being a

"receipt/invoice if invoice not received until after delivery date." I agree also that the supply contract is silent as to whether title in the wool was to pass.

[30] Unfortunately for the plaintiffs I agree that title did pass to Feltex at the time of delivery and that therefore the plaintiff became an unsecured creditor of Feltex. Even if this is wrong I agree with the defendants that any retention of title would constitute a security interest in terms of the Act.

[31] In my view the composite debenture catches the collateral and that the two bank security interest complied with the requirements of s 40 of the Act. The security interest was taken over all of the debtors present and after acquired property and in my view s 36 of the PPS Act applied. In other words the two banks acquired a perfected security interest in the wool and the two banks had a priority over an unsecured creditor being the plaintiff.

**Decision**

[32] I find that title did pass to Feltex upon delivery of the wool on 5 September 2006 and that the plaintiff was merely an unsecured creditor. If I am wrong in this regard and the plaintiff had reserved title in the nature of a Romalpa clause then any conditional sale agreement would constitute a security interest. In my view the two banks created a perfected security interest. As such that has priority over any unregistered interest.

[33] It follows from this decision that there can be no question of a conversion.

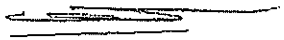
[34] Of course I have sympathy for the plaintiff, it acted in good faith and was rather led along a path in to granting credit due to the supposed viability of an old and established company as Feltex. Unfortunately due to the philosophy of the PPS Act registration is everything. The plaintiffs failed to register and this has led to this adverse decision.

[35] The plaintiff has sought a summary judgment. This is one of those cases where the factual basis is clear enough for me to make a decision that the defendant



through its receivers has title to the wool and that the plaintiff is merely an unsecured creditor. The summary judgment must fail and judgment is entered in favour of the defendants.

[36] If costs are sought and the parties cannot agree on the question of costs I will receive memoranda within 21 days.



Nicola Mathers
**District Court Judge**