

**IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
ŌTAUTAHI ROHE**

**CIV-2018-409-000653  
[2019] NZHC 34**

BETWEEN PARTNERS FINANCE AND LEASE  
LIMITED  
Plaintiff

AND RENEE JOHN RICHMOND and JADE  
KYLIE RICHMOND as trustees of the  
RICHMOND BUSINESS TRUST  
First Defendants

AND ASB BANK LIMITED  
Second Defendant

Hearing: 28 November 2018

Appearances: D G Dewar for Plaintiff  
C R Vinnell for Second Defendant  
(L G Cox for First Defendants, adopting Second Defendant's  
submissions excused)

Judgment: 29 January 2019

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**JUDGMENT OF JUSTICE OSBORNE  
(on plaintiff's and defendant's summary judgment applications)**

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**Introduction**

[1] This case concerns a bulldozer. It is a Caterpillar D8T. The plaintiff, Partners Finance and Lease Ltd (Partners), is a finance company. It says that it funded in 2015 the purchase of the bulldozer by Westland Hire Ltd (Westland Hire), having registered a financing statement on the Personal Property Securities Register (the Register).<sup>1</sup>

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<sup>1</sup> "Financing statement" is a concept defined in s 135 Personal Property Securities Act 1999 ("the PPSA").

Partners seeks a declaration as to its ownership and an order requiring the second defendant to remove from the Register or discharge its security interest in respect of the bulldozer.

[2] The second defendant, ASB Bank Limited (ASB) funded the first defendants as trustees of the Richmond Business Trust (Richmond) to purchase the bulldozer in December 2017. ASB promptly registered a financing statement on the Register.

[3] ASB says that Partners' financing statement was invalid and Partners' security interest was therefore unperfected. ASB says that Richmond took the bulldozer free of Partners' security interest and that ASB became the first secured party.

[4] The first defendants, Renee and Jade Richmond, are sued in their capacity as trustees of the Richmond Trust. They adopt the arguments advanced by ASB.

### **Summary judgment applications**

[5] Partners applies for summary judgment against both defendants. The applications are opposed.

[6] ASB, as second defendant, applies for summary judgment on Partners' claim.

### **The central questions**

[7] The questions raised by the parties' pleadings and other documents are:

- (a) Was Partners' registration of its financing statement on 17 November 2015 effective in perfecting its interest?
- (b) If the answer to question (a) is 'Yes', did Partners' security interest come to an end on 13 December 2017 when \$220,053.76 was paid to Partners?
- (c) If the answer to question (a) is 'No', did ASB effectively perfect its interest by registration of its financing statement on 6 December 2017?

## **The perfection regime under the Personal Property Securities Act 1999**

### *Effective perfection of Partners' interest?*

[8] It is common ground that the respective priorities between the partners and ASB fall to be determined under the Personal Properties Securities Act 1999 (PPSA).

[9] The reason for that arises in this way:

- (a) Partners, in July 2015, leased the bulldozer to Westland Hire for a term of six years.
- (b) Partners' title thereby became a "security interest" by reason of s 17(1)(a) of the PPSA.
- (c) As a consequence, Westland Hire secured rights in (the bulldozer) by reason of s 40(3) of the PPSA.
- (d) To obtain the protection of the PPSA, including priority between security interests, Partners needed to register a financing statement on the Register under Part 10 of the PPSA.
- (e) On 17 November 2015, Partners registered a financing statement relating to the bulldozer.
- (f) In late-2017, Westland Hire purported to sell the bulldozer to Richmond.
- (g) For the purchase, Richmond borrowed funds from ASB and entered into a facility agreement dated 7 December 2017, granting security to ASB over (amongst other items) the bulldozer. At the same time, the first defendants for Richmond executed a specific security deed in which the bulldozer was identified as one of the items of collateral.
- (h) On 6 December 2017, ASB registered its security interests on the Register.

- (i) Richmond's statutory rights over the bulldozer formed a part of ASB's security as there was an attachment of security interests because ASB:
  - (i) had given value (satisfying s 40(1)(a) of the Act);
  - (ii) Richmond had rights in the collateral (satisfying s 40(1)(a) of the Act); and
  - (iii) ASB's security agreement was enforceable against Partners as a third party (under s 36), (satisfying s 40(1)(c) of the Act), with Richmond having signed the security agreement in compliance with s 36(1)(b)(ii) of the PPSA.
  
