McKay v Toll Logistics (NZ) Ltd

High Court Auckland CIV-2009-404-7389
5 February; 22 June 2010
Rodney Hansen J

Commercial law – Liens – Whether and when common law general lien arose – Whether packers' lien recognised – Whether statutory and common law liens protected by PPSA – Personal Property Securities Act 1999, ss 17(1)(a), 23(b), 66(b) and 93.

Company law – Receivership – Application for directions – Whether common law general lien existed – If so, whether common law general lien had priority over security interest arising from general security deed – Whether packers' lien existed – Personal Property Securities Act 1999, ss 17(1)(a), 23(b), 66(b) and 93.

From May 2008, Toll Logistics (NZ) Ltd provided warehousing services for DVDs imported by Scene 1 Entertainment Ltd. There was no formal agreement between Toll and Scene 1, only a signed, non-binding letter of intent.

Scene 1 had previously granted ASB Bank Ltd – through a general security deed – a security interest in its property, and ASB had registered a financing statement on the personal property securities register in respect of its security interest.

In June 2009 Toll wrote to Scene 1 proposing terms for the repayment of outstanding invoices, which included a request for Scene 1 to agree to Toll's standard terms and conditions which were attached to that letter. One of the provisions of the standard terms and conditions was that Toll be granted a general lien over the goods of Scene 1. On 14 June, Scene 1 accepted these terms.

On 22 June 2009 ASB appointed receivers of Scene 1. As at that date, Scene 1 owed Toll over $280,000. Of that amount, over $240,000 related to services performed before 5 June, and the remainder related to services performed between 5 and 19 June.

Toll argued that it was entitled to assert a common law general lien for the sum owed for services performed prior to 5 June 2009 on the basis that Toll was a packer, and packers were among a select group of occupations which have a general lien arising by implication from custom. Toll also argued that it had a contractual and common law lien for the sum owed for services provided after 5 June 2009.

The receivers denied that Toll had a common law general lien or that, if it did, it would have priority over ASB's security interest. The receivers accepted that Toll had a contractual lien for the sum owed for services provided after 5 June 2009, but that according to the Personal Property Securities Act 1999 (the PPSA), ASB had priority under its general security deed.

Held: 1 A right to a general lien at common law could be established only by strict proof of custom or usage that was so universally acquiesced in that everybody involved in the relevant trade was taken to have known of it or it could have been ascertained upon inquiry (see [12]).

2 A packer's lien was not part of the general law of New Zealand. It did not arise as a matter of law once the necessary relationship between the parties was proved such as in relationships between banker and customer, and solicitor and client. In order to assert a packer's lien, proof that a general lien was part of the custom of packers was required (see [17], [18], [20], [23], [24]).

Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd (1973) 129 CLR 48, (1973) 1 ALR 1 considered

3 A contractual lien might be a security interest under the PPSA but a lien created by statute or by operation of law was not a security interest under the PPSA. The PPSA deliberately distinguished between liens created by statute or which arose by operation of law and contractual liens in accordance with the goal of treating alike contractual obligations which created an interest in property (see [29], [30], [38], [46]).

Result: Directions given accordingly.

Observation: Although the late 18th century and early 19th century cases demonstrate general support of the existence of a packer's lien, considerable caution is required before applying a rule derived solely from ancient usage to the very different conditions of contemporary commerce (see [25]).

Other cases mentioned in judgment

Deeze, Ex parte (1748) 1 Atk 228, (1748) 26 ER 146 (Ch).
Green v Farmer (1768) 4 Burr 2214, (1768) 98 ER 154 (KBD).
Ockenden, Ex parte (1754) 1 Atk 235, (1754) 26 ER 151 (Ch).
Olive v Smith (1813) 5 Taunt 56, (1813) 128 ER 607 (CP).
Provost Lefebvre Export Ltd v E Lichtenstein & Co Ltd HC Auckland CL56/87, 4 March 1988.
Turners & Growers Exports Ltd v Henderson HC Auckland CP1727/89, 28 November 1989.
Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd [1974] 1 NZLR 484 (CA).
Witt, Re, ex parte Shubrook (1876) 2 Ch D 489 (CA).

Application

This was an application by Andrew John McKay and John Joseph Cregten as receivers of Scene 1 Entertainment Ltd (in rec) for directions as to whether Toll Logistics (NZ) Ltd had a security interest or other right which ranked in priority to the security interest held by ASB Bank Ltd, and, if so, the amount which Toll was entitled to claim in priority to ASB.

