IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-2809
[2019] NZHC 664

UNDER	The Personal Property Securities Act 1999 and Part 19 of the High Court Rules
IN THE MATTER	of an application to maintain the registration of a financing statement
BETWEEN	AUTO FINANCE DIRECT LIMITED Applicant
AND	BRIDGET MORTON Respondent

Hearing: 26 March 2019

Appearances: A J Steel for the Applicant
No appearance of Respondent

Judgment: 2 April 2019

JUDGMENT OF MUIR J

This judgment was delivered by me on Tuesday 2 April 2019 at 1.30 pm
Pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel:
A J Steel, Barrister, Auckland

Solicitors:
S Weir, Kemps Weir, Greenlane

Copy to the Respondent

Introduction

[1] The applicant, Auto Finance Direct Limited (AFDL), applies by originating application under s 167 of the Personal Property and Securities Act 1999 (the PPSA) for an order maintaining registration of its financing statement on the Personal Property Securities Register (PPSR). Such registration is in respect of the respondent Ms Morton's 2005 BMW motor vehicle, which she purchased on 28 September 2018 for the sum of $5,495.00. That sum, together with related fees of $375.35, was fully financed by AFDL. The vehicle was purchased from Christchurch dealer, Major Motors Limited (MML).

[2] On 7 January 2019, AFDL obtained a without notice order from the Court in terms of its application. It did so because of the strict statutory time limits attaching to proceedings of this nature.

[3] Subsequently, Ms Morton filed a notice of opposition and affidavit, and the matter was scheduled for a substantive hearing on the originating application.

[4] As is usual in the context of without notice orders which are followed by an on notice application, the onus of proof remains on the original applicant, in this case AFDL.[1]

Background

[5] On 31 October 2018, one month after purchase, the vehicle broke down. Coincidentally, this was outside local Dunedin authorised distributor, Cooke Howlison BMW. It identified the car as having faults with its starter motor and alternator. Ms Morton engaged with MML. However, disputes arose about whether it was entitled to undertake repairs with after-market parts and in respect of its liability for Cooke Howlison's diagnostic services. Ms Morton accordingly instructed Cooke Howlison to proceed with the repairs.

[6] In the course of doing so, Cooke Howlison found that the car's digital motor electronics unit (DME), which comprises the comprehensive management system for

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1 *Toyota Finance New Zealand Ltd v Christie* HC Auckland CIV-2009-404-379, 15 July 2009.

the engine, was floating in water and required replacement. Ms Morton notified MML accordingly and on 7 November 2018 informed AFDL that MML was not co-operating with her required repair regime. By 8 November, all repairs (including replacement of the DME) were complete for which the total account was $5,356.34, including diagnostic services.

[7] Ms Morton sought recovery of that sum from MML in proceedings before the Motor Vehicle Disputes Tribunal (the Tribunal). By decision dated 22 January 2019, the Tribunal awarded her the diagnostic costs of $149.50 but otherwise dismissed her claim.[2] Although satisfied that the vehicle was not of acceptable quality in terms of s 6 of the Consumer Guarantees Act 1993 (CGA), it held that she had proceeded to self-help remedies under s 18(2)(b) of the CGA in circumstances where MML was willing and able to remedy the failures within a reasonable time. It further held that MML's intention to install after-market parts, where possible, was reasonable.

[8] In tandem with her proceedings against MML, Ms Morton also sought to have AFDL's security over the vehicle lifted. On 9 November, she wrote to the applicant claiming that her obligations under the security agreement had been "performed". She gave 15 working days' notice of an intention to lodge a change demand on the PPSR.

[9] On 12 December, this change demand was lodged. The stated basis for the demand was "security agreement extinguished – s 162(e)".

[10] Through its solicitors, AFDL sought withdrawal of the demand, but Ms Morton declined to do so and an interim order was made preserving registration of the financing statement. Although Ms Morton was critical of disclosure on the application for interim relief, she accepted in a telephone conference before Duffy J on 7 February 2019 that the AFDL's undertaking as to damages sufficiently protected her in that respect. The matter was accordingly set down for a substantive hearing on 26 March 2019 before me.

[11] On the morning of 26 March, I was advised by the Registry that Ms Morton anticipated attendance at the hearing by way of telephone link to Christchurch.

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2 *Bridget Victoria McClean Morton v Major Motors* [2019] NZMVDT 05.

Although the conference before Duffy J had proceeded on that basis with the Court's express permission, that permission did not extend to the substantive hearing. I therefore convened an urgent telephone conference, at which I indicated I would adjourn the proceedings to 27 March to facilitate Ms Morton's attendance in person. She said that she would, in those circumstances, engage counsel.

