IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-3107

	BETWEEN	HARVESTPRO LOGGING LTD Plaintiff
	AND	CORDYLINE HOLDINGS LTD Defendant

Hearing: 18 September 2006

Appearances: S.M Hunter for plaintiff
S. Mills for defendant

Judgment: 3 October 2006 at 11.a.m.

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***03.10. 2006 at 11 am**, pursuant to*
Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar
Date……..…

Background

[1] In this proceeding the plaintiff sues the defendant for damages for conversion. The plaintiff alleges that the defendant converted to its own use four logging trucks and trailers. The background facts are as follows.

[2] On 19 December 2004 the defendant signed a document which described itself as an agreement for sale and purchase pursuant to which it sold to a company called ForestOne four logging trucks and trailers together with ancillary equipment ("the vehicles") on 19 November 2004. There was argument before me as to exactly how the agreement should be categorised. The defendant said that it was a lease agreement, and the plaintiff that it was an agreement for sale and purchase. I will return to that topic further on in this judgment. The total payment that the purchaser, ForestOne, was required to make under the agreement was $1,436,307. ForestOne took possession of the vehicles on 19 November 2004. The agreement contained a condition that it was subject to the approval of Speir's Finance Group.

[3] On 15 December 2004 the defendant's solicitors confirmed that the agreement was unconditional. Only two relatively modest payments were made under the agreement before ForestOne defaulted. On 31 January 2005 that company ceased trading.

[4] Unbeknown to the defendant, the plaintiff held a general security agreement (the "GSA") over the property of ForestOne. The plaintiff was later to assert that the GSA extended to the vehicles which the defendant had sold to ForestOne.

[5] On 31 January 2005, the same day that ForestOne ceased trading, the plaintiff gave notice that it was going to take possession of ForestOne's assets. It is not disputed that a notice to that effect was served. The notice was headed "Notice of Intention to Take Possession of Collateral Under Section 109 of the Personal Property Securities Act 1999". The notice was addressed to ForestOne. It stated the following:

TAKE NOTICE THAT:

1. HARVESTPRO LOGGING LIMITED (the secured party) with priority over all other secured parties has taken possession of the property belonging to you including that set out in the attached schedule (the collateral). All property belonging to you is subject to the security interest that was created or provided for in the security agreement (the security agreement) dated 4 March 2003.

2. As at the date of this notice, the total amount of arrears due under the security agreement is $2,342,355 plus the secured party's expenses of enforcing the security agreement and further interest on the arrears.

[6] The schedule that was attached to the notice was one-and-a-half A4 pages in length and referred to various items of logging equipment, trucks, de-barkers, welders, and other miscellaneous equipment. It did not, however, expressly identify the four trucks and trailers with associated mounted cranes that were the subject of the agreement dated 19 November 2004.

[7] There was some dispute at the hearing before me as to the sequence of events surrounding what happened to the vehicles after ForestOne ceased to trade. I will refer to this dispute below.

[8] Subsequently the defendant purported to sell the vehicles for $980,000 plus GST and ownership has long since been transferred to the new owners.

[9] ForestOne initially granted the general security agreement over its present property and after-acquired property in favour of the ANZ bank. By deed entered into 18 August 2004 ANZ assigned its rights under the security agreement to the plaintiff. The assignment deed recites that, as at 18 August 2004 ForestOne owed it $1,599,205. Under the agreement for assignment of the GSA, the plaintiff was obliged to pay $130,000 to ANZ.

[10] I accept, because the parties agreed that this was so, that the defendant did not know of the existence of the general security agreement over ForestOne's assets, and did not know about the assignment of that agreement. I also conclude that the defendant could have found out about both if it had searched the Personal Property Securities Register. I accept the evidence of Mr Stevenson that the first occasion on

which the defendant had actual knowledge of the plaintiff's asserted right to a general security over ForestOne's assets was when the plaintiff served the defendant with these proceedings in or about June of 2006.