MR Bos and *CL Clayton* for the receivers.
BJ Upton and *L Barnard* for Toll.

Cur adv vult

RODNEY HANSEN J.

Introduction

[1] The respondent, Toll Logistics (NZ) Ltd (Toll), provided warehousing services for DVDs imported by Scene 1 Entertainment Ltd (in rec) (Scene 1). When the applicants were appointed receivers of Scene 1 by ASB Bank Ltd (ASB), Scene 1 owed Toll $287,000. Toll claims it has priority over the secured debt of ASB by virtue of a contractual or common law lien over the DVDs in its possession at the date of receivership.

[2] The receivers have applied, pursuant to s 34 of the Receiverships Act 1993, for directions as to whether Toll has a security interest, or other right, which ranks in priority to the security interest held by ASB and, if so, the amount which Toll is entitled to claim in priority to ASB.

Further background

[3] ASB's security interest was a general security deed granted by Scene 1 over its property in February 2008. ASB registered a financing statement on the personal property securities register on 4 March 2008.

[4] Toll commenced providing warehousing services to Scene 1 in May 2008. These services included:

- the provision by Toll of a warehousing distribution facility;
- transporting and warehousing of the DVDs;
- provision of an inventory system;
- order processing and picking and packing of the DVDs to order;
- the receipt, sorting and reporting on returns; and
- delivery of DVDs to Scene 1 customers.

[5] Until June 2009, there was no formal agreement in place between Scene 1 and Toll, although there was a signed (non-binding) letter of intent. On 5 June 2009, Toll wrote to Scene 1 proposing terms for the repayment of outstanding invoices. Toll requested Scene 1 to agree to the standard terms and conditions attached. The standard terms and conditions included a provision granting Toll a general lien over the goods of Scene 1. The terms of Toll's letter were accepted by Scene 1 on 14 June.

[6] On 22 June 2009, the applicants were appointed receivers of Scene 1. At that date, Toll was owed $287,368.05 by Scene 1. Of that amount, $243,374.34 related to services performed before 5 June. The balance of $43,994.16 related to services performed between 5 and 19 June 2009.

[7] At the date of the receivership, Toll was holding approximately 500,000 DVDs in its warehouse on behalf of Scene 1. Pending the determination of this proceeding, the parties agreed to the release and sale of the DVDs against an undertaking by the receivers to hold sufficient sale proceeds on trust to repay Toll.

Issues

[8] Toll claims:

- it has a common law general lien for the sum of $243,374.31 owed in respect of services provided prior to 5 June 2009; and
- it has a contractual lien and a common law general lien for the sum of $43,994.16 owed to it for services provided after 5 June 2009.

[9] The receivers accept that Toll has a contractual lien but claims that ASB has priority under its general security deed. The receivers do not accept that Toll is entitled to a common law general lien but acknowledge that, if a common law general lien exists, it will have priority over ASB's security interest.

[10] The issues requiring determination are:

- Does Toll have a general common law lien?
- If so, was it discharged or otherwise affected by the June agreement or the subsequent conduct of Toll?
- Does Toll's contractual lien have priority over ASB's security interest?

Does Toll have a general common law lien?

[11] A general lien confers the right to retain possession of goods or chattels in respect of a general balance of account, or until the satisfaction of debts or obligations incurred independently of the goods or chattels subject to the right.[1] In contrast, a particular lien is confined to debts and obligations incurred in respect of the goods and chattels subject to the right.[2]

[12] Particular liens are favoured by the law. However, because of the "manifest advantages" they offer to the bailee, the law does not favour general liens.[3] As a result, a right to a general lien at common law may be established only by strict proof of a custom or usage, including a requirement that the custom or usage is so universally acquiesced in that everybody involved in the relevant trade must be taken to have known of it, or must be capable of ascertaining it upon enquiry.[4]

[13] Mr Upton submitted that Toll was entitled to assert a general lien in favour of packers. Packers are among a select group of occupations which has been held to have a general lien by implication from custom. The earliest of the cases generally cited in support of the existence of a packer's lien is *Ex parte Deeze*.[5] In that case, Lord Hardwicke stated:[6]

> To be sure packers may retain goods till they are paid the price and labour of packing, and so other trades may retain in the like manner, therefore these goods were in the petitioner's hands in the nature of a pledge for some part of his debt, that is, the price of the packing; and what right has a court of equity to say, that if he has another debt due to him from the same person, that the goods shall be taken from him without having the whole paid?

