Simpson v New Zealand Associated Refrigerated Food Distributors Ltd

Court of Appeal Wellington CA 36/06
16 November; 11 December 2006
William Young P, Glazebrook and Robertson JJ

Commercial law – Personal property securities – Security interest – Terms of trade providing supplier had security interest in goods supplied – Supplier registering terms of trade as security interest – Whether terms of trade to identify obligations secured by security interest – Whether security interest not perfected if misdescription of collateral – Personal Property Securities Act 1999, ss 17(1)(a), 74, 149, 162, 163, 165, 166 and 167 – Personal Property Securities Regulations 2001 (SR 2001/79) Schedule 1, cl 8.

Service Foods Manawatu Ltd (SFM) executed a general security agreement with a bank which was registered as a security interest under the Personal Property Securities Act 1999. New Zealand Associated Refrigerated Food Distributors Ltd (NZARFD) later supplied goods to SFM under a trading account which provided that NZARFD had a security interest in the goods supplied. This document was registered under the Act as securing "all present or after-acquired property". After SFM went into liquidation, NZARFD argued that it had a purchase money security interest in inventory which was perfected at the time the debtor took possession of the collateral and, by virtue of s 74 of the Act, priority over the bank's security as a non-purchase money security. The High Court granted judgment to NZARFD. On appeal, the liquidators of SFM argued that: (a) the terms of trade did not create a security interest as they did not specifically identify the obligations secured by the security interest; and (b) registration did not perfect NZARFD's security because the description of the collateral in the financing statement as "all present or after-acquired property" overstated the security and did not assign a proper category, as provided by cl 8 of Schedule 1 of the Personal Property Securities Regulations 2001 (SR 2001/79).

Held: 1 The terms of trade created a security interest. In particular, the liquidators' argument as to the form of the document was contrary to the purposes of the Act, for example s 17(1)(a)(i), which defined a security interest as a transaction securing payment or performance of an obligation without regard to the form of the transaction (see para [24]).

2 NZARFD had perfected its security interest by registration because "all present or after-acquired property" was an available description, even if over-broad, in the context of legislation providing for simple online registration of security interests and when, in any event, a debtor could issue a notice under ss 162 – 167 of the Act to modify the description. Under s 149, the validity of

registration of a financing statement was only affected by a defect or error in the statement if it was seriously misleading. An over-broad description in a financing statement was not seriously misleading because the security interest was defined by the security agreement, not the financing statement (see paras [28], [29], [33]).

Result: Appeal dismissed.

Case mentioned in judgment
Waller v New Zealand Bloodstock Ltd [2006] 3 NZLR 629 (CA).

Appeal
This was an appeal by Richard Grant Simpson and Ronald Walton, as receivers, and Iain Bruce Shephard and Christine Dunphy, as liquidators, of Service Foods Manawatu Ltd (in receivership and liquidation) from the judgment of Goddard J (reported at (2006) 2 NZCCLR 1103; 9 NZCLC 263,979) in favour of New Zealand Associated Refrigerated Food Distributors Ltd in respect of terms of trade registered as a security interest under the Personal Property Securities Act 1999.

G J Toebes for the receivers.
P R W Chisnall for the liquidators.
B D Gustafson and *D M Hughes* for NZARFD Ltd.

Cur adv vult

The judgment of the Court was delivered by

ROBERTSON J. [1] This appeal is about the meaning and operation of the provisions for perfecting a security interest under the Personal Property Securities Act 1999 (the Act).

[2] The first appellants are the receivers of Service Foods Manawatu Ltd (in rec and liq) (SFM). The second appellants are the liquidators of SFM.

[3] SFM applied for a trading account with the respondent, New Zealand Associated Refrigerated Food Distributors Ltd (NZARFD). The arrangement is recorded in a document of 19 November 2004. NZARFD claims that this document created a security interest in its favour in respect of which a financing statement was registered on the Personal Property Securities Register on 23 December 2004. The financing statement details provided by NZARFD were:

"Collateral type: all present and after-acquired property.
Description: being all the debtors personal property and all other property."

[4] SFM had previously signed a general security agreement on 14 October 2003 in favour of Westpac, in respect of which a financing statement was registered on the Personal Property Securities Register on 22 October 2003.

[5] That financing statement provided:

"Collateral type: all present and after-acquired personal property."

[6] Although the NZARFD security was second in registration, it takes priority in respect of goods which are subject to title retention until paid for, providing the security has been perfected by registration (s 74 of the Act).

[7] There was some divergence between the first appellants and the respondent as to the exact issues on appeal. We identify them as:

(a) Did NZARFD's written terms of trade create a security interest? If so;
(b) Did NZARFD perfect its security interest by registration?; and
(c) Is the perfected security interest of NZARFD restricted to goods supplied but not paid for?