- (j) Upon the attachment of ASB's security interest and the registration of ASB's financing statement, ASB's security interest was, in terms of s 41 of the PPSA, perfected.

### *Priorities*

[10] The PPSA removes title from priority considerations.<sup>2</sup> In the High Court decision in *Waller v New Zealand Bloodstock Ltd*, Allan J observed that:<sup>3</sup>

... the result is a reflection of the extent to which the registration regime introduced by the Act has altered long-established priority principles grounded in notions of legal title. Irrespective of title, it is paramount that security interests be the subject of registration if priority is to be preserved.

[11] Section 66(a) of the PPSA provides (in the absence of other ways of determining priority under the Act) that, where there are security interests in the same collateral, a perfected security interest has priority over an unperfected security interest in the same collateral. ASB claims priority under this provision.

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<sup>2</sup> Linda Widdup *Personal Property Securities Act: Concepts and Practice* (4<sup>th</sup> ed, LexisNexis, 2016) at 7.1.

<sup>3</sup> *Waller v New Zealand Bloodstock Ltd* [2005] 2 NZLR 549 (HC) (affirmed on appeal – *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA)).

[12] As between Richmond (the lessee which acquired the collateral for value) and Partners, Richmond took the collateral free of any unperfected security interest in the collateral.<sup>4</sup>

## **The validity of the financing statement registered by Partners**

### *The description of the collateral – general requirements*

[13] Section 142(1) of the PPSA sets out statutory requirements in relation to data to be contained in a financing statement for registration. It provides:

#### **142 Data required to register financing statement**

- (1) The following data must be contained in the financing statement in order to register it:
  - (a) if the debtor is an individual, the debtor's name, address, and date of birth or, if the debtor is an organisation,—
    - (i) the name and address of the organisation; and
    - (ii) the name or job title, and contact details, of the person acting on its behalf:
  - (b) [Repealed]
  - (c) if the debtor is an organisation that is incorporated, the unique number assigned to it on its incorporation:
  - (d) if the secured party is an individual, the secured party's name and address or, if the secured party is an organisation,—
    - (i) the name and address of the organisation; and
    - (ii) the name or job title, and contact details, of the person acting on its behalf:
  - (e) a description of the collateral, including its serial number if required by this Act or by the regulations:
  - (f) the date of prior registration, if prior registration law (as defined in section 193) applies in respect of the security interest:
  - (g) any other data required by this Act or the regulations to be contained in the financing statement.

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<sup>4</sup> PPSA, s 52.

[14] Regulation 8 of the Personal Property Securities Regulations 2001 imposes additional requirements of data, providing:

**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; and
  - (b) every financing change statement that is not a change demand must contain all of the data specified in Parts 1 and 2 of Schedule 1 that is applicable; and
  - (c) every change demand must contain all of the data specified in Part 3 of Schedule 1 that is applicable.
- (2) In addition to the data referred to in subclause (1), a financing statement, financing change statement, or a change demand may contain any further details that the register allows.

[15] Schedule 1 of the PPS Regulations, as referred to in reg 8(1), identifies particular requirements in relation to the detailed subject-matter of financing statements. Clause 8 of Sch 1 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).

[16] Sections 149 to 152 of the PPSA deal with the validity of registration of financing statements. In summary they provide that only seriously misleading defects in financing statements will invalidate their registration, with what is “seriously misleading” to be objectively determined. In full, the relevant provisions here are:<sup>5</sup>

**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.

**150 When financing statement seriously misleading**

Without limiting the circumstances in which a registration is invalid, a registration is invalid if there is a seriously misleading defect, irregularity, omission, or error in—

- (a) the name of any of the debtors required by section 142 to be included in the financing statement other than a debtor who does not own or have rights in the collateral; or
- (b) the serial number of the collateral if the collateral is consumer goods, or equipment, of a kind that is required by the regulations to be described by serial number in a financing statement.

**151 Proof that person actually misled not necessary**

In order to establish that a defect, irregularity, omission, or error is seriously misleading, it is not necessary to prove that any person was actually misled by it.

