IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-001526
[2013] NZHC 936

UNDER	Part 19 of the High Court Rules and section 34 of the Receiverships Act 1993
BETWEEN	COLIN THOMAS MCCLOY AND DAVID JOHN BRIDGMAN ACTING AS RECEIVERS OF MAINZEAL PROPERTY AND CONSTRUCTION LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Applicants
AND	MANUKAU INSTITUTE OF TECHNOLOGY First Respondent
AND	BODY CORPORATE 177519 (HOBSON GARDENS) Second Respondent

Hearing: 22 April 2013

Counsel: M Kersey and A J Millar for Applicants
P V Shackleton for First Respondent
R M Dillon for Second Respondent

Judgment: 1 May 2013

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 12 noon on the 1st day of May 2013.

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] The key issues I have to resolve are encapsulated in the following questions:

> (1) Does the Bank of New Zealand (BNZ) have a security interest in two hoists and ancillary equipment (the hoists) owned by Mainzeal Property and Construction Ltd (Mainzeal) prior to it being placed in receivership, located at a building owned by the second respondent (Hobson Gardens)?
>
> (2) What interest, if any, does Hobson Gardens have in the hoists?
>
> (3) If both Hobson Gardens and the BNZ have security interests in the hoists, which of those security interests has priority?

[2] This judgment is only concerned with Mainzeal's receivers' (the receivers) dispute with Hobson Gardens. The receivers' dispute with the first respondent has been settled.

[3] At the conclusion of the oral hearing I ordered that the hoists not be removed, used or dealt with in any way until three working days after the delivery of this judgment, or until further order of the Court. I made that order because an undertaking given by Hobson Gardens not to use the hoists expired on the day of the oral hearing.

Context

[4] The questions posed in paragraphs [1] arise in the context of an application for directions made by the receivers who were appointed by the BNZ on 6 February 2013. The receivers' applications are made under s 34(1)(a) of the Receiverships Act 1993.

[5] The receivers' case can be distilled to the following three points:

(1) Mainzeal entered into a general security agreement and two specific security agreements with the BNZ. Those agreements gave the BNZ a security interest in the hoists under the Personal Property Securities Act 1999 (the Act).

(2) BNZ's security interest has priority over any security interest which Hobson Gardens may have in relation to the hoists.

(3) The receivers are entitled to take possession of the hoists under the terms of the general security agreement and s 14 of the Receiverships Act 1993.

[6] Hobson Gardens' case is:

(1) Under the terms of a construction contract between Hobson Gardens and Mainzeal, the hoists have been transferred to Hobson Gardens and that Hobson Gardens' interest in the hoists does not amount to a security interest for the purposes of s 17 of the Act.

(2) BNZ does not have an enduring security interest in the hoists because it expressly or impliedly authorised Mainzeal to transfer the hoists to Hobson Gardens. This aspect of Hobson Gardens' case is based upon its understanding of the meaning of s 45(1)(a) of the Act.

Alternatively,

(3) Mainzeal sold the hoists to Hobson Gardens in the ordinary course of Mainzeal's business and that, accordingly, Hobson Gardens acquired the hoists free of BNZ's security interest. This aspect of Hobson Gardens' case is based upon its understanding of s 53(1) of the Act.

Alternatively,

(4) Under s 88 of the Act the individual unit owners at Hobson Gardens have an interest in the hoists which prevails over BNZ's security interest.

Alternatively,

(5) The hoists were transferred to Hobson Gardens with the consent and/or knowledge of BNZ, therefore its security interest is subordinate to the interest Hobson Gardens has in the hoists, by reason of ss 89 and 90 of the Act.

Background

[7] Mainzeal was incorporated in 1987. It traded as a construction company until it was placed in receivership. As part of its business Mainzeal entered into construction contracts.

[8] Hobson Gardens is the body corporate for the units in an apartment complex located in Hobson Street, Auckland. The apartment complex is multi-storeyed and was found to be suffering from a number of defects that caused leaks to the building.

[9] Mainzeal executed a general security agreement in favour of BNZ on 2 February 2006. In doing so it agreed:

(1) That the general security agreement provided BNZ with a security interest in all of Mainzeal's "present and after acquired property" and "all personal property in which [Mainzeal had] rights".

(2) That Mainzeal could not "dispose of", "part with" or "deal with" any of the secured property (except for in limited circumstances) without BNZ's consent.