[11] In its proceedings, the plaintiff claims that on or about 4 March 2003 ForestOne granted a general security agreement to ANZ. It pleads that the general security agreement ("GSA") created a security interest as defined in s 17 of the Personal Property Securities Act 1999 ("PPSA") in favour of ANZ and all present and after-acquired personal property of ForestOne. The plaintiff also pleads that the ANZ registered financing statements in relation to the GSA which stated that it applied to all present and after-acquired personal property of ForestOne. Those statements were registered on 13 January 1999, 20 September 2001, and 31 January 2003. The statement of claim also alleges the assignment from ANZ of the rights and interests under the GSA on 18 August 2004. The plaintiff further alleges that on or about 15 December 2004 property in the vehicles passed to ForestOne and the assets therefore became subject to the GSA from that date. As well, the plaintiff alleges that on or about 31 January 2005 the plaintiff exercised its rights under the GSA and took possession of the assets but that in or about February 2005 (but in any event after 31 January 2005), the defendant unlawfully seized the assets contrary to the plaintiff's rights under the GSA and subsequently disposed of them. The plaintiff pleads that it suffered loss in the sum of $1,225,000 being the value of the assets as a result of the "defendant's conversion".

[12] The defendant in its notice of opposition says:

> The Defendant has a defence to the claim of the Plaintiff on the grounds that:
>
> a) At no time did property and title in the assets pass to ForestOne Limited and the assets did not therefore become subject to the General Security Agreement held by the Plaintiff; and/or
>
> b) The Agreement between the Defendant and ForestOne in respect of the assets was cancelled and the Defendant is entitled to apply for relief under Section 9 of the Contractual Remedies Act 1979.
>
> c) As appearing in the affidavits of John Robert Stevenson and Karen Linda Stevenson filed in support of this Notice of Opposition.

[13] Against that background I turn to consider the issues in the case.

Summary Judgment Principles

[14] The principles which apply to an application for summary judgment have been clearly established through decisions of the Court of Appeal such as *Pemberton v Chappell* [1987] 1 NZLR 1; *Grant v New Zealand Motor Corporation* Ltd (1989) 1 NZLR 8 and *Westpac Banking Corporation v MM Kembla New Zealand Limited* [2001] 2 NZLR 298.

[15] In his judgment in *Pemberton v Chappell* at page 3, Somers J said:

> If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.
>
> At the end of the day r 136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence. See eg *Wallingford v Mutual Society* (1880) 5 App Cas 685, 693; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99*; Orme v De Boyette* [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

Was the agreement of 19 November 2004 an agreement to sell and buy equipment or an agreement to lease?

[16] As I have said, it is the plaintiff's case that the four truck and trailers and associated equipment became subject to the general security agreement granted by ForestOne because when ForestOne purchased those items they became part of its "present and after-acquired property" within the meaning of the GSA.

[17] The defendant's position is that ForestOne did not acquire property in the vehicles. The defendant says that what happened was that the defendant leased those

items of equipment to ForestOne only. The defendant said that it was entitled to reclaim possession of the vehicles because it never ceased to be the owner.

[18] In my view the agreement entered into between the parties was an agreement for sale and purchase which contained a leasing provision to cover the period which would elapse between when ForestOne took possession of the property and when the agreement became unconditional. That conclusion is based upon the identification of the agreement as a "sale and purchase agreement" and the consequent identification of the defendant as the vendor and ForestOne as the purchaser. The "background" section of the agreement records:

> A. The vendor is the owner of the property set out in Schedule A [schedule A particularises the vehicles]
>
> B. The vendor agrees to sell to the Purchaser the property set out in Schedule A
>
> C. The parties to record [sic] the terms of their agreement for sale and purchase.