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<sup>5</sup> Section 152 of the PPSA is not reproduced, it is concerned with situations where a description of part of collateral is omitted, which does not arise in this case.

“Seriously misleading” – the law

[17] The New Zealand legislation, and in particular s 151 of the PPSA, adopts the wording of Canadian provinces apart from Ontario. In *Polymers International Limited v Toon*, Asher J reviewed Canadian authority, observing:<sup>6</sup>

[23] ... In Ontario the concept of “reasonable searcher” is applied. I have decided not to use that concept given that the Ontario legislation expressly contains a “reasonable person” test whereas New Zealand, along with the other Canadian provinces, does not. In those circumstances to apply the concept of “reasonable user” would be to create an unnecessary complexity. I agree with various New Zealand commentators that it is preferable to ask whether the error would prevent a registration being disclosed by a properly formatted search in the relevant searchable field.<sup>7</sup> Such a question is straightforward and objective.

[18] Provisions equivalent to s 151 of the PPSA were passed in Canadian provinces specifically to reverse early Canadian decisions which had required proof that someone had actually been misled by the error in the financing statement. The effect of an error is, by reason of s 151, to be objectively determined.

[19] An issue might then arise if a person accessing a seriously misleading registration has actual knowledge of the security interest. The issue is identified by the authors of *Gault on Commercial Law*:<sup>8</sup>

A further question which has arisen is whether a searcher, who has conducted a search and found a security interest, can nonetheless rely upon a defect in the financing statement.

The authors of *Gault* refer to a number of earlier Canadian authorities in which the Courts held that a searcher could not take advantage of such an error to avoid its consequences.<sup>9</sup>

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<sup>6</sup> *Polymers International Ltd v Toon* [2013] NZHC 1897, (2013) 10 NZBLC 99-712 at [23].

<sup>7</sup> *Gedye, Cuming and Wood*, Michael Gedye, Ronald Cuming and Roderick Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at 4-5, and Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7<sup>th</sup> ed, LexisNexis, Wellington, 2010) vol 2 at 691-692. Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at 8A.7.01 discusses the reasonable person tested 8A.7.3(1)(a).

<sup>8</sup> *Gault on Commercial Law*, above n 7, at PS 7.03(5)

<sup>9</sup> *Peat Marwick v General Motors Acceptance Corp of Canada* [1990] 4 WWR 282; *Kelln (Trustee of) v Strasbourg Credit Union Ltd* [1990] 5 WWR 670; *Re Harder* (2004) 6 PPSAC (3d) 346; *Fritz v Ford Credits Canada Ltd* (1992) 15 CBR (3d) 311.



[20] In New Zealand, the judgment of Asher J in *Polymers International* recognises that s 151 of the PPSA, properly applied, results in a straightforward and objective approach to what is “seriously misleading”. It eliminates any subjective assessment of what a particular searcher of the register might or should be taken to have known.

[21] *Polymers International* has been applied by Brereton J in the New South Wales Supreme Court (Equity) in *Re OneSteel Manufacturing Pty Limited*.<sup>10</sup> That case concerned the Personal Property Securities Act 2009 (Cth). The plaintiff (Alleasing Pty Ltd) registered a defective financing statement. Brereton J applied the conclusions of Asher J in *Polymers International*, concluding:<sup>11</sup>

It does not avail Alleasing that the administrators, apparently using a B2G interface, discovered the original registrations; it is unnecessary for a defect to be misleading, to establish that anyone was in fact actually misled. It is the capacity or potential to mislead that is crucial.

*Financing statements – description of collateral*

[22] It is implicit in reg 8(1) PPS Regulations that the assignment of collateral should be to appropriate collateral types. The approach taken in the Regulations means, for instance, that a person searching the Register for aircraft as collateral, will be able by searching the register for “aircraft” to identify the collateral in question if it has been the subject of an accurate registration.

[23] The position in relation to motor vehicles is the same.

[24] “Motor vehicle” is defined in s 57 of the PPSA, which provides:

**motor vehicle or vehicle—**

- (a) means a vehicle, including a trailer, that—
  - (i) is equipped with wheels, tracks, or revolving runners on which it moves or is moved; and
  - (ii) is drawn or propelled by mechanical power; and

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<sup>10</sup> *Re OneSteel Manufacturing Pty Limited* [2017] NSW SC21, (2017) 93 NSW LR 611, (2017) 316 FLR 402, (2017) 344 ALR 657.