[10] Mainzeal also executed two specific security agreements in favour of BNZ. They were:

(1) an agreement dated 12 December 2007 in relation to at least one of the two hoists to which this proceeding relates;

(2) an agreement dated 3 November 2012 which relates to the hoists.

[11] BNZ registered three financing statements with the Registrar of Personal Property Securities under s 41 of the Act. Those financing statements were registered on:

(1) 17 January 2006 in relation to the general security agreement subsequently executed on 2 February 2006.[1]

(2) 8 November 2007 in relation to the specific security agreement subsequently executed on 12 December 2007.

(3) 3 November 2012 in relation to the specific security agreement executed that day.

[12] On 8 June 2011 Mainzeal entered into a construction contract with Hobson Gardens to carry out remedial work on the apartment complex in Hobson Street. That construction contract incorporated the terms of a standard New Zealand Institute of Architects' contract.

[13] Under cl 16.5.1 of the construction contract, Hobson Gardens could terminate the construction contract if Mainzeal went into receivership and if the receivers failed, within ten working days, to take over the contract work.

[14] Clause 16.7.1 of the construction contract provides that if Hobson Gardens ended the contract pursuant to cl 16.5.1, Hobson Gardens is:

> deemed to be in possession of the contract works. [Mainzeal's] interest in the contract works and in the materials, fittings and construction machinery on the site is transferred to [Hobson Gardens]. [Hobson Gardens] is entitled to:

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[1] Financing statements can and often are registered before a security agreement is executed, see for example *Healy Holberg Trading Partnership v Grant* [2012] NZCA 451, [2012] 3 NZLR 614.

> (a) complete the contract work; use the materials, fittings, construction machinery for that purpose; and employ any other person;
>
> (b) recover from [Mainzeal] any reasonable costs incurred in completing the contract works as certified by the architect;
>
> (c) sell by public auction or in some other way agreed to by [Mainzeal] any surplus materials or fittings, and [Hobson Gardens'] interest in the construction machinery. The net proceeds are to be deducted from Mainzeal's liability to [Hobson Gardens]. Hobson Gardens must pay any balance to [Mainzeal].

[15] Mainzeal commenced remedial construction work on the Hobson Street apartment complex. Part of that work included placing the two hoists onto the exterior of the building to enable construction materials and personnel to be hoisted to higher levels of the building.

[16] On 20 February 2013 the receivers gave notice to Hobson Gardens that they would not continue the construction work. The following day Hobson Gardens gave notice to the receivers under cl 16.5.1 of the construction contract that the construction contract was at an end. In its notice Hobson Gardens asserted that it was now lawfully in possession of the hoists.

What are the powers of the receivers?

[17] Before exploring the substantive issues raised by this proceeding, it is helpful to briefly explain the general powers of the receivers.

[18] In the present case:

(1) Clause 14.1.1 of the general security agreement authorised BNZ to:

(a) "enter upon land and any buildings ... upon which any secured property is located (using reasonable force if necessary), and;

(b) take possession of and realise the secured property ... ."

(2) Clause 15.2.1 of the general security agreement conferred upon any receivers of Mainzeal the power to take possession of all or any part of the secured property and to exercise all of BNZ's rights in regard to the secured property.

[19] Under s 14 of the Receiverships Act 1993 a receiver has the powers expressly or impliedly conferred by an instrument pursuant to which the appointment is made.[2]

[20] Thus, if the BNZ has a security interest in the hoists which has priority over any other interests then, s 14 of the Receiverships Act 1993 and the general security agreement confer upon the receivers the power to exercise all of BNZ's rights in respect of the hoists, including taking possession of and selling the hoists.

Does the BNZ have an enforceable security interest in the hoists?

[21] BNZ has a security interest in the hoists because:

(1) the hoists are "tangible personal property";[3] and

(2) the general security agreement, and the specific security agreements were transactions which secured payment or performance of an obligation namely, Mainzeal's obligation to repay the money it borrowed from BNZ.[4]

[22] BNZ's security interest in the hoists became "attached",[5] when:

(1) BNZ lent money to Mainzeal; and

(2) Mainzeal acknowledged in writing that the general and specific security agreements were given in relation to the hoists.[6]

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2 *Re Weddell New Zealand Ltd (In Receivership and In Liquidation)* [1998] 1 NZLR 30 (CA).
3 Personal Property Securities Act 1999, s 16(1)(a).
4 Section 17(1)(a).
5 Section 40(1).
6 Section 36.