[12] By further memoranda dated 26 and 27 March, she advised that counsel would not be appearing (although assisting her in relation to any costs submission which may be necessary) and that the Court should either "dismiss this application for the pragmatic reason that it is a waste of the Court's time", or alternatively "dispose of the matter on the papers".[3] As a further alternative, she suggested that she was "satisfied for the judgment to be made in default with costs to be reserved".

[13] This somewhat acquiescent approach was no doubt a function of her stated belief (recorded in her written submissions) that the vehicle now has no or very little value. That is because of her understanding that, having not been paid for the parts installed in the car, Cooke Howlison have since removed them, with the result that it has scrap value only.

[14] In the event, I elected to deal with the application by way of an oral hearing on 27 March 2019 at which counsel for AFDL was present and during the course of which I endeavoured to test the key propositions advanced by Ms Morton in her comprehensive written synopsis. In that sense, the approach adopted was a hybrid one, designed best to satisfy the interests of justice.

[15] AFDL says that there is inadequate evidence in this respect and that it wishes to maintain its security. Accordingly, the High Court has been required to hear a case which should have long since been resolved between dealer, financier and client, and which at most probably concerns a few thousand dollars only.

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[3] Ms Morton had earlier filed an extensive (20 page) written submission.

The change demand framework

[16] Under s 167 of the PPSA, if the Court is satisfied that none of the five grounds for making a demand under s 162 of the PPSA exist, it may order that the registration of a financing statement be maintained. The grounds potentially relevant in this proceeding are:

> (a) all of the obligations under the security agreement to which the financing statement relates have been performed:
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> ...
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> (b) the collateral described in the collateral description included in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor;
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> ...
>
> (e) the security interest is extinguished in accordance with this Act.

[17] Although Ms Morton's change demand relied on s 162(e), her notice of opposition to the application appears to rely also on subs (a) and (c). In particular, under s 162(a) she says that the applicant is liable to her under the CGA for repair costs she has incurred and that the set-off available to her is such that it has extinguished all of the obligations under the CGA. Under s 162(b), she alleges that the DME unit installed by her is not collateral, and that AFDL's description of its security interest as "goods - motor vehicle" is incorrect and should be amended. Unlike her initial claim under s 162(e) and her new claim under s 162(a), this ground assumes a continuing security, but not in respect of all of the component parts of the car.

[18] The claim under s 162(e) mirrors that under s 162(a) and is based on the asserted set-off.

[19] Under s 163, a demand under s 162 of the PPSA may require the secured party to discharge or amend the financing statement. If the change demand is not complied with within 15 working days, then the person giving the demand may register the

change demand.[4] The Registrar of the PPSR then notifies the secured party that the change demand will be registered unless an order is made under s 167 within 15 working days.

The test under s 167

[20] Section 167(1) of the Act provides that, before making an order that the financing statement/security interest be maintained, the Court must be "satisfied that none of the grounds for making a demand under s 162 exist". As indicated by Gendall J in *Working Capital Solutions Holdings v Pizaro*, interpretation of this provision has had a vexed history.[5] A number of the earlier authorities emphasised the similarity of the procedure to applications to sustain a caveat. As a result, the quality of the security holder's case was assessed on a "reasonably arguable" or "seriously arguable" basis.[6] Some of these authorities emphasised the tight time frame within which an order under s 167 was required although, in my view, this is ameliorated by the common practice of obtaining interim orders, as occurred in the present case.[7]

[21] In the subsequent decision of *Nichibo Trading Company New Zealand Ltd v Lucich*, Toogood J accepted the approach in these early cases but went on to consider what the situation should be where a positive defence was asserted under s 53 or s 58 of the PPSA (purchase of motor vehicle sold in the ordinary course of business of the seller or by registered trader).[8] In that context his Honour held:

> [37] I recognise the force of the point made in *Toyota Finance New Zealand Limited v Christie,* that the summary procedure for maintaining registration of a security interest is not usually suitable for the determination of disputed questions of fact. The other relevant issue, on a simple application of ss 162 and 167, is that maintaining the security on the register is not a final determination of the issue of whether the party claiming an interest holds that interest free of the security. It would be open to a buyer, if the registration is

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4 Personal Property Secureities Act 1999, s 165(1).

5 *Working Capital Solutions Holdings v Pizaro* [2014] 3 NZLR 379 at [3].