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1 FMB Reynolds (ed) *Bowstead and Reynolds on Agency* (18th ed, Sweet & Maxwell, London, 2006) at [7-070]; *Laws of New Zealand Lien* at [2].

2 Reynolds, above n 1, at [7-070].

3 N Palmer (ed) *Palmer on Bailment* (3rd ed, Sweet & Maxwell, London, 2009) at [15-090]; RT Garrow & JME Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (6th ed, Butterworths, Wellington, 1998) at [9.005]; and *Waitomo Wools (NZ) Ltd v Nelsons (NZ) Ltd* [1974] 1 NZLR 484 (CA) at 487–488.

4 Palmer, above n 3, at [15-191]; *Laws of New Zealand Lien* at [2]; LE Hall *Possessory Liens in English Law* (Sweet & Maxwell Ltd, London, 1917) at 33; *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 1 ALR 1 at 9; and Garrow & Fenton, above n 3, at [9.005].

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

6 Ibid 229; 147.

[14] In *Ex parte Ockenden*[7] Lord Hardwicke, in holding that a miller's general lien could not be implied from trade usage or the parties' manner of dealing, distinguished his judgment in *Deeze* saying:[8]

> In the petition *Ex parte Deeze* ... before me there was evidence, that it is usual for packers to lend money to clothiers, and the cloths to be pledge not only for the work done in packing, but, for the loan of money likewise.

Mr Upton pointed out that there was no reference to any such evidence in the Atkyns' report (which Lord Mansfield had described in *Olive v Smith*[9] as "notoriously unreliable") but Lord Mansfield was later able to refer to the evidence having attended the proceedings in *Deeze* and taken his own notes. Based on those notes, he said in *Green v Farmer*:[10]

> I have enquired into *Ex parte Deeze*, and the affidavit of the bookkeeper (which he [sc Lord Hardwicke] particularly stated). 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 a factor, would be entitled to a lien". [Citations omitted.]

[15] These authorities were considered and the existence of a packers' lien authoritatively recognised in *Re Witt, ex parte Shubrook*.[11] In that case, Witt had employed the services of a packer to warehouse its goods, pack them and send them for shipment. When Witt went into liquidation, the packer asserted a general lien. The trustee in bankruptcy sought to distinguish the 18th century cases on the ground that when the packers' lien was first recognised, packers often made advances to their principal. He argued that they had since ceased to make advances and therefore should no longer have a lien. The submission was emphatically rejected. James LJ said:[12]

> 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* (2); 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 ... 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.

Mellish LJ said:[13]

> 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

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7 *Ex parte Ockenden* (1754) 1 Atk 235, (1754) 26 ER 151 (Ch).
8 Ibid at 237; 152.
9 *Olive v Smith* (1813) 5 Taunt 56 (CP) at 64, (1813) 128 ER 607 (CP) at 610.
10 *Green v Farmer* (1768) 4 Burr 2214 (KBD) at 2222, (1768) 98 ER 154 (KBD) at 158.
11 *Re Witt, ex parte Shubrook* (1876) 2 ChD 489 (CA).
12 Ibid at 491.
13 Ibid at 491.

> 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 circumstances 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.

[16] For the receivers, Mr Bos submitted that, the pronouncements in *Re Witt* notwithstanding, a packers' lien should not be recognised in New Zealand without proof of custom. He submitted that the concluding comments of Mellish LJ showed that the existence of the lien there recognised was not immutable as a finding of law, but remained an issue of fact subject to proof.

[17] In asserting that a packers' lien required proof of custom, Mr Bos relied on *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd*.[14] That case concerned the existence of a warehouseman's lien but the judgment of Stephen J contains an extensive discussion of the way in which possessory liens have achieved recognition at common law. After considering the particular liens recognised by the common law,[15] he discussed the creation of a right of general lien.[16] He said:[17]

> In quite a large number of other occupations the law now recognizes a right of general lien; instances are collected in *Bowstead on Agency*, 12th ed, 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* (1846) 12 Cl & F 787, at 805; [1843–60] All ER Rep 719, at 722, 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 recognize". Lord Lyndhurst spoke to the same effect (12 Cl & F, at 810). 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 banker and customer, solicitor and client or otherwise as the case may be.

[18] Stephen J then went on to consider cases in which a general lien had not received the requisite judicial notice and required proof of custom or usage.

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14 *Majeau Carrying Co Pty Ltd v Coastal Rutile Ltd* (1973) 1 ALR 1.
15 At 4.
16 At 5–7.
17 At 5.