[19] In the operative part of the document the following provisions appear:

a) In clause 1 the vendor agrees to sell the vehicles to the purchaser;

b) In clause 2 ForestOne which is identified as the purchaser agrees to pay the vendor the instalments set out in the agreement;

c) In clause 3 ForestOne is again identified as "the purchaser";

d) In paragraph 4 "the purchase price" is expressed to be $1,225,000 plus GST which is to be paid "to the vendor" in accordance with Schedule B;

e) In paragraph 7, it is stated that "this sale and purchase of the Property is subject only to the approval of Speir's Finance Group as required by the vendor".

f) in clause 8 the vendor agrees to lease the property until the agreement becomes unconditional.

[20] The agreement contained a provision, as I have noted, that it was subject to the approval of Speir's Financial Group. That was the only condition in the agreement. The schedule attached to the agreement set out the payment instalments. The second payment is referred to as a "lease charge". The balance of the payments is either on account of interest or principal. Interest totals $48,485 and principal $1,225,000. The total payments including the lease payment, interest, principal, and GST came to $1,436,307.

[21] Mr Stevenson gave evidence, that notwithstanding the actual terms in which their agreement was cast, it was that it was his intention and that of ForestOne to lease the vehicles and not to sell them.

[22] I agree with Mr Hunter's submission on this aspect of the case:

> 20. Paragraphs 15 to 28 of Mr Stevenson's affidavit describe what he says were the prior negotiations of the parties leading to their entry into the Sale and Purchase Agreement. Mr Stevenson's evidence is not directed at the "*factual matrix*" but rather describes the parties' negotiations and his own subjective intentions. Such evidence is plainly inadmissible.
>
> "*The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent.*"
>
> *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, [page], per Lord Hoffman.
>
> 21. Mr Stevenson's evidence is that the parties discussed a lease agreement with six monthly lease payments **[J. Stevenson, paragraph 22]**. Whatever the parties discussed, this is certainly not the agreement they entered into.

[23] My conclusion is that ForestOne acquired the property. The defendant did not continue as owner of the property after the date when the agreement became unconditional. From that date it was in effect an unpaid unsecured vendor under the agreement for sale and purchase.

Allegation that contract cancelled

[24] I understand that the defendant asserts that even if the arrangements between defendant and ForestOne should properly be construed as a contractual relationship by means of which property in the vehicles could theoretically pass to ForestOne, the contract was cancelled before that could occur. The result, it is argued, is that the defendant never relinquished property in the vehicles.

[25] Mr Stevenson's evidence on this point is that he received a call on Wednesday, 2 February 2005 from Malcolm Burns who was employed by ForestOne who advised him that ForestOne had terminated the agreement. He then invited the defendant to come and uplift the plant from ForestOne's yard in Wyndham.

[26] Mr Hunter met the plaintiff's argument this point by saying that ForestOne had not unilaterally cancelled the agreement for sale and purchase. He said that under the Contractual Remedies Act 1979 a party could cancel the contract only if the other party is in default. I understood Mr Hunter to say that there was no evidence of default on the part of the defendant. In such circumstances ForestOne had no right to cancel.

[27] I agree with that submission. As well, s 8 of the Contractual Remedies Act states that:

> (3) Subject to this Act, when a contract is cancelled the following provisions shall apply: …
>
> (b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

[28] Because of that section, even if there had been a valid cancellation it would not have divested ForestOne of property in the equipment. As well, it would not seem that any order could be made under s 9 of the Act to revest the equipment in the defendant because of the provisions of s 9(5) of the Act which prohibits the making of an order vesting property where it would defeat the rights of another

person not being a party to the contract. The plaintiff would qualify as such "another person" in the context of this case.

The alleged conversion

Elements of tort

[29] The essential features of the tort of conversion are described in *The Law of Torts in New Zealand* 4th ed, Todd, p 467 citing *Kuwait Airways Corporation v Iraqi Airways Company (Nos 4 and 5)* [2002] 2 AC 883,1084 as the following three: first, the defendant's conduct is inconsistent with the rights of the owner or other person entitled to possession; second, the conduct is deliberate; and third, the conduct is so extensive an encroachment on the rights of the owner or other person as to exclude him or her from use and possession of the goods. The reference to conversion being an intentional wrong requires that the defendant must intend to do the act which constitutes the denial of the plaintiff's rights. (See *The Law of Torts in New Zealand* ibid).