[23] In order for an "attached" security interest to have priority over another attached security interest it must be "perfected". An attached security is perfected when:[7]

(1) a financing statement recording the security interest is registered with the Registrar of Personal Property Securities; or

(2) the secured party has possession of the collateral (in this case, the hoists).

[24] BNZ's security interests were registered on 17 January 2000, 8 November 2004 and 3 November 2012. Accordingly, BNZ took the steps that were necessary for it to acquire an enforceable security interest in relation to the hoists. As the receivers have the same powers and rights as the BNZ, the receivers may enforce BNZ's security interest, if that interest has priority over any other interest. It is therefore necessary to examine if any of the reasons advanced by Hobson Gardens enable it to gain priority over BNZ in relation to the hoists.

Hobson Gardens' interest in the hoists

[25] In analysing Hobson Gardens' interest in the hoists I will examine:

(1) the effect of cl 16.7.1 of the construction contract between Mainzeal and Hobson Gardens;

(2) whether, under s 45(1)(a) of the Act, BNZ expressly or impliedly authorised Mainzeal to transfer the hoists to Hobson Gardens thereby negating BNZ's security interest;

(3) if, under s 53(1) of the Act, Mainzeal sold the hoists to Hobson Gardens in the ordinary course of Mainzeal's business thereby negating BNZ's security interest;

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7 Section 41.

(4) whether Hobson Gardens' submissions concerning the effects of ss 88, 89 and 90 of the Act are correct.

[26] In following this line of analysis I note that initially Hobson Gardens also raised issues that:

(1) Section 93 of the Act negated BNZ's security interest in the hoists; and

(2) BNZ was estopped and/or barred by waiver from asserting it had a security interest in relation to the hoists that prevailed over Hobson Gardens' interest in the hoists.

During the course of his oral submissions Mr Dillon, counsel for Hobson Gardens, abandoned those aspects of Hobson Gardens' case.

The effect of cl 16.7.1 of the construction contract

[27] Clause 16.7.1 of the construction contract provides Hobson Gardens with a form of security over the hoists. Hobson Gardens' interest in the hoists was activated when:

(1) Mainzeal repudiated the contract. This occurred after Mainzeal was placed in receivership and when the receivers notified Hobson Gardens on 20 February 2013 that the receivers would not continue the construction work, and when,

(2) Hobson Gardens then cancelled the contract on 21 February 2013.

[28] When these steps occurred Mainzeal's interest in the "construction works", "materials", "fittings", and "construction machinery" was, subject to any security interest with greater priority, transferred to Hobson Gardens to enable Hobson Gardens to carry out the steps set out in sub-paras (a), (b) and (c) of cl 16.7.1 of the

construction contract (refer [14] above). The hoists form part of the "construction machinery".

[29] Mr Dillon submitted that cl 16.7.1 of the construction contract did not create any form of security interest in favour of Hobson Gardens in relation to the hoists. The rationale of this argument is that if Hobson Gardens has a security interest, the priority rules contained in s 66 of the Act apply, and Hobson Gardens wishes to avoid those priority rules being given effect in this case. I disagree with Mr Dillon's submission on this point because:

(1) Clause 16.7.1 is clearly intended to provide Hobson Gardens with a form of security over Mainzeal's interest in, amongst other items, the construction machinery (and therefore the hoists) on the Hobson Gardens site; and

(2) Mainzeal provided Hobson Gardens with its interest in the hoists to secure Mainzeal's obligations to complete the contract works and to meet any liability that Mainzeal had to Hobson Gardens through not being able to complete the contract works.

[30] These purposes, which underpin cl 16.7.1 are reinforced by the text of sub-paras (a), (b) and (c) of cl 16.7.1 of the construction contract. Under those sub-paras Hobson Gardens acquires Mainzeal's interests in the hoists to enable Hobson Gardens to, amongst other things:

(1) complete the contract works; and

(2) sell the hoists and apply the net proceeds towards meeting Mainzeal's liability to Hobson Gardens.

[31] When both the text and purpose of cl 16.7.1 of the construction contract is understood it becomes clear that the clause is "a transaction that in substance secures payment or performance of [Mainzeal's] obligation"[8] to Hobson Gardens. I

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[8] Section 17(1)(a).

therefore conclude that Hobson Gardens acquired a security interest in the hoists when cl 16.7.1 was invoked by Hobson Gardens on 21 February 2013.