<sup>11</sup> *Polymers International Limited v Toon*, above n 6, at [40]. Citing s 164(2) of the PPSA (Cth), being the equivalent of s 151 of the PPSA (NZ).

- (iii) has a registration number or a chassis number, or both of those numbers; ...

[25] Section 57 goes on to exclude as motor vehicles some specified forms of transport, none of which is relevant here.

*Partners' financing statement*

[26] On 17 November 2015 Partners registered a financing statement in respect of the bulldozer.

[27] ASB asserts that the financing statement was seriously misleading in that it described the bulldozer collateral type as "goods - other" rather than "goods – motor vehicles" and it listed the bulldozer's VIN number J8B00623 as an "identifying number" which is not available as a searchable field for a "motor vehicle serial number search" on the Register.

[28] Partners' financing statement was produced in evidence. It records under "COLLATERAL":

- (a) **Collateral Type:** Goods – Other.
- (b) **Description:** Engine Serial Number: LHX04589 c/w AIR ROPS Cab, Blade, MS Ripper.
- (c) **Identifying Numbers:** J8B00623.

(Thereafter details of make, model and description are included in the financing statement).

[29] David Battersby, the Head of Asset Finance for ASB, provided ASB's affidavit evidence. He deposes as to the circumstances in which ASB agreed to provide finance to Richmond for the purchase of the bulldozer in late 2017. He deposes in simple terms how the ASB's search of the Register failed to disclose Partners' financing statement:

As per the Bank's usual practise, on 24 November 2017, a PPSR "motor vehicle search" was undertaken for the Bulldozer. The search was for a VIN number or a chassis number J8B00623 as, unlike the previous searches, the Bank required a serial numbered goods search on the Bulldozer in isolation. This showed no security interest under Identifier No J8B00623. It now transpires that this was because Partners had registered the Bulldozer as "Goods Other" on the PPSR and the identifying number was not therefore a valid search filed for a registration of that type.

*The bulldozer as a "motor vehicle" under s 57 of the PPSA*

[30] To qualify as a "motor vehicle" under the PPSA, a vehicle must have three characteristics identified in s 57(a)(i) – (iii). It is common ground that the bulldozer satisfies the first two requirements. It is contended by Partners, however, that the bulldozer was not a motor vehicle under s 57 in that it lacked "a registration number or a chassis number or both of those numbers".

[31] Regulation 3 of the PPS Regulations provides a definition of "chassis number":

**3 Interpretation**

...

**chassis number**, in relation to a motor vehicle, means any numbers or letters, or any combination of numbers or letters, stamped directly on to a metal panel, or a component, that are part of the permanent structure of the motor vehicle, and that are intended to identify the vehicle ...

[32] In this case, the witnesses have referred both to "chassis number" and to the "VIN". The latter term is an acronym for "vehicle identification number", being the identifying code for a particular vehicle. The New Zealand Transport Agency identifies a VIN as a 17 character number which identifies a vehicle.<sup>12</sup>

[33] It is Mr Battersby's evidence that on a search on the register (for a motor vehicle) it is possible to search for both chassis number J8B00623 and for VIN J8B00623. Mr Battersby's evidence was that the use of neither number caused the financing statement over the bulldozer to be identified.

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<sup>12</sup> [www.nzta.govt.nz/vehicles/vehicle-registration-vin/](http://www.nzta.govt.nz/vehicles/vehicle-registration-vin/).

[34] The issue between the parties in relation to whether the bulldozer is a “motor vehicle” in terms of the PPSA turns on whether it has a chassis number.

[35] Rene Richmond, one of the first defendants, exhibited photographs which he took of the bulldozer in April 2018. In particular he took a photograph of a metal plate attached to the bulldozer near the cab area showing “Sequence Number J8B00623”.