Actual Possession

[30] Mr Hempel, was the chief financial officer of ForestOne. The plaintiff now employs him. He gave evidence for the plaintiff. Mr Hempel said that after the plaintiff had given its notice asserting its rights under the GSA:

> 16. Three of the four truck and trailer units and one crane were secured in ForestOne's yard in Wyndham, Southland. The fourth truck and trailer unit and one crane were secured in a yard at 80 Ingram Road, Ramarama. This process was completed by Wednesday, 2 February 2005.

[31] Mr Hempel gave evidence that the defendant directed a repossession agent to seize the truck and trailer unit that was secured at Ramarama. He said that the defendant:

> … also repossessed the other three truck and trailer units and a crane from ForestOne's yard in Wyndham. I believe that this occurred on Friday, 4 February 2005.

[32] As I have already said Mr Stevenson in his affidavit referred to a telephone call between himself and Mr Burns of ForestOne on 2 February 2005.

[33] Mr Stevenson said that after the call from Malcolm Burns:

> 46. We immediately made arrangements to repossess the trucks. Three of the truck and trailer units were at ForestOne's headquarters at Wyndham and we arranged for these to be uplifted and returned to our premises. The remaining truck was in the North Island, and as detailed in Mr Hempel's affidavit, we made arrangements for this to be repossessed on or about 10 February 2005.

[34] There was significant dispute at the hearing as to what, if anything, the affidavits proved. I believe, that the affidavits can reasonably be read in a way that reveals that there is no conflict between what each deponent says.

[35] Mr Hempel says that the plaintiff secured three of the four truck and trailer units at ForestOne's yard at Wyndham, and the other at a yard at 80 Ingram Road, Ramarama, and that this process was completed by Wednesday 2 February 2005.

[36] Mr Stevenson's affidavit detailing that three of the truck and trailer units were uplifted from ForestOne's yard in Wyndham, Southland, suggests that they were removed from there and retained until they were sold. There is no suggestion that the defendant had other than unbroken possession of the vehicles until they were sold. The defendant also uplifted the fourth truck from the yard in Ramarama.

[37] Mr Mills was critical of the affidavit sworn by Mr Hempel on 2 June 2006 about the circumstances in which the truck and trailer units were allegedly seized by the plaintiff from ForestOne.

[38] However, having looked again at paragraphs 15 to 18 of that affidavit I believe that it is tolerably clear that what Mr Hempel is saying is that the plaintiff secured three of the vehicles at ForestOne's yard in Wyndham, Southland. ForestOne had ceased trading at the end of January 2005. Mr Hempel said this process of securing the vehicles at Wyndham was completed by 2 February 2005, as was the task of securing a fourth truck and trailer unit which was in the North Island. Then he says that he later learnt that a repossession agent acting on instructions from

the defendant seized the truck and trailer unit that had been secured at Ramarama and also "repossessed" the three other truck and trailer units from ForestOne's yard in Wyndham with the latter occurring on Friday 4 February 2005. The reference to "repossession" is consistent with the fact that there had been a change of possession prior to the defendant taking possession of the truck and trailers.

[39] My conclusion is that the affidavits can be fairly and reasonably read, and should be read, as establishing that the plaintiff took possession of the vehicles first and then subsequently the defendant took possession of the vehicles, retaining possession until the vehicles were sold.

Entitlement to immediate possession

[40] The plaintiff alleges that ForestOne was in default under the terms of its general security agreement enabling the plaintiff to take the possession of the assets and sell them pursuant to s 109 of the PPSA.

[41] As I understand the argument for the defendant, it is that there is no proof that ForestOne was indebted to the plaintiff at the time of the alleged conversion. If there was no proved indebtedness, it follows that there can have been no entitlement on the part of the plaintiff to take possession and, as a consequence, no cause of action in conversion is available to the plaintiff.