Did BNZ expressly or impliedly authorise Mainzeal to transfer the hoists to Hobson Gardens?

[32] Section 45(1)(a) provides that, except where otherwise provided in the Act, where collateral is dealt with, then the security interest continues "unless the secured party expressly or impliedly authorises the dealing".

[33] The correct approach to s 45 of the Act was explained in the following way by White J in *Gibson v Stockco Ltd*:[9]

> (a) The purpose of the provision is to enact the common law principle that no one can give a better title than he or she has *(nemo dat quod non habet):* M Gedye, R C C Cumming QC & R J Wood *Personal Property Securities in New Zealand* and *Garrow and Fenton's Law of Personal Property in New Zealand* at [12.8.2].[10] When collateral is "dealt with", a security interest in it continues after the dealing. A perfected security interest persists in the collateral even though the debtor may no longer own the collateral. Subject to the other provisions of the Act, the security interest is not affected by a sale or other disposition and can be enforced against the buyer.
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> (b) As s 45(1)(a) makes clear, however, the security interest will be lost if the secured party "expressly or impliedly authorised the dealing".
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> (c) In order to "authorise" a dealing, whether expressly or impliedly, the secured party would need to be aware of the specific "dealing" or, at least, previous dealings of the same type, and either have expressly authorised the dealing or by its conduct be taken as having done so impliedly: *Royal Bank of Canada v Canadian Commercial Corp, National Livestock Credit Corp v Schultz* and *Motorworld Limited (In Liquidation) v Turners Auctions Ltd*.[11]
>
> (d) Whether in a particular case the secured party did "expressly or impliedly" authorise the dealing will be a question of fact in that case.
>
> (e) As the use of the word "authorised" in s 45(1)(a) indicates, the authorisation of the dealing needs to be given before the relevant

9 *Gibson v Stockco Ltd* [2011] NZCCLR 29 (HC) at [165] (citations added).

10 M Gedye, R C C Cumming QC and R J Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at [45.1]; Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis NZ, Wellington, 2010) vol 2 at [12.8.2].

11 *Royal Bank v Canadian Commerical Corp* [2001] NBQB 199; *National Livestock Credit Corp v Schultz* 653 P 2d 1243 (Okla App 1982); *Motorworld Limited (In Liquidation) v Turners Auctions Ltd* HC Auckland CIV-2007-404-6558, 17 February 2010.

dealing has taken place: *Lanson v Saskatchewan Valley Credit Union Ltd* at [9] and *Royal Bank v Ag-Com Trading Inc*.[12]

(f) In contrast to s 53 where the focus is on the dealings between the seller (debtor) and the purchaser, s 45 focuses on the arrangement between the security holder and the debtor: *Ford Motor Credit Co of Canada v Centre Motors of Brampton Ltd* at 525 and *Motorworld Limited (In Liquidation) v Turners Auctions Limited* at [39].[13]

[34] There were a number of strands to Mr Dillon's submission that the BNZ expressly or impliedly authorised Mainzeal to transfer the hoists to Hobson Gardens. Mr Dillon submitted that the BNZ consented to the transfer of the hoists to Hobson Gardens and that consent arose from the BNZ's "knowledge of the nature of the goods, of the location of the goods, the requirement to consent to that location, and of the knowledge of the receivers in triggering the relevant provision".

[35] It is convenient to examine Mr Dillon's submissions in relation to s 45(1)(a) of the Act under the following headings:

(1) Clause 6.2.1 of the general security agreement;

(2) Clause 9.1 of the specific security agreement; and

(3) Clauses 16.5.1 and 16.7.1 of the construction contract.

Clause 6.2.1 of the general security agreement

[36] Clause 6.2.1 of the general security agreement enabled Mainzeal to

> dispose of, or ... deal with, any inventory in the ordinary course of, and for the purpose of carrying on, [Mainzeal's] ordinary business, on ordinary arm's length commercial terms and for proper value ... ."

[37] Mr Dillon submitted that the hoists were inventory.

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12 *Lanson v Saskatchewan Valley Credit Union Ltd* (1998) 172 Sask R 106 (SKCA) at [9]; *Royal Bank v Ag-Com Trading Inc* (2001) 2 PPSAC (3d) 1 (ONCJ) at [92].