He discussed the position of wharfingers, commenting that "it may be debatable" whether, like bankers, they have had conferred upon them, as a matter of law, a right to the exercise of a general lien.[18] He concluded:[19]

> I have dealt at some length with the case of the wharfinger not merely because it illustrates the difficulty, in some cases, of determining whether a general lien has, by repeated decision, become a matter of law applicable to all members of the particular trade rather than a matter for proof of custom in each instance ...

[19] Stephen J was of the clear view that packers were in the latter category. He had this to say about *Re Witt*:[20]

> *Re Witt* (1876) 2 Ch 489, was concerned with the general lien of a packer, not a warehouseman; Mellish LJ pointed out, at 491–2, that packers were formerly in the habit of acting as the financiers of their customers and for that reason came to be treated as having a general lien. This case is, if anything, an authority against the appellant's proposition since from the judgment of Mellish LJ it clearly emerges that the lien there successfully claimed was established only by proof of custom and not as a matter of common law. The case also provides a further example of the practice to which I earlier referred whereby the courts tend not to require evidence of a well-established custom, Mellish LJ saying, at 492, that "if a single affidavit of the custom had been produced, that would have been sufficient evidence, if any evidence is required at all".

[20] I find the analysis and reasoning of Stephen J compelling. I respectfully agree with the way in which he characterised the decision in *Re Witt*. It is clear from the report 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.

[21] In New Zealand the existence of a packers' general lien appears to have been considered twice only. In *Turners & Growers Exports Ltd v Henderson*[21] Barker J, in rejecting an application for summary judgment by a kiwifruit exporter, referred to *Re Witt* as a case of "some antiquity" but authority for the proposition that a packer is entitled to a general lien on the goods of a customer which are in his hands.[22] He observed:[23]

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18 At 6.
19 At 6.
20 At 7.
21 *Turners & Growers Exports Ltd v Henderson* HC Auckland CP1727/89, 28 November 1989.
22 At 8.
23 At 8–9.

> Whilst the learned Lord Justice [Mellish] may not however have heard of kiwifruit, the principle seems still appropriate today.

[22] The previous year, in a case which was not referred to by Barker J, Gault J was asked to find in *Provost Lefebvre Export Ltd v E Lichtenstein & Co Ltd*[24] that a wool scouring and wool merchant, whose services included packing activities, could rely on a packers' lien. He was referred to in *Re Witt* and *Ex parte Deeze* which he said clearly indicate that a packer is entitled to a general lien.[25] He went on to say:[26]

> I have some difficulty in identifying the scope of such a general lien and its availability in the circumstances of this case. The first defendant does engage in certain packing activities but its business extends to other activities and, in particular, to trading in wools in respect of which no packing activities need be involved ... I do not think it can be said that the first defendant has possession of the wools in its capacity as a packer.
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> The author of *4 Halsbury 28, para 516* counsels caution in the finding of general liens and that clearly is justified for the reasons there given. In this case no evidence was called to show any custom or usage establishing such a general lien or its extent. In particular, even though some of the moneys claimed had been owing since 1981, there was no indication of any prior claim to a general lien. Accordingly I am not satisfied that the first defendant has made out grounds for a general lien to support its retention of the wool against payment of outstanding charges of $13,011.

[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. *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.

[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 *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

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24 *Provost Lefebvre Export Ltd v E Lichtenstein & Co Ltd* HC Auckland CL56/87, 4 March 1988.
25 At 24.
26 At 24–25.

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 21st 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.[27]

Contractual lien

[26] The contractual lien was created by cl 7.0 of Toll's standard terms and conditions attached to the letter of 5 June 2009. It reads as follows:

> **7 Lien**
>
> 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.

[27] The letter agreement provided that the standard terms and conditions would apply to all services rendered by Toll from the date of the letter. It is common ground that the contractual lien thereby created related only to services to the value of $43,994.16 performed after 5 June.

[28] The only remaining issue is whether Toll's contractual lien has priority over ASB's security interest. That turns on the application of the Personal Property Securities Act 1999 (the PPSA).

[29] It is not in dispute that the contractual lien is a security interest in terms of s 17 of the PPSA. It comes within s 17(1)(a) of the Act, which provides:

> **17. Meaning of "security interest" –** (1) In this Act, unless the context otherwise requires, the term **security interest** —
>
> (a) Means an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation, without regard to —
>
> (i) The form of the transaction; and
>
> (ii) The identity of the person who has title to the collateral ...