6 See *Asset Traders Limited v Favas Sportscar World Limited* [2006] NZHC 903; [2006] 3 NZCCLR 545 at [13] per Winkelmann J (as she then was); *Toyota Finance Limited v Christie* HC Auckland CIV-2009-404-379, 15 July 2009 at [19] per Asher J; and *Daniel Smith Industries v Cranes International Ltd* HC Rotorua CIV-2009-463-286, 16 December 2009 per Allan J.

7 A view shared by Mallon J in *Universal Trucks and Equipment Limited v Reynolds* [2012] NZHC 483 at [38] and Gendall J in *Working Capital Solutions Holdings v Pizaro* [2014] 3 NZLR 379 at [10].

8 *Nichibo Trading Company New Zealand Ltd v Lucich* HC Auckland CIV-2010-404-3869; [2011] NZHC 722 at [38].

> maintained by a s 167 application, to apply for a declaration by this Court or a District Court as to the validity of the security interest.
>
> (footnotes omitted)
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> [38] But in these proceedings, the respondents have effectively taken that step by calling ss 53 and 58 in aid of their opposition; the notice of opposition, in effect, is an originating application by the respondents. A determination that either s 53 or s 58 applies in favour of the respondents results (sic) cannot be expressed as an interim finding that they have acquired the Pajero free of the applicant's security interest; it is inherently a final determination. In those circumstances, it is necessary that the respondents should bear the onus of proving their claims, and that more than an arguable case should be made out.

[22] The position was revisited by Mellon J in *Universal Trucks and Equipment Limited v Reynolds*, where her Honour concluded that:[9]

> If the applicant establishes only a reasonably or seriously arguable case that the registered interest exists, that does not seem to me to be the same as saying that the Court is "satisfied" that "none of the grounds for making the demand ... exist".

[23] In the subsequent decision of *Vegar-Fitzgerald v Mawdsley*, Bell AJ respectfully declined to follow that approach, again emphasising the tight 15 working day deadline to obtain a court order and, in the context of what he described as a "summary procedure", the requirement that the hearing should "in the normal course be short and to the point and the judgment likewise".[10]

[24] All these cases were comprehensively reviewed by Gendall J in *Working Capital Solutions Holdings v Pizaro*.[11] He focused on the meaning of the phrase "is satisfied", drawing on numerous cases in both the civil and criminal jurisdictions, and emphasising that what was required was an "actual persuasion", having weighed the opposing contentions. He concluded:

> [11] I therefore propose to consider the present application not on the basis of any approaches previously proposed but rather, by an evaluation of the submissions and evidence before me. In doing so, I will ask whether WCSH has persuaded me that none of the grounds contained in s 162 apply here. I do not intend to qualify the statutory language in any way. Either I will be satisfied or I will not.

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9 *Universal Trucks and Equipment Limited v Reynolds* [2012] NZHC 483 at [35].
10 *Vegar-Fitzgerald v Mawdsley* [2012] NZHC 1311 at [15].
11 *Working Capital Solutions Holdings v Pizaro* [2014] 3 NZLR 379.

[25] I respectfully adopt that approach as applicable, at least in cases such as the present where interim orders have been previously made, the Court is assisted in its decision by full affidavits and comprehensive submissions, and the concerns about the summary nature of the jurisdiction do not therefore resonate as strongly.

[26] Mr Steel encourages me to adopt the approach of Toogood J in *Nichibo Trading Company New Zealand Ltd v Lucich* and says that because the respondent raises in her notice of opposition specific grounds under s 162 that she says exist, these should be construed as affirmative defences, for which she then carries the onus of proof. Although such may well be appropriate where affirmative defences are raised under ss 53 and 58, a notice of opposition which relies on s 162 grounds cannot, in my view, be said to reverse the onus on the applicant (to satisfy me that no such grounds exist). That would, in my view, be to stand the statutory test on its head.

[27] I intend, therefore, to approach the issue by asking whether the applicant has satisfied me, in the sense of persuaded me, that none of the grounds contained in s 162 apply.

Analysis

[28] I group (in terms of discussion) the grounds under s 162(a) and (e), because in both cases the essence of Ms Morton's argument is that, as a result of set-offs which she can assert against AFDL under the extended definition of "supplier" in the CGA, the obligations under the security may now be regarded as fully discharged or extinguished.

[29] It is apparent that Ms Morton's case has, to some extent at least, evolved over time. Although she now says that the Tribunal did not engage with all the points she was making, it is clear that, at the outset at least, the remedy she sought was recovery of her repair costs either from MML or AFDL.