13 *Motorworld Limited (In Liquidation) v Turners Auctions Ltd,* above n 13, at [39]; *Ford Motor Credit Co of Canada v Centre Motors of Brampton Ltd* (1982) 38 OR (2d) 516 (OntHC) at 525.

[38] The general security agreement adopts the definition of "inventory" found in s 16 of the Act. "Inventory" is defined in that section to mean goods that are:

> (a) held by a person for sale or lease, or that have been leased by that person as lessor; or
>
> (b) to be provided or have been provided under a contract for services; or
>
> (c) raw materials or work in progress; or
>
> (d) materials used or consumed in a business.

[39] The Act distinguishes between "inventory" and "equipment". Equipment is defined in s 16 of the Act to mean:

> Goods that are held by a debtor other than as inventory or consumer goods.

[40] I do not accept that the hoists are inventory. Inventory is usually trading stock, although the term also clearly includes raw materials, work in progress and materials used or consumed in a business.[14] The fact that a company such as Mainzeal may ultimately decide to sell equipment that has become surplus or which needs to be replaced does not change that equipment into inventory.[15] In my judgement, in the context of this case, the hoists are equipment and accordingly cl 6.2.1 of the general security agreement does not assist Hobson Gardens.

Clause 9.1 of the 12 September 2007 specific security agreement

[41] Under cl 9.1 of the specific security agreement dated 12 September 2007 the hoists are to be kept at Mainzeal's depot at 7 Bolderwood Place, Wiri. Under that clause Mainzeal was to notify the BNZ of any change of location of the hoists. From this Mr Dillon submits that the BNZ must have at least implicitly consented to the hoists being placed on the Hobson Gardens' site and implicitly consented to the purpose for which the hoists were placed on that site. Mr Dillon then took the further step of submitting that the BNZ must implicitly have consented to the hoists

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[14] Personal Properties Securities Act 1999, s 16.

[15] Roger Fenton *Garrow and Fenton's Law of Personal Property in New Zealand*, above n 10, at [5.2.1]. Section 16(3) of the Act states that the determination of whether goods are consumer goods, equipment, or inventory is to be made at the time when the security interest in the goods attached. The categorisation will depend on the purpose for which the goods are held or acquired for use at the time of attachment.

being transferred to Hobson Gardens in the event of the construction contract being cancelled by Mainzeal repudiating its obligations under the contract.

[42] The submissions based upon Mainzeal's need to notify BNZ of the location of the hoists does not address the fact that the specific security agreement of 3 November 2012 refers to the hoists being located at "7 Bolderwood Place, Wiri unless project based". The words "unless project based" clearly demonstrate that the BNZ expected the hoists to be used on construction sites by Mainzeal and that they would only be at Mainzeal's Wiri depot when not in use. The words "unless project based" constituted a general consent by the BNZ for the hoists to be used on any site that Mainzeal deemed appropriate. The BNZ did not expect to be notified each time the hoists were then moved to a new site.

[43] I find myself unable to take the many steps which Mr Dillon encourages me to take to conclude that the BNZ expressly or impliedly consented to the transfer of the hoists to Hobson Gardens because of cl 9.1 of the specific security agreement dated 12 September 2007. I therefore find that clause does not assist Hobson Gardens.

BNZ's knowledge of cls 16.5.1 and 16.7.1 of the construction contract

[44] Mr Dillon also submitted that the BNZ expressly or impliedly agreed to the transfer of the hoists to Hobson Gardens because, when the receivers decided not to continue the contract works they must have known that Hobson Gardens could invoke cl 16.5.1 of the construction contract, thereby causing cl 16.7.1 of the construction contract to also possibly become engaged. Through this reasoning Mr Dillon submitted that the BNZ must have expressly or impliedly consented to the transfer of the hoists to Hobson Gardens under cl 16.7.1 of the construction contract. Part of Mr Dillon's submission on this point is that the BNZ was in the business of lending money to construction companies and that it must have known that construction contracts often contain terms such as those found in cls 16.5.1 and 16.7.1 of the construction contract.

[45] There is, however, no evidence before me which would enable me to conclude that the BNZ had any knowledge of cls 16.5.1 and 16.7.1 of the construction contract. It would seem highly improbable that the BNZ would consent to the transfer of the hoists which were, after all, part of the collateral which secured the money which BNZ had lent to Mainzeal. It would be surprising and contrary to sound commercial practice if the BNZ consented to the transfer of the hoists to Hobson Gardens in the circumstances of this case, thereby depriving itself of its security interests in the hoists for no apparent purpose.