Relevant statutory material

[8] Section 16 of the Act contains definitions, including:

> **perfected by registration**, in relation to a security interest, means the security interest has attached and a financing statement has been registered in respect of the security interest:
>
> **perfected security interest**, in relation to a security interest, means the security interest is perfected by possession or by registration or is temporarily perfected, as the case may be:

[9] Section 17 of the Act 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; and
>
> (b) Includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than 1 year, and a commercial consignment (whether or not the transfer, lease, or consignment secures payment or performance of an obligation).
>
> (2) A person who is obligated under an account receivable may take a security interest in the account receivable under which that person is obligated.
>
> (3) Without limiting subsection (1), and to avoid doubt, this Act applies to a fixed charge, floating charge, chattel mortgage, conditional sale agreement (including an agreement to sell subject to retention of title), hire purchase agreement, pledge, security trust deed, trust receipt, consignment, lease, an assignment, or a flawed asset arrangement, that secures payment or performance of an obligation.

[10] Section 74 of the Act provides:

> **74. Priority of purchase money security interest in inventory or its proceeds –** A purchase money security interest in inventory or its proceeds has priority over a non-purchase money security in the same collateral given by the same debtor if the purchase money security interest in the inventory or its proceeds is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

[11] Section 149 of the Act provides:

> **149. Registration of financing statement invalid only if seriously misleading –** The validity of the registration of a financing statement is not affected by any defect, irregularity, omission, or error in the financing statement unless the defect, irregularity, omission, or error is seriously misleading.

[12] Regulation 8 of the Personal Property Securities Regulations 2001 (SR 2001/79) (the Regulations) details the method of registration of financing statement and relevantly provides:

> **8. Data required to register financing statement, financing change statements, and change demands –** (1) In addition to any data requirements specified in the Act:
>
> (a) every financing statement must contain all of the data specified in Part 1 of Schedule 1 that is applicable.

[13] Schedule 1, cl 8 provides:

> **8. Description of collateral: general requirements –** (1) All collateral must be assigned to 1 or more of the following collateral types:
>
> (a) goods: motor vehicles:
> (b) goods: aircraft:
> (c) goods: livestock:
> (d) goods: crops.
> (e) goods: other:
> (f) documents of title:
> (g) chattel paper:
> (h) investment securities:
> (i) negotiable instruments:
> (j) money:
> (k) intangibles:
> (l) all present and after-acquired property:
> (m) all present and after-acquired property, except.
>
> (2) A further description must be provided for all collateral that has not been assigned to the collateral type described in subclause (1)(l).

The arrangement between the first appellants and the respondent

[14] The terms of trade, as set out in a document dated 19 November 2004, were that SFM (described as the buyer) acknowledges that NZARFD:

> "Has a security interest in the goods supplied by NZARFD to the buyer, as detailed, in each invoice supplied to the buyer as well as the proceeds of such goods."

[15] Paragraph [11] of the document states:

> "The term 'goods', as used in these terms and conditions, means all personal property supplied by the Company to the Buyer from time to time, together with the proceeds of such goods and includes: frozen, chilled and dry foodstuffs, packaging and paper products, plastic utensils, all goods and/or services which are described on any invoice, delivery docket or order form, all inventory."

[16] This is the relevant collateral for the personal property securities regime.

Did NZARFD's written terms of trade create a security interest?

[17] It was contended that the arrangement between NZARFD and SFM was not within the provisions of s 17(3). Mr Toebes reminded us that not every agreement to sell subject to retention of title created a security interest, but only one which secured payment or performance of an obligation (s 17(1)(a)).

[18] He claimed that the terms of trade document did not specifically identify which, if any, obligations incurred by SFM were to be secured by the security interest which the document purported to create.

[19] Counsel noted that, in terms of the trade contract, the following obligations were taken by SFM:

(a) to hold resale proceeds on trust;
(b) purchase price for goods (not resold) due on the 20th of the month following delivery;
(c) payment of interest at 2.5 per cent per month from due date for goods not paid for;
(d) in the case of a disputed account, the undisputed amount will be payable as per the normal terms of trade;
(e) payment of debt collection agency and legal costs on default enforcement; and
(f) payment of GST.

[20] Mr Toebes said in respect of (a) that there could not be a security interest. He is probably correct in a strict sense that, if the goods were held on trust, then SFM had never had ownership rights in the inventory supplied. If SFM had no rights in the inventory, however, nor could Westpac or anyone else claiming an interest through SFM's property. That argument takes him nowhere. In any event, this proprietary analysis of what are in substance security transactions is inconsistent with the scheme and purpose of the Act. See discussion in both judgments of this Court in *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629.

[21] Mr Toebes accepted that (b) could be a security interest and suggested the other obligations were arguable. He contended that there was insufficient precision and that the documentation did not create a security interest at all.

[22] Mr Gustafson, without conceding the remaining points, contended that at least (b) must constitute a secured obligation. He relied particularly on s 74 of the Act, arguing that there was a purchase money security interest at the time that SFM obtained possession.

[23] Mr Gustafson pointed to s 17(3), which expressly states that an "agreement to sell subject to retention of title" constitutes a secured transaction. He contended that the obligations listed in the terms of trade, when taken as a whole, amounted to a security interest.