[30] So, for example, at 5.00 pm on 8 November 2018, which was the day the repairs were completed she advised AFDL that:

> As I have not heard from Major Motors, and the car has not been repaired in a reasonable period of time, I have instructed my own mechanic to repair the car pursuant to the Act.

[31] In the same email, she stated that she regarded the applicant as bound by the CGA and that she would be stopping "my finance payments while the matter is in dispute".

[32] At 9.44 am the next morning she further advised the AFDL that:

> As discussed, Major Motors have not responded to my emails or taken any action in regards to getting my car repaired under the Consumer Guarantees Acts (sic). Pursuant to the Act, I have now had the car repaired myself, and the costs of repairs are recoverable from Autofinance and Major Motors Ltd jointly.

[33] Later the same day (at 10.57 am), she advised AFDL that, "At this stage I am still requesting Auto Finance meet the repairs today".

[34] It was this background which featured prominently in the Tribunal's decision. It held that:

> The fundamental problem with Ms Morton's claim is that she went ahead and authorised Cooke Howlison to repair the vehicle, even though Major Motors had not refused to remedy the vehicle's failures.

[35] Applying the approach adopted by the High Court in *Acquired Holdings Limited v Turvey*, the Tribunal held that:[12]

> … Ms Morton went about things in the wrong order – she proceeded to exercise the self-help remedies under s 18 of the Act without giving the trader an adequate opportunity to remedy the failure itself.

[36] The Tribunal then went on to describe the genesis for what occurred as having been in Ms Morton's resistance to the installation of after-market parts, which it regarded as unreasonable.

[37] AFDL says that these findings apply *a fortiori* to its position, in that the first it knew of any difficulties Ms Morton was having with the car was when she phoned them on 7 November to say, among other things, that the car was "a lemon", that she

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12 *Acquired Holdings Limited v Turvey* (2008) 8 NZBLC 102 at 107.

had had no luck sorting out these issues with the dealer, that the dealer wanted to install "secondhand non-genuine parts" when she required "genuine parts" and that she had an estimate of "$5,000 (possibly more) to repair".[13]

[38] By this date all of the original defects with the car involving the starter motor and crank sensor had been fixed, and by the following day the new DME had been installed (again at Ms Morton's request). At no time was AFDL, as deemed supplier, called upon to remedy the failure. Instead it was presented with a fait accompli and told (first on 9 November after the repairs had been completed) that the cost was recoverable from it.

[39] However, although Ms Morton's initial focus was clearly on the recovery of the repair costs, this has now segued into a claim under s 18(3) of the CGA for damages for reduction in the value of the goods below the price paid and (possibly) under s 18(4) for consequential losses reasonably foreseeable as a result of the failure of the goods.[14] Mr Steel submits that this change in approach followed provision of the AFDL's reply evidence, clearly setting out the relevant chronology and Ms Morton's failure to give the applicant any (or at least any reasonable) opportunity to remedy the defects.

[40] Nevertheless, he accepts that all this is relatively peripheral to the issue I must decide, because he acknowledges:

(a) The failings with the vehicle were clearly of a "substantial character" within the terms of s 18(3).

(b) Although Ms Morton never gave AFDL an adequate opportunity to remedy the defects, she does have a potential claim against it for compensation under s 18(3)(b).

(c) Were Ms Morton to obtain a judgment (presumably from the Disputes Tribunal) for claims under s 18(3)(b) and (4) which exceeded the sum

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13 The quoted extracts are from the applicant's contemporaneous telephone log.
14 Such are foreshadowed in her submission but not in her affidavit in opposition.

outstanding under the financing statement, then it would not be possible for AFDL to maintain its registration.

[41] However, he says no such judgment had been obtained, nor is there any adequate evidence before the Court establishing the reduction in value of the goods on account of the defects.

[42] In that context, he emphasises that the original cash price of the vehicle was $5,495.00 to which the sum of $375.35 was added on account of fees. At the point Ms Morton suspended payments, the amount outstanding in the loan agreement was $5,686.50.[15] He says that, even assuming the reduction in value equated to the full purchase price, there would still be an amount owing under the financing statement. But he says that is an extreme example given the fact that, with the installation of after-market parts and a used DME, economic value could be salvaged in the vehicle. Alternatively, he says its value for parts must be taken into account. Accordingly, he says that I may be "satisfied" that the set-off potentially available under s 18(3)(b) would not be sufficient to engage the criteria in s 162(a) or (e).

