IN THE COURT OF APPEAL OF NEW ZEALAND

CA58/2011
[2012] NZCA 330

BETWEEN	STOCKCO LIMITED Appellant
AND	BRENDON JAMES GIBSON AND MICHAEL PETER STIASSNY First Respondents
AND	NUGEN FARMS LIMITED Second Respondent

Hearing: 29-31 May 2012

Court: O'Regan P, Randerson and Asher JJ

Counsel: F M R Cooke QC and M H L Morrison for Appellant
R B Stewart QC, S C D A Gollin, A E Simkiss and N R Frith for First Respondents
No appearance for Second Respondent

Judgment: 26 July 2012 at 12.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is allowed.

C Costs are reserved. Counsel may file memoranda if agreement cannot be reached.

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] This appeal and cross-appeal raise a number of issues about the application of the Personal Property Securities Act 1999 (PPSA) to arrangements involving the financing of livestock.

[2] There are two different priority disputes, one relating to 4,000 rising one year heifers (R1 heifers) and the other relating to 750 cows. The competing security interest holders are a consortium of financial institutions comprising Westpac New Zealand Limited, Rabobank Limited, PGG Wrightson Limited and PGG Wrightson Finance Limited on the one hand, and the appellant, StockCo Limited, on the other. The first respondents are receivers appointed by the consortium (we will, as did the trial Judge, refer to this consortium collectively as "the Banks" and we will call the first respondents "the Receivers").

[3] Both the Banks and StockCo had provided financing in various ways to four dairy farming companies owned by interests associated with Allan Crafar, namely Plateau Farms Limited (Plateau), Hillside Limited, Taharua Limited and Ferry View Farms Limited. We will call these four companies "the Security Group". The Banks held a security interest over the personal property of the Security Group, including livestock.

[4] StockCo is a livestock trading and finance company. In 2008, it entered into a number of sale and leaseback transactions involving the Security Group and another company, Nugen Farms Limited (Nugen). Nugen is owned by interests associated with Allan Crafar's son, Robert Crafar, and is not part of the Security Group.

[5] The dispute in relation to the 4,000 R1 heifers arises from a transaction between Plateau and StockCo, under which Plateau sold the 4,000 heifers to StockCo, and StockCo thereupon leased those heifers to Nugen. The dispute in relation to the 750 cows involved a transaction under which Nugen sold the 750 cows to StockCo, and leased those cows back from StockCo.

[6] In the judgment under appeal, White J dealt with an application by the Receivers for directions and, in relation to the matters in issue in the appeal, made orders that were broadly in the form sought by the Receivers.[1]

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[1] *Gibson v StockCo Ltd* [2011] NZCCLR 29 (HC) [High Court Judgment]. The orders sought by the Receivers in their application for directions are reproduced at [124] of the High Court Judgment.

Issues

[7] There are four substantive issues that arise on the appeal and cross-appeal.

Ordinary course of business: s 53

[8] The first issue relates to the sale of the 4,000 R1 heifers by Plateau to StockCo. The 4,000 heifers were subject to the Banks' security interest. StockCo argues that the sale of the 4,000 heifers to it was a sale made in the ordinary course of Plateau's (or the Security Group's) business, and it therefore took the 4,000 heifers free of the Banks' security interest under s 53 of the PPSA. The trial Judge, White J, found against StockCo on this issue. It appeals against that decision.

[9] So the first issue is, was the sale of the 4,000 heifers by Plateau to Nugen in the ordinary course of Plateau's business?

Subordination: s 88

[10] The second issue also relates to the 4,000 R1 heifers, and arises only if we find that the sale of those heifers to StockCo was in the ordinary course of Plateau's business, in which case StockCo's security interest would prevail over that of the Banks. The 4,000 heifers that were the subject of the StockCo transaction remained on farms owned by the Security Group notwithstanding the sale of the heifers to StockCo and the immediate leasing of those heifers by StockCo to Nugen. So the Security Group companies were bailees of those heifers.

[11] Some months after the Plateau/StockCo/Nugen sale and lease transaction, Nugen and Plateau entered into a bailment agreement. Plateau's lawyers sent a letter to StockCo enclosing this agreement. The terms of the letter and agreement were oblique. The Receivers argue that s 88 of the PPSA was engaged because Nugen as debtor had transferred an interest in the heifers to the Security Group. Under s 88, a secured party has 15 days from the date on which it first had knowledge of a transfer to register a financing change statement showing the transferee as the new debtor. As StockCo did not register a financing change statement until six months after

receiving the letter, the Receivers say StockCo's security interest became subordinated to that of the Banks in relation to advances made by the Banks after the 15 day period had elapsed.

[12] So the second issue is, was StockCo's security interest in the 4,000 heifers subordinated to that of the Banks under s 88?

[13] We need to address two questions to decide that issue. The first is whether the entry into the bailment agreement by Nugen was a transfer of an interest in StockCo's collateral (the 4,000 heifers) for the purpose of s 88(1). The second is whether the letter sent to StockCo meant that StockCo had knowledge of the information required to register a financing change statement. If it did, then the 15 day period commenced at the time StockCo received the letter and, therefore, acquired the requisite knowledge.

Ascertainment

[14] The third issue relates to the 750 cows that were the subject of a sale and leaseback transaction between Nugen and StockCo. Those cows had previously belonged to members of the Security Group and were subject to the security interest given by the Security Group in favour of the Banks. StockCo says that the cows were transferred from the Security Group to Nugen prior to the Nugen/StockCo transaction being entered into. However, there was no documentation relating to the transfer and the cows remained on farms owned by the Security Group.

[15] In the High Court, the argument focused on whether there was ascertainment of the cows subject to the transaction for the purposes of the Sale of Goods Act 1908. However, in this Court it was acknowledged that the only evidence about the transfer of the cows from the Security Group to Nugen was to the effect that they had been gifted, so the focus of the argument in this Court was on the requirements for an effective gift. The Receivers argued that, in the absence of a deed of gift, a gift is ineffective unless the property subject to the gift is actually delivered to the donee. They say this did not happen, and therefore Nugen did not get any property right in

the cows. Thus the cows remained in the ownership of the Security Group and subject to the Banks' security interest.

[16] StockCo disputes this. It also says that, even if the gift was not effective because the cows were not delivered to Nugen, Nugen still had the right to call for delivery of the cows, and this was a sufficient interest in the cows for PPSA purposes.

[17] So the third issue is: did Nugen have any property rights in the 750 cows at the time it entered into the sale and leaseback arrangement with StockCo? A consequential issue is: if not, does that matter?

Adequacy of description: s 36

[18] The fourth issue also concerns the 750 cows. It arises only if StockCo's argument in relation to the third issue succeeds.

[19] In the transaction documents relating to the StockCo/