[46] For these reasons, I do not accept Mr Dillon's arguments that the BNZ expressly or impliedly authorised Mainzeal to transfer the hoists to Hobson Gardens.

Did Mainzeal sell the hoists to Hobson Gardens in the ordinary course of Mainzeal's business?

[47] Mr Dillon submitted that Mainzeal sold the hoists to Hobson Gardens in the ordinary course of its business. This submission aimed to establish that Hobson Gardens acquired the hoists free of BNZ's security interest in the hoists. In advancing this argument Mr Dillon was focused upon s 53(1) of the Act which provides:

> **53 Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests**
>
> (1) A buyer of goods sold in the ordinary course of business of the seller, ... takes the goods free of a security interest that is given by the seller ..., unless the buyer or lessee knows that the sale or the lease constitutes a breach of the security agreement under which the security interest was created.
>
> ...

[48] The purpose of s 53 of the Act was explained in the following way by Lindon J in *Fairline Boats Ltd v Leger*, when referring to the Ontario equivalent of s 53 of the New Zealand Act:[16]

> The objective of this section, as I understand it, is to permit commerce to proceed expeditiously without the need for purchasers of goods to check with the titles of sellers in the ordinary course of their business. Purchasers

[16] *Fairline Boats Ltd v Leger* [1981] 1 PPSAC 218 (ONCJ) at [8].

> are allowed by our law to rely on sellers using the proceeds of sales to repay any liens on the property sold. In these days inventory is almost invariably financed, and as a result is almost invariably subject to liens of one kind or another. To require searches and other measures to protect lenders in every transaction would stultify commercial dealings, and so the legislature exempts buyers in the ordinary course of business from these onerous provisions, even where they know that a lien is in existence.

[49] This statement was endorsed by the New Zealand Court of Appeal in *Tubbs v Ruby* [17] and *Stockco Ltd v Gibson*.[18]

[50] It is also helpful to repeat the observations of the Court of Appeal in *Stockco Ltd* when it said:[19]

> In most situations in which s 53 applies, the arrangement involves a sale by a trader of inventory in a manner that is contemplated and permitted by the security agreement between the trader and its financier. In those circumstances the proceeds of the sale, whether cash, an account receivable, a trade-in or a financing agreement (chattel paper) (or a combination of these) become subject to the security interest of the trader's financier, and may then be used to purchase further inventory. This just reflects the circulating nature of the assets of trading enterprises and the nature of trade financing. In such cases the expectations of the trader, the trader's financier and the trader's customer are aligned. There will be no difficulty in applying s 53.

[51] I am satisfied s 53 does not apply to the circumstances of this case. There are two reasons why I have reached this conclusion:

(1) The hoists were not sold by Mainzeal to Hobson Gardens.

(2) Even if they were sold, they were not sold in the "ordinary course of business" of Mainzeal.

The hoists were not sold

[52] Any interest which Hobson Gardens acquired in the hoists arose through the operation of cl 16.7.1 of the construction contract. That clause provides for the transfer of Mainzeal's interest in the hoists to Hobson Gardens.

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17 *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353, (2010) 12 TCLR 746 at [38].
18 *Stockco Ltd v Gibson* [2012] NZCA 330, (2012) 11 NZCLC 98-010 at [45].
19 At [46].

[53] Although a legitimate sale or lease involves the transfer of the vendor's interest in the item to the purchaser, a transfer of interest can be achieved through a number of means that do not involve a sale or lease of the property in question. For example, an interest in an item can be transferred by gift, or by way of a default arrangement whereby a third party becomes entitled to acquire the owner's interest in an item if the owner defaults in performing an obligation they owe the third party.[20]

[54] In my assessment, the arrangements set out in cl 16.7.1 of the construction contract are an example of an interest being able to be transferred by way of a default arrangement. Mainzeal's interest in the hoists could only be transferred to Hobson Gardens if Mainzeal defaulted on its obligations under the construction contract and if Mainzeal cancelled the contract in accordance with cl 16.5.1 of the construction contract. This was not a case in which Mainzeal and Hobson Gardens agreed to sell and buy the hoists for valuable consideration.