[43] I find that submission persuasive. Significantly, although Ms Morton's submissions variously describe the vehicle as having a value of $200 (less towing expenses) or "at best … $25.00", there is no evidence in that respect. Nor does her affidavit of 1 February 2009 lay any foundation for a claim under s 18(4) sufficient (either on its own or in combination with a s 18(3)(b)) to off-set the amount owing under the financing statement. In this respect, therefore, AFDL satisfies me that the relevant grounds are not made out.

[44] Ms Morton's next argument is that the DME is not collateral under a security agreement and that the applicant cannot therefore satisfy the Court that the ground specified in s 162(c) of the PPSA is not made out. In short, her position is that the collateral described in the financing statement includes an item (the DME) that is not collateral under the security agreement between the parties.

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[15] Pursuant to cl 3 of the Consumer Credit Agreement, default interest will have since accrued on this sum at an apparent rate of 17.55 per cent.

[45] The starting point in assessing this submission is the financing statement. Under the heading "collateral details" is included the line item:

> **Collateral Type** Goods – Motor Vehicles

[46] This accords with regulation 8(1)(a) of the Personal Properties Securities Regulations 2001, which provides that:

> (a) All collateral must be assigned to one or more of the following collateral types:
>
> (i) Goods: motor vehicles.
>
> …

[47] As to what is secured under the Consumer Credit Agreement, cl 1 provides that:

> "Security" and "Vehicle" means the vehicle security specified in the Disclosure Statement.

[48] Clause 5.3 in turn provides that:

> **All obligations secured**
>
> All money that You owe under this Agreement and under any other agreement with Us will be secured by the security.

[49] The disclosure statement includes a heading "Description Of Goods Being Used As Security (Security) under which the relevant security is described as being over a silver 2005 BMW 320 1 with VIN number, registration number and odometer reading recorded.

[50] Clause 6 of the Consumer Credit Agreement further provides under the heading: "Maintenance":

> 6.1 You will, at Your expense:
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> …
>
> (i) Replace all defective or worn out parts of the Security. All accessories and replacement parts and any additional thing or material which is now or at any time during the continuance

> of this Agreement attached to the Security and form part of the Security.

[51] Although the word "and" in the final line is otiose, the meaning of the provision is clear and understandably so. If replacement parts were to be excluded from the security, its value would or could be substantially undermined. The present case is a useful example. The term of the credit contract was two years. The security was an older, higher mileage vehicle, almost inevitably requiring replacement parts at some stage during the term. If prior to repossession the owner were permitted to remove replacement parts on the basis that they were not part of the security, the lender could be significantly exposed.

[52] Ms Morton says that the terms of cl 6(1)(i) give rise to many potential problems in the context of recent technological advancements – including the ability, for example, to integrate telephones with the audio and display systems in motor vehicles. That issue does not arise in this case. Although she may be correct in suggesting that the DME is simply "plugged into" the vehicle in a way analogous to a phone, it nevertheless is a replacement part which, at the time it was fitted, became a part of the security. That does not mean to say that the applicant's security is good for all purposes. The PPSA has specific provisions[16] in relation to what are identified as "accessions". So, for example, if the DME was subject to a security interest at the time of installation, such security interest would have priority over the claimant's interest.[17] So too, a lien arising out of materials or services provided in respect of the goods that are subject to a security interest has priority over the security interest in the circumstances set out in s 93.

[53] What rights Cooke Howlison had in respect either of the DME or of the motor vehicle itself (and whether contractual or at common law) are not matters before the Court on the current application. It is said[18] that the company has since removed the DME as a result of non-payment of its invoice. If it were entitled to do so, then the vehicle will now obviously be immobile and of significantly reduced value. However,

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16 Sections 78-81.
17 Section 79.
18 Again in Ms Morton's written submissions.

those are matters I am not required to address further and there is no evidence in respect of them.

[54] The applicant satisfies me that the grounds in s 162(c) are similarly not made out.

Result

[55] I order that registration of the applicant's financing statement in respect of the BMW motor vehicle, registration GLT 734, VIN number WBAVA76050NK12377, chassis number WBAVA 76050NK12377, be maintained.

Costs

[56] Mr Steel requests that costs be reserved pending discussions with counsel who have been retained by Ms Morton for that purpose.

[57] In the event costs are unable to be resolved, memoranda (maximum three pages plus any schedules) may be filed on the following timetable:

(a) Applicant's memorandum to be filed and served by 19 April 2019.

(b) Respondent's memorandum to be filed and served by 3 May 2019.

(c) (Any) memorandum in reply to be filed and served by 10 May 2019.

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Muir J