[42] Mr Hempel said that on 31 January 2005 the plaintiff gave the notice that it was taking possession of the assets pursuant to the GSA. The notice I have already quoted from. The notice stated that the arrears due under the security agreement dated 4 March 2003 were $2,342,355.

[43] In my view the verification provided by the plaintiff of its statement of claim, together with the fact that the plaintiff served a notice under s 109 of the Act that over $2.3 million was owing, are all enough to establish, in the absence of evidence to the contrary, that ForestOne was in fact in arrears under its agreement with the plaintiff. Beyond that, matters of quantum would not seem to be the concern of the defendant – a point that I will return to below.

[44] On this issue of fact, the Court has to maintain a balance between the defendant's rights to have his day in Court and to have his proper defences explored and the appropriate robust and realistic approach called for by the particular facts of the case: See *Australian Guarantee Corporation (NZ) Ltd v McBeth* [1992] 3 NZLR 54, 59. In striking a fair balance, it is also pertinent to note that the defendant has not raised the issue of there being no debt owing to the plaintiff by ForestOne in its notice of opposition or in any affidavit that it has filed.

[45] I take the view that there is nothing in the point urged by Mr Mills under this head. The plaintiff has established that ForestOne owed money to the plaintiff, that it was in arrears and that it was the case when it took possession of the vehicles. This is not a case where proof that a debt is owed is a live question. That could occur, where for example, the amounts were not great and there was a possibility that the plaintiff's accounts were in error; or where the defendant has cross-claims of uncertain quantum which could equal or exceed the amount owed to the plaintiff.

[46] I therefore consider that Mr Hunter is correct when he says that the plaintiff had an immediate right to control the truck and trailer units. Mr Hunter says that the plaintiff can satisfy this requirement by invoking s 109 of the Act.

[47] Section 109 says:

> **109 Secured party may take possession of and sell collateral**
>
> (1) A secured party with priority over all other secured parties may take possession of and sell collateral when—
>
> (a) The debtor is in default under the security agreement; or
>
> (b) The collateral is at risk.
>
> (2) In subsection (1), collateral is **at risk** if the secured party has reasonable grounds to believe that the collateral has been or will be destroyed, damaged, endangered, disassembled, removed, concealed, sold, or otherwise disposed of contrary to the provisions of the security agreement.

[48] The defendant was in default at the time the vehicles were seized by the defendant. The default consisted of either or both of being in arrears under the advances from the plaintiff and ceasing to carry on business. The right to take

possession was sanctioned by s 109 of the Act. I accept therefore that the plaintiff had an immediate right to possession of the motor vehicles.

[49] I understood Mr Mills to submit that a right to possession was not sufficient on its own: there had also to be a taking of possession. I have to disagree. The right to sue in conversion at common law is available to a person who is entitled at the time of the conversion to the immediate possession of the goods: *Winkworth v Christie Manson & Woods Ltd* [1980] Ch 496. For the reasons I have given, the plaintiff was entitled to immediate possession from the point when ForestOne was in default. The defendant's actions interfered with that right to possession. Therefore, even if I am wrong in my conclusion that the vehicles were in the plaintiff's actual possession when the defendant seized them, the defendant had a right to immediate possession of them at that point. By that stage, ForestOne had ceased trading and was therefore in default. On either view, the central constituent element required to prove conversion is made out.

Miscellaneous points

Proof of amount owing – no evidence of amounts that plaintiff obtained from realisation of other assets

[50] In my judgment, the exact quantum of what ForestOne owed to the plaintiff is not a matter which needs to be proved. All that needs to be proved is that ForestOne owed some amount to the plaintiff under the GSA and was in arrears in making payment of that amount so that the power to seize assets under the GSA had accrued. As Mr Hunter pointed out, if the plaintiff had been able to enforce its security by selling the vehicles, then any excess left over after meeting its debt and incidental expenses would have to be distributed to other creditors whether under the Act or pursuant to the insolvency regime which would apply to ForestOne, now that it is in liquidation. Even if one makes the hypothetical assumption that there would have been a surplus left over had the plaintiff been able to sell the vehicles, that is not something that would give rise to any reduction of the damages payable to the plaintiff by the defendant.