The hoists were not sold in the ordinary course of Mainzeal's business

[55] Furthermore, if the hoists were sold, that sale did not occur in the ordinary course of Mainzeal's business.

[56] In *Stockco Ltd v Gibson* the Court of Appeal adopted a two-step analysis for determining whether stock was sold in the ordinary course of a company's business.[21] The approach adopted by the Court of Appeal when adapted to the present case involves answering the following two questions:

(1) What was the ordinary course of business of Mainzeal?

(2) Was the sale of the hoists in the ordinary course of the business of Mainzeal?

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[20] See Thomas Gault (ed) *Gault on Commercial Law: Introduction to the Sale of Goods* (online looseleaf ed, Brookers) at [3A.2.01] for a discussion of transactions that have some of the characteristics of a sale but do not amount to a sale at law.

[21] The Court of Appeal's two-step analysis involved a slight modification of an analysis formulated by Rodney Hansen J in *ORIX New Zealand Ltd v Milne* [2007] 3 NZLR 637 (HC).

[57] In answering the first question it is important to bear in mind the following passage from O'Regan P:[22]

> The "ordinary course" provides important context to the analysis of "business". The word "course" suggests flow or continual operation and ordinary is self-explanatory. The inquiry is therefore directed to what business was being carried on by [Mainzeal] "in the ordinary course".

[58] The only evidence before me concerning Mainzeal's business is contained in an agreed statement of facts from the parties which records that Mainzeal was a construction company and that its business included entering into construction contracts.

[59] I am confident that on occasions Mainzeal would have sold equipment, such as hoists, which became superfluous to its requirements or which needed to be replaced. However, such a sale would not have been part of the ordinary flow or continual operation of Mainzeal's business.

[60] For these reasons, s 53 does not assist Hobson Gardens.

Hobson Gardens' claims under ss 88, 89 and 90 of the Act

[61] The last two limbs of Hobson Gardens' submissions concern its interpretation of ss 88, 89 and 90 of the Act. I can deal with this aspect of Hobson Gardens' case succinctly.

Section 88

[62] Mr Dillon submitted that the construction contract was an agreement to sell the hoists when it was entered into on 8 June 2011. He said that the agreement was conditional upon Mainzeal's default and that the transferee, for the purposes of this part of his argument, were the unit owners of Hobson Gardens who have a beneficial interest in the common property of Hobson Gardens.

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22 *Stockco Ltd v Gibson* [2012] NZCA 330, (2012) 11 NZCLC 98-010 at [51].

[63] I do not accept this submission because:

(1) The hoists were not sold, conditionally or unconditionally, to Hobson Gardens at any time by Mainzeal.

(2) The hoists are not part of the common property of the Body Corporate. Common property is defined in s 5 of the Unit Titles Act 2010 to mean "all the land and associated fixtures that are part of the unit title development ... ." The hoists are not a fixture. They are a piece of equipment that is temporarily attached to the exterior of a building and are intended to be removed once the construction work is completed.[23]

Sections 89 and 90

[64] Mr Dillon also submitted that Hobson Gardens acquired a security interest in the hoists that has priority over BNZ's security interest through the effects of ss 89 and 90 of the Act.

[65] Section 89 applies where the secured party consents to the transfer of collateral. Section 90 applies where the secured party has knowledge of the information required to register a new financing statement after the transfer of collateral, or the new name of the debtor if it has changed its name. The secured party must file a financing change statement within 15 days identifying the new debtor or risk losing the priority of its security interest. The rationale for these provisions is that a third party's ability to search for and find potentially competing security interests would be affected by change in ownership of the collateral, because a search is generally conducted using the name of the person in possession of the collateral.[24] A change of debtor name will create the same concerns. Unless the register is updated, a search result based on the name of the person currently in possession of the collateral will not disclose the secured party's interest, registered

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[23] See *Elitestone Ltd v Morris* [1997] 2 All ER 513 (HL) at 518, where it was said the test as to what is a fixture is determined by considering the degree of annexation of the item to land and the purpose of the annexation. See also *Auckland City Council v Ports of Auckland Ltd* [2000] 3 NZLR 614 (CA) at [72]-[76].