[36] Mr Richmond’s photograph of the metal plate reveals a number of other entries including the make of machine (“D8T”) and a serial number (“LHX04589”). The “serial number” however is on a part of the plate that deals with “motor-engine”. It is the number J8B00623, appearing as “sequence number”, which comes within the part of the plate identifying the Model. It is unsurprising that Partners itself, when registering its financing statement in 2015, stated that J8B00623 represented the “Identifying Numbers”.

[37] The evidence establishes beyond doubt that J8B00623 represents the combination of numbers and letters stamped onto a component of the bulldozer which was intended to identify the bulldozer.

[38] It is unnecessary in these circumstances to refer in detail to further evidence provided by Donovan Morgan. Mr Morgan, a general manager for an independent banking and finance organisation, gave evidence of his extensive background in the equipment finance industry. He referred particularly to finance for yellow goods.<sup>13</sup> Mr Morgan deposed that there is no uniformity in the industry in naming a unique identification number, with the numbers variously being called chassis, serial, sequence or something else. Mr Morgan deposed that every yellow goods item will have a unique identification number stamped on it or on an attached plate, and it is industry practice to use that number as “chassis number” when registering a financing statement.

[39] Mr Morgan’s evidence might be taken to reinforce the conclusion I have already reached. It is however unnecessary that it be relied upon given that my earlier

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<sup>13</sup> Yellow goods are material for construction and earth moving equipment, quarrying equipment, and forklift trucks.

conclusion had been reached by a straightforward application of the definition of the “chassis number” in the regulations.

*Seriously misleading financing statement*

[40] As Mr Battersby’s evidence indicates, the use of the collateral type “goods – other” in Partners’ financing statement meant that the identifying number J8B00623 (correctly used by Partners) was insufficient to make the vehicle show up on a search of the Register. Had Partners in its financing statement designated the collateral type as “goods – motor vehicles”, ASB’s search would have revealed the registration.

[41] Partners’ adoption of “goods – other” as its collateral type was misleading. The type “goods – other” (listed in Schedule 1 to the PPS Regns in clause 8(1)(e)) conveys the meaning that the goods in question are goods other than the earlier (clause 8(1)(a – d)) types, being motor vehicles; aircraft; livestock; and crops.

[42] By its nature the misdescription of the goods was seriously misleading, precisely because it meant that a searcher adopting the appropriate collateral type for the bulldozer would be unable to identify the registered financing statement.

*ASB’s previous search of the register*

[43] Mr Battersby deposed that in September 2017 ASB had obtained a search of the Register in relation to Richmond’s potential purchase of three items of equipment from Westland Hire. It was a search conducted by the name of the intending vendor. As Mr Battersby deposed, it was intended to be “a high level look at what charges may be on proposed security assets”. As a result of the search, ASB ascertained that the three items being considered for purchase by Richmond (including the bulldozer) had as at September 2017 PPSR charges on them to other parties.

[44] In its notice of opposition to ASB’s application for summary judgment, Partners asserted as one ground that ASB had not been misled by the financing statement and “had knowledge of it”.

[45] As set out above (at [19] – [21]), such knowledge (as at September 2017) on the part of ASB does not relieve Partners of the consequences of its seriously misleading registration.

[46] I therefore do not deal with Mr Vinnell’s alternative submission that, if knowledge of ASB were relevant, ASB’s knowledge at the earlier date in September 2017 (rather than at the time of the bulldozer purchase in December 2017) would not be material.

### **The validity of the financing statement registered by ASB**

[47] On 6 December 2017 ASB registered a financing statement in respect of the bulldozer.

[48] ASB’s financing statement was produced in evidence. It records under “Collateral”:

<b>Collateral Type:</b>	Goods – Motor vehicles
<b>Registration:</b>	NO INFO
<b>Vin:</b>	J8B00623
<b>Chassis:</b>	J8B00623

(Thereafter details of make, model, year and description are included in the financing statement).

[49] Partners did not say in its Notice of Opposition (to ASB’s summary judgment application) it challenged the validity of ASB’s 6 December 2017 registration. Rather it put its case on the basis of its own priority through its 17 November 2015 registration.

[50] On the evidence adduced, ASB has established beyond argument that its own registration was effective to perfect its interest in the bulldozer.