[51] Mr Mills took a number of other miscellaneous points which need to be dealt with. One of these was that no information had been provided which indicated what amounts, if any, had been realised by the plaintiff on the sale of other assets over which ForestOne may have given it security. In part this is a repetition of the defendant's complaint concerning whether or not the defendant was actually indebted to the plaintiff so entitling the plaintiff to enforce its security – a point that I have already dealt with. Beyond that, there does not seem to be any obligation to inform the defendant about the outcome in money terms of the steps taken by the plaintiff to dispose of the equipment. There is a statutory right under s 117 for certain parties to participate in a distribution of the surplus but the defendant does not seem to come within any of the categories in s 117(1)(a)-(c).

Plaintiff's delay in informing defendant of claim

[52] The submissions made by Mr Mills first of all are that the plaintiff did not at the time it served its s 109 notice or at the date of the act of conversion relied upon, assert to the defendant that it had rights to the assets. I think the answer to that is that it did not need to. The important issue is whether or not the plaintiff had the right to possession under its security.

[53] Mr Mills made reference to what he described as 18 months' silence on the part of the plaintiff before it issued proceedings against the defendant. In fact, the proceedings having been issued in June of this year, a period of about 16 months elapsed but nothing depends upon that difference. Mr Mills said that the fact that the plaintiff said nothing to the defendant might have been because Mr Hempel for the plaintiff had known about an earlier general security agreement over the same truck and trailers. In order to understand that point it is necessary to say something more about the background.

[54] The defendant originally purchased the vehicles in 2002. Initially they were leased to a company called Rural Haulage in which the defendant had a shareholding. When Rural Haulage went into receivership, the defendant took back possession of the vehicles. It is agreed between the parties that the leasing arrangement between the defendant and Rural Haulage was evidenced by a

registered security interest. The defendant speculates that Mr. Hempel "would have been aware of the continued security interest registered over the assets in relation to the Rural Haulage indebtedness".

[55] I have difficulty understanding what significance this point assumes in the case. But in case it is a matter of relevance, I set out my assessment of the point. First, there is in fact no evidence that Mr. Hempel was influenced by considerations relating to the registration of the defendant's earlier general security agreement.

[56] Then, in case the defendant regards its prior general security agreement as being of intrinsic significance, some further points can be noted. The lease arrangement must have come to an end at some point prior to the sale of the vehicles to ForestOne. It is unlikely that the defendant would have been in a position to give possession of the vehicles to ForestOne had the leasing agreement over them with Rural Haulage still been in effect.

[57] The defendant's real complaint seems to be that the lengthy period that elapsed from when ForestOne went out of business and the vehicles were seized until the point where proceedings were taken somehow defeats the plaintiff's claim.

[58] Mr. Mills accepted that there were no limitation difficulties with the plaintiff's claim. But he submitted that the affect of the delay on the part of the plaintiff in bringing proceedings to enforce its rights resulted in the GSA not being effective as against the defendant. I understand that his argument is that the plaintiff breached the good faith requirement in s 25 of the Act. It was Mr. Mills' submission that the plaintiff's conduct amounted to some type of estoppel. It is not necessary to examine this argument in detail. That is because the authority that Mr. Mills referred me to makes it clear that any such argument must fail in this case. The authority in question was *Canadian Imperial Bank of Commerce v AK Construction (1988) Ltd and AK Construction Ltd* 171 ALR 326 – a decision of the Alberta Court of Queens Bench given by Veit J. In that case it was held that mere knowledge of a prior unperfected security interest that will be defeated by the registration of the competing security was not sufficient.