[24] Gedye, Cumming and Wood, above n 12, at 329. See also Gault, above n 20, at [8A.4.07(3)].

under the originating debtor's name. However, loss of priority under these sections is limited to parties that have consented to the transfer or have the requisite knowledge in s 90(1).[25]

[66] In this case Mr Dillon submitted that BNZ consented to the transfer of the hoists by Mainzeal to Hobson Gardens or that it had knowledge of the terms of the transfer, and that if its security interest was to have continued to have priority it should have registered a financing change statement.

[67] I do not accept that ss 89 and 90 apply in the circumstances of this case. My reasons for reaching this conclusion are:

> (1) The BNZ did not consent to the transfer of the hoists to Hobson Gardens.[26]
>
> (2) There is no evidence the BNZ had knowledge of the information required to register a financing change statement amending the register to disclose Hobson Gardens as the new debtor. BNZ cannot reasonably have anticipated that its security interest in the hoist would be affected following the cancellation of the contract, as it did not know of the cancellation or impending purported transfer to Hobson Gardens,[27] and therefore cannot reasonably be expected to have updated the Register.

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[25] At 329. "Knowledge" is defined in s 19 of the Act. Relevantly, the definition provides:
(b) an organisation knows or has knowledge of a fact in relation to a particular transaction when–
 (i) the person within the organisation with responsibility for matters to which the transaction relates has actual knowledge of the fact; or
 (ii) the organisation receives a notice stating the fact; or
 (iii) the fact is communicated to the organisation in such a way that it would have been brought to the attention of the person with responsibility for matters to which the transaction relates if the organisation had exercised reasonable care.
The extent of the information that must be within the secured party's knowledge is unclear from s 91. The creditor must know more than the fact that the collateral has been transferred, it must know the identity of the transferee with sufficient precision to satisfy the information requirements prescribed by the Personal Property Security Regulations for debtor identification in the Register.

[26] The general security agreement prevented Mainzeal disposing of, parting with or dealing with any of the secured property without BNZ's consent: see [9] above.

[27] The statement from the transferor to the secured party notifying it of a transfer must be a clear and unequivocal statement of that fact: see *Stockco v Gibson* [2012] NZCA 330, (2012) 10 NZBLC 99-709 at [9].

[68] In summary, I have concluded that Hobson Gardens' submissions based on ss 45, 53, 88, 89 and 90 of the Act fail. However, Hobson Gardens does have an in substance security interest in the hoists. It is therefore necessary to determine which party's security interest has priority.

Which party's security interest has priority?

[69] Where there are two competing security interests, the priority rules state:[28]

(1) Where both security interests are perfected, the first to register or the first to take possession has priority;

(2) Where one security interest is perfected and the other security interest is not perfected, the perfected security interest prevails;

(3) Where both security interests are unperfected, the first to attach gains priority.

[70] In the present case, it is arguable that Hobson Gardens perfected its security interest by acquiring physical possession of the hoists on 21 February 2013. However, I also think it more likely that Hobson Gardens did not in fact perfect its security interest because if it did acquire physical possession of the hoists, it did so by seizing them.

[71] Possession is recognised as a form of perfection because it gives publicity to the existence of that party's security interest.[29] In determining what is meant by "perfection by possession", regard must be had to that underlying policy rationale. In this case, Hobson Gardens were not in possession of the hoists prior to Mainzeal's default. Mainzeal had apparent control of the hoists up until that point, even though they were on Hobson Gardens' building. Hobson Gardens then secured apparent control or possession upon Mainzeal's default. That amounts to seizure.

[28] Personal Property Securities Act 1999, s 66.
[29] Personal Property Securities Bill 1999 (251-2) (select committee report) at iii. Gault, above n 20, at [pps 18.02].

Section 41(1)(b)(ii) of the Act excludes seizures or repossessions from actions which constitute acquiring possession of collateral.[30].

[72] In any event, even if Hobson Gardens did perfect its in substance security interest by taking physical possession of the hoists on 21 February 2013, that date is well after the dates BNZ perfected its security interest in the hoists when it registered its financing statements on 17 January 2006, 8 November 2007 and 3 November 2012.

Conclusion

[73] The BNZ's security interest in the hoists has priority over any security interest which Hobson Gardens may have in the hoists.

[74] The receivers are entitled to take possession of the hoists and exercise all of BNZ's rights in respect of the hoists.

[75] If the parties are unable to reach agreement on costs then they should file memoranda within ten working days of the date of this judgment.

D B Collins J

Solicitors:
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[30] See also the definition of "perfection by possession" in s 16 which excludes possession through seizure or repossession.