[24] We are satisfied that the arrangement between the parties was a security interest. We note that Mr Toebes' argument requires a distinction to be drawn on the basis of the form of the transaction, which is contrary to the purposes of the Act (see, for example, s 17(1)(a)(i)).

Did NZARFD perfect its security interests?

[25] Mr Toebes submitted that describing the collateral as "all present and after-acquired property" was not acting strictly in conformity with cl 8 of the First Schedule to the Regulations. The collateral type the respondent selected led to an overstatement of the scope of the security interest and consequently NZARFD had not perfected its security interest in the collateral by registration.

[26] Mr Toebes' argument was that the correct and accurate description of the collateral was essential for perfection. If the mandatory requirement to complete the form in the schedule was not rigorously followed, the resulting registration was ineffective.

[27] The argument, in this extreme form, cannot be correct. The starting point is s 149 of the Act. Although Mr Toebes did not directly deal with this provision, it is of fundamental importance in assessing his argument. Two questions emerge.

[28] First, is the so-called overstatement a "defect, irregularity, omission or error" at all? Goddard J found not, and we agree (see (2006) 9 NZCLC 263,979). Mr Toebes did not suggest that "all present and after-acquired property" was not an available description; he simply contended that it was overly broad. Whether it is an available description needs to be assessed as part of the overall framework of this legislation which was enacted to provide a simple online means of obtaining registration and the advantages which flow from it.

[29] If this had been a serious issue about the categorisation, then under ss 162 – 167 of the Act there is the ability for a debtor to issue a notice to have the offending description modified to better reflect the security interest contained in the security agreement. Accordingly, an over-broad description cannot be a significant error invalidating the perfection of a security interest.

[30] Secondly, even if assuming the overstatement could be categorised as a "defect, irregularity, omission or error", then it does not affect the validity of the registration unless it is "seriously misleading".

[31] Goddard J dealt with this issue at para [36]:

> "**[36]** The answer to whether a broad collateral description like 'all present and after-acquired property' is adequate or seriously misleading is helpfully summarised by Widdup and Mayne in '*Personal Property Securities: A conceptual approach*' (revised ed) (table 1, para 20.19) as follows:
>
> > 'The PPSA does not penalise overly board collateral descriptions in financing statements. The security agreement, not the financing statement, governs the terms of the security and reflects the intentions of the parties with respect of the collateral provided to secure the obligation. An overly broad financing statement collateral description should not be viewed as an attempt by the secured party to subject the collateral to the security agreement to which the debtor did not agree. The PPSA indicates that the secured party will only have a valid security interest in the property described in the security agreement and this is not affected by the fact that the financing statement defines the collateral.
> >
> > *For example if a secured party registers a financing statement describing the collateral as all of a debtor's present and after acquired property, but the security agreement evidences that a security interest is taken in all of the debtor's accounts receivable only, then the financing statement perfects the security interest in the accounts receivable only, but not in any other property*.'" (Emphasis added.)

[32] Later, quoting from an article by Michael Gedye, *Reflections on Contractual Issues which have arisen under New Zealand's Personal Property Securities Act and some lessons for Australia* (2004) 15 JBFLP 20, the Judge said at para [38]:

> "'An overly broad description, while being effective to perfect a security interest in a subclass of the described collateral will be open to challenge by the debtor. The secured party may then be put to the cost and inconvenience of defending a demand by the debtor that the registered collateral description be narrowed to reflect properly the terms of the security agreement entered into parties.'"

[33] Like the High Court Judge, we are satisfied that NZARFD perfected its security interest by registration. If there were any problems, they were covered by s 149. There was nothing done which was seriously misleading. Anyone searching the Register was put on notice. Checking the document would have revealed that the security interest was not as broad as it might have been thought to have been, but that is not seriously misleading.

[34] Notwithstanding our finding, we emphasise that best practice suggests that the description of collateral in a financing statement should reflect accurately the description of the security agreement. To do otherwise means that a party on initial searching does not obtain an accurate version of what the security interest covers. That is counterproductive and inefficient, even if not ineffective.

What is covered by a perfected security interest?

[35] This is a non-issue, as Mr Toebes accepted before us. The answer, self-evidently, is only what is covered by the security agreement. Registration does not create any interest different from that which exists in the security interest itself. The collateral is only about goods supplied and not paid for, and the proceeds thereof. NZARFD's security interest is confined to goods supplied and not paid for, and any traceable proceeds of sale of those goods.

Conclusion

[36] None of the challenges advanced in this Court have validity. They were properly disposed of by Goddard J and the appeal must be dismissed.

[37] The High Court judgment noted that the respondent was entitled to costs and disbursements. It was silent as to whether that was against the current first appellants only, but that appears to be the obvious implication.

[38] The respondent before us is entitled to costs of $6000 together with usual disbursements against the first appellants. We make no order for costs either for or against the second appellants.

Appeal dismissed.

Solicitors for the receivers: *Buddle Findlay* (Wellington).
Solicitors for the liquidators: *Gibson Sheat* (Wellington).
Solicitors for NZARFD: *Kensington Swan* (Auckland).

Reported by: Stewart Benson, *Barrister*