> The required action is action that could constitute a waiver or support an estoppel argument or actively mislead or hinder the perfection of the prior interest.

[59] In this case, there were no circumstances which the defendant could point to which might constitute an estoppel. Mr Mills said an estoppel arose from the silence of the plaintiff during the period 9 February 2005 until June 2006.

[60] Normally an estoppel cannot be spelt out from silence on the part of the alleged representor. I see nothing in the present circumstances justifying a departure from that approach. There was no communication between the parties. That means that the plaintiff never gave the defendant reason to believe it would not enforce its rights.

[61] Nor do I agree that there was any duty for the plaintiff to tell the defendant what it intended to do. The function of the PSSA register is to enable parties in the position of the defendant to find out if there are any extant charges over property. The register provides certainty. It would be contrary to the objectives of the legislation to conclude that before a security holder can enforce its rights, it must seek out affected persons and tell that of its intentions with the consequence that a delay in telling another party of the existence of registered rights could overcome the security holder's right.

[62] I am not aware of any other circumstance that could reasonably be seen as raising an issue in the proceedings of whether the plaintiff acted contrary to the Act's requirements of good faith.

Quantum and other issues

[63] The only other matter that seemed to be in issue, initially at least, was that of quantum. However, the parties advised during the course of the hearing that they were agreed that the quantum of value of the truck and trailer units as at February 2005 was $980,000.

[64] Finally, Mr Mills submitted that the defendant was entitled to discovery and to the right to cross-examine on the affidavits. I do not accept that submission. This

is not a case where the Court is persuaded that there is a possible defence but the circumstances are such that discovery is required to clarify that issue. This case is one which principally depends upon consideration of written agreements. The closest that the defendant approached to making out a reasonably arguable defence concerned the issues of the sequence in which the parties seized the vehicles. But, as I have concluded, a careful reading of the affidavits persuades me that there is no substantial inconsistency between the accounts of the two main deponents, Mr. Hempel and Mr. Stevenson. Even if there had been, a disturbance of actual possession is not a critical component that the plaintiff must prove. An immediate entitlement to possess is enough. That entitlement has been established with reasonable clarity.

[65] I do not regard this as a case where there is an outline defence available to the defendant which warrants further investigation. Discovery and cross-examination would be speculative exercises for the purpose of enabling the defendant to cast about for some defence that has not at the present stage occurred to it.

Conclusion

[66] I have some sympathy for the defendants. Mr. Mills who came into the matter at the eleventh hour outlined to me the reasons why he had been briefed late. Those reasons had to do with possible inadequacies in the legal advice that the defendant had been previously given. That was the reason, I was told, why there had been a late change of solicitors and a need to brief counsel. I make no further comment on those matters. The last word may not have been heard on that subject. But despite Mr. Mills' well-constructed submissions for the defendant, my conclusion in the present proceeding is that the defendant does not have a reasonably arguable defence.

[67] In my view it is appropriate to enter judgment on the plaintiff's application and I do so in the sum of $980,000. It also seems to me to be appropriate for interest to be awarded under s 87 of the Judicature Act 1908. No submissions were made to me on what the rate of interest should be. The maximum prescribed rate is 7.5%. The basic principle is that the plaintiff should be compensated for being out of its

money (see *McGechan* Commentary J 87.2). There is no evidence as to the financial circumstances of the plaintiff for what it might have used the money for. It may have been prevented from retiring debt and therefore attracted interest charges as a result of the failure to obtain the proceeds of sale of the vehicles. Alternatively, had it got its money back by selling the vehicles, it may have been able to invest it elsewhere. I think a relatively conservative approach is required, and I direct that interest is to be paid at the rate of 6%. Interest is to be payable from 1 March 2005 down to the date of judgment.

[68] I invite the parties to come to an agreement on the matter of costs. If they are not able to, they should file memoranda within 14 days.

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J.P. Doogue
Associate Judge