### **Partners' practice in relation to registration**

[51] Partners adduced evidence as to the practice it adopts in relation to registration of yellow goods such as diggers and bulldozers. I do not find that evidence material as, whatever Partners' practice and the reasons for it, Partners' registration of the bulldozer in this case fails because (through its failure to identify the bulldozer as a motor vehicle) it did not meet the requirements of the PPSA and the PPS Regulations. I will therefore only briefly discuss the evidence.

[52] Leigh Ellmers, the PPSR administrator for Partners, deposed as to his extensive experience in the finance industry. He refers to the specifically developed software system which Partners uses in relation to PPSA registration. He explains that through that software package machines such as bulldozers which are not registered for use on the roads are customarily registered by reference to their serial identification numbers and placed in the category of "goods – other". Mr Ellmers deposes that in relation to the registration of the bulldozer he followed this normal procedure. He considered that had he populated fields for registration and VIN numbers in relation to the bulldozer, it would have involved incorrect entries. He observes that when ASB effected its registration it identified "registration" as "no info" and VIN as "J8B00623".

[53] Michael Johnson, an operations manager for a business solutions company, also filed a brief affidavit for Partners. He explained that the software package used by Partners is widely used by finance companies in New Zealand. He added that mobile plant such as diggers and bulldozers which "does not have registration, chassis or VIN numbers" has to be registered in terms of the software system as "goods – other" rather than as motor vehicles.

[54] Francis Fitzgerald, a director of Partners, filed a further affidavit. He also explained that if Partners had been registering their financing statement by reference to "motor vehicle" it would have required Partners "to populate fields with false information ascribing a registration number that does not exist and a vehicle identification number that does not exist". He confirmed that mobile plant such as the bulldozer are customarily registered as "goods – other".

[55] For ASB, Mr Battersby filed a reply affidavit. He agreed that “J8B00623” is not a VIN number (because, as a bulldozer, it is not required to have a VIN number). Having referred to “J8B00623” as the “manufacturer’s serial number unique to this bulldozer” he noted that ASB had accordingly populated the filed “chassis” with that number. That meant that a search for a motor vehicle with that chassis number successfully identified ASB’s financing statement in relation to the bulldozer.

[56] In reply to Ms Ellmers’ affidavit, Mr Battersby exhibited a financing statement registered by Ms Ellmers on behalf of Partners on 12 April 2018. It relates to other yellow goods (a Caterpillar Bucket Loader). It was registered as “goods – motor vehicles” with an eight digit number (40Y09740) noted as the chassis number.

[57] Mr Battersby exhibited further examples of financing statements of Partners in which yellow goods were registered as “goods – motor vehicles” with a six digit chassis number. Finally, Mr Battersby exhibited an example of registration of a financing statement by an unrelated party (the Bank of Queensland) in which yellow goods were listed as “goods-motor vehicles”.

[58] The reply evidence of Mr Battersby indicates that registration practices which Ms Ellmers describes as “customary” are in fact departed from by Partners (apparently using its software system) and that the similar eight figure configuration of letters and numbers is used after “goods-motor vehicles” to populate the “chassis” field. It is clear beyond argument that such registration is possible and was possible for Partners. Ultimately what deprives Partners of priority upon registration is its failure to comply with the statutory and regulatory requirements.

#### **ASB’s alternative ground of an authorised sale**

[59] A substantial body of evidence was devoted to ASB’s alternative contention that Partners had authorised the sale of the bulldozer on certain terms which were fulfilled, thereby giving Westland Hire the ability to provide ASB with security over the bulldozer freed from its charge to Partners.

[60] In the circumstances I reach no determination in relation to that evidence or the submissions I heard on this aspect of the case.



## Competing summary judgment applications

### *The principles*

[61] Unusually, this case has involved competing summary judgment applications, one on the part of Partners and one on the part of ASB. The starting point for a plaintiff's summary judgment application is r 12.2(1) of the High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[62] I summarise the general principles which I adopt in relation to this application:

- (a) Commonsense, flexibility and a sense of justice are required.<sup>14</sup>
- (b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.<sup>15</sup>
- (c) The Court will not hesitate to decide questions of law where appropriate.<sup>16</sup>
- (d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.<sup>17</sup>
- (e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.<sup>18</sup>

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<sup>14</sup> *Haines v Carter* [2001] 2 NZLR 167 (CA) at [97].