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27 FMB Reynolds (ed) *Bowstead and Reynolds on Agency* (18th ed, Sweet & Maxwell, London, 2006) at [7-081].

A contractual lien is an interest in personal property created or provided for by a transaction that in substance secures payment.[28]

[30] A contractual lien is not one of the interests excluded by s 23 of the PPSA. Section 23(b) provides:

> **23. When Act does not apply –** This act does not apply to —
>
> ...
>
> (b) a lien (except as provided in Part 8), charge, or other interest in personal property created by any other Act (other than section 169 of the Tax Administration Act 1994 and sections 169 and 184 of the Child Support Act 1991) or by operation of any rule of law ...

A contractual lien is not created by any other Act or by operation of law and does not come within the section.[29]

[31] Toll's security interest was perfected pursuant to s 41(1)(b)(ii) of the PPSA, which provides:

> **41. When security interest perfected –** (1) Except as otherwise provided in this Act, a security interest is perfected when —
>
> (a) The security interest has attached; and
>
> (b) Either —
>
> (i) A financing statement has been registered in respect of the security interest; or
>
> (ii) The secured party, or another person on the secured party's behalf, has possession of the collateral (except where possession is a result of seizure or repossession).
>
> (2) Subsection (1) applies regardless of the order in which attachment and either of the steps referred to in paragraph (b) of that subsection occur.

Toll has possession of the DVDs in terms of para (b)(ii).

[32] It is at this point that the issue of priority arises and the positions of the parties diverge.

[33] The receivers rely on s 66(b) of the PPSA which provides:

> **66. Priority of security interests in same collateral when Act provides no other way of determining priority –** If this Act provides no other way of determining priority between security interests in the same collateral, —
>
> ...
>
> (b) Priority between perfected security interests in the same collateral (where perfection has been continuous) is to be determined by the order of whichever of the following first occurs in relation to a particular security interest:
>
> (i) The registration of a financing statement:
>
> (ii) The secured party, or another person on the secured party's behalf, taking possession of the collateral (except where possession is a result of seizure or repossession):
>
> (iii) The temporary perfection of the security interest in accordance with this Act ...

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28 Peter Blanchard *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [9.l05].

29 M Gedye, RCC Cumming, R Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at [23.3].

As ASB registered its financing statement on 4 March 2008, before Toll took possession of any of the DVDs, ASB has priority under s 66(b).

[34] Toll claims, however, that it has priority, pursuant to s 93 of the PPSA which provides as follows:

> **93. Lien has priority over security interest relating to same goods** – A lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest if —
>
> (a) The materials or services relating to the lien were provided in the ordinary course of business; and
>
> (b) The lien has not arisen under an Act that provides that the lien does not have the priority; and
>
> (c) The person who provided the materials or services did not, at the time the person provided those materials or services, know that the security agreement relating to the security interest contained a provision prohibiting the creation of a lien by the debtor.

[35] It is accepted that the requirements of paras (a)–(b) of s 93 are satisfied. The issue is whether the contractual lien created in this case is one to which the section applies. Toll says it does. Mr Upton argued that s 93 is a specific provision which overrides the general priority provisions of s 66 and that it applies to all liens, whether statutory, common law or contractual. Mr Bos, for the receivers, submitted that s 93 is limited to liens which are not security interests, that is, liens created by any other Act or by operation of law as provided in s 23(b).

[36] Toll relies on the unqualified use of the word "lien" in s 93 as showing an intention that the section should cover liens however created. The receivers counter that such an interpretation is inconsistent with the scheme and purpose of the Act.

[37] Mr Upton contrasted the unqualified way in which "lien" appears in s 93 with the dichotomy created by s 23(b) (quoted in [30] above) between liens created by statute and operation of law, on the one hand, and contractual liens, on the other. He submitted that the use of "lien" in s 93 without similar qualification indicates that there was no intention to limit its meaning.

[38] However, in my view, s 23(b), if anything, supports the receivers' position. By excluding Part 8 of the Act from its operation (as it affects liens), s 23(b) expressly provides that liens created by statute or operation of law (common law liens and maritime liens) may be liens for the purpose of s 93 but are otherwise excluded from the application of the Act. A contractual lien may be a security interest but a lien created by statute or operation of law cannot be. In the absence of a contrary indication in the statute, s 93 should be interpreted to conform with the regime established by the earlier provisions, in particular, ss 17 and 23(b).