<sup>15</sup> *Pemberton v Chappell* [1987] 1 NZLR 1 (CA).

<sup>16</sup> *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 All ER 508 (CA) at 516.

<sup>17</sup> *Harry Smith Car Sales Pty Ltd v Claycom Vegetable Supply Co Pty Ltd* (1978) 29 ACTR 21 (SC).

<sup>18</sup> *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12 (HC).

- (f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation – the defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the Notice of Opposition.<sup>19</sup>
- (g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.<sup>20</sup>
- (h) The need for judicial caution in summary judgment applications has to be balanced with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.<sup>21</sup>
- (i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.<sup>22</sup>

[63] The starting point for a defendant’s summary judgment application is r 12.2(2) High Court Rules, which requires that the defendant satisfy the Court that none of the causes of action in the statement of claim can succeed.

[64] I summarise the general principles which I adopt in relation to the application:

- (a) The onus is on the defendant seeking summary judgment to show that none of the plaintiff’s causes of action can succeed. The Court must be left without any real doubt or uncertainty on the matter.

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<sup>19</sup> *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).

<sup>20</sup> *Jowada Holdings Ltd v Cullen Investments Ltd* CA248/02, 5 June 2003 at [28].

<sup>21</sup> *Bilbie Dymock Corporation Ltd v Patel & Bajaj* (1987) 1 PRNZ 84 (CA).

<sup>22</sup> *Pemberton v Chappell*, above n 15.

- (b) The Court will not hesitate to decide questions of law where appropriate.
- (c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.
- (d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.
- (e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.
- (f) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

*Application of summary judgment principles*

[65] Partners sues on a single cause of action. Relevantly, as against ASB, it asserts that it has a validly registered security interest, as a result of which it seeks a declaration that it is the lawful owner of the bulldozer and an order that ASB remove and discharge its security interest from the Register (to enable Partners to sell the bulldozer).

[66] I am satisfied on the evidence that Partners' single cause of action against ASB cannot succeed. Partners' financing statement was seriously misleading in terms of s 150 of the PPSA. Its security interest was not perfected. The security interest of

ASB on the other hand was perfected. ASB's security interest accordingly takes priority pursuant to s 66(a) of the PPSA.

### *Outcome*

[67] There will be summary judgment for ASB on Partners' claim against ASB.

### **Consequential matters**

[68] In the normal course costs would follow the event on a 2B basis. As I did not hear from counsel in relation to costs, I will be reserving them to be determined on the papers if submissions are filed. Any submissions filed are to be limited to four pages.

[69] The proceeding as between the plaintiff and first defendants will be adjourned.

### **Orders**

[70] I order:

- (a) There is judgment for the second defendant on the plaintiff's claim against the second defendant.
- (b) The second defendant through its registration of financing statement FP09B21EP1822475 is the lawful owner of the Caterpillar Model DT8 (Chassis J8B00623) therein identified ("the bulldozer").
- (c) The plaintiff shall within 5 working days discharge its security interest over the bulldozer from the Personal Property Securities Register.
- (d) The costs of the proceeding and the interlocutory applications as between plaintiff and second defendant are reserved.
- (e) Any application for costs is to be made by memorandum filed and served within 10 working days with any submission in response to be filed within five working days thereafter. In the event that no application is filed for costs within the said 10 working days the order

of the Court (without further direction) will be that there be no order as to the costs and disbursements as between plaintiff and second defendant.

- (f) To the extent that claims remain as against the first defendants, the proceeding is adjourned to a case management conference at 12 noon, 6 March 2019 (Associate Judge Lester).
- (g) Counsel are to file, five working days before that conference, preferably a joint memorandum dealing with the readiness of this proceeding for hearing. The agenda for the conference (r 7.4(2)) will be all Schedule 5 matters including:
- any steps necessary for the disposal of interlocutory applications;
  - the suitability of the case for Judicial Settlement Conference or alternative dispute resolution;
  - the estimated duration of the hearing;
  - timetable directions for trial;
  - the names and number of witnesses (and which are factual and expert);
  - any particular directions required in relation to experts; and
  - confirmation that a back-up fixture will be accepted (or if not, why not), subject to prior notification.

**Osborne J**

Solicitors:  
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