[39] The wording of s 93 itself and the scheme for ordering priorities, of which it is a part, support an interpretation which harmonises with the earlier provisions affecting liens. Both reflect an intention to exclude liens which are security interests from the operation of s 93.

[40] Part 8 of the Act, which begins with s 93, is concerned with ordering priority between security interests and interests which are not security interests. This is clear from the heading of Part 8 – "Priority of other interests in

collateral" – and the provisions of ss 93–103 which comprise it. Each section sets out the conditions which must be satisfied before the specified interest in property can take priority over a security interest in the same property.

[41] The reference to "that security interest" in s 93 suggests that the competing security interest is the only security interest in issue. The wording of the remaining sections in Part 8 similarly reflect an intention to order the priority of interests which are not security interests and security interests in the same collateral.

[42] Part 8 may be contrasted with Part 7, which is headed "Priority between security interests" and which begins with s 66. This part of the PPSA is where priorities between competing security interests are determined. It applies in this case unless trumped by s 93. The need to resolve that conflict by according a contractual lien with what Mr Bos called "super-priority" would, of course, be avoided if s 93 is interpreted so as to exclude contractual liens.

[43] Mr Bos pointed out a further conflict which would arise on Toll's interpretation of s 93 in a contest between a purchase money security interest (PMSI) and a contractual lien which is not a PMSI. Section 74 of the PPSA provides that a PMSI over inventory has priority over a non-PMSI. Section 74 is not expressed to be subject to s 93. On the interpretation of s 93 contended by Toll, a contractual lien which is not a PMSI, has priority over a PMSI. There would be a conflict between ss 74 and 93 which would not arise if s 93 is confined to liens which are not security interests.

[44] The potential for conflict is the predictable outcome of an interpretation which is inconsistent not only with the scheme of the PPSA but also its underlying purpose. I was referred to the leading work on the PPSA which identified as one of the principal aims of the legislation:[30]

> ... to do away with the myriad of formalistic distinctions that existed under prior law and to treat in like manner all transactions that in economic substance utilise personal property as a collateral for the performance of an obligation. This is achieved by the extensive definition of "security interest".

The authors elaborate:[31]

> The goal of the drafters was to merge separate streams of personal property security law into a single system. In this respect, their goal was principally a pragmatic one; conceptualisation, at least in traditional terms, was not important; indeed, it was to be avoided. What was common to the forms of transaction that were the focus of the drafters' attention was that they all had essentially the same function: to provide through contract to a person to whom an obligation was owed an interest in personal property that would permit that person to look to the property as a source of compensation should the obligation not be performed. The effect of the transaction, not its form or the way in which the interest arose, was to be determinative.

[45] The drafters' aim would be frustrated if s 93 had the function contended by Toll. A security interest could achieve priority simply by being described as

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30 M Gedye, RCC Cumming, R Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at 4–5.

31 At 72.

a lien. The form of the transaction, not its effect, would be determinative. In response, Mr Upton deprecated the substance-over-form argument. He said the receivers' position itself required a formalistic distinction between categories of liens which had no inherent functional difference. He also pointed to instances in which the PPSA itself departs from the substance-over-form principle. Section 17(1)(b), for example, declares various interests to be security interests which do not, in substance, secure performance and s 114(2) and (4) exempt general company charges and mortgages over goods from the statutory notice regime.

[46] The issue is not, however, whether considerations of form or substance should prevail. It is which interpretation of s 93 aligns most closely with the scheme and purpose of the Act. The answer emerges clearly from the foregoing discussion. The PPSA has deliberately distinguished between different categories of lien. That was necessary in order to keep faith with the goal of treating alike contractual obligations which created an interest in property. A contractual lien would, therefore, qualify as a security interest; other forms of lien could not. Liens which are security interests are subject to the same priority rules as other security interests. The priority of liens which are not security interests is determined in accordance with s 93.

Result

[47] I make a direction that the respondent does not have a security interest or other right in respect of the property of Scene 1 Entertainment Ltd (in rec) which ranks in priority to the security interest held by ASB Bank Ltd over the property of Scene 1.

[48] The applicants are entitled to costs. If the parties are unable to agree, I will consider memoranda; that of the applicants to be filed within 21 days and that of the respondent within a further 14 days.

Directions given accordingly.

Solicitors for the receivers: *DLA Phillips Fox* (Auckland).
Solicitors for Toll: *Simpson Grierson* (Auckland).

Reported by: Bernice Ng, *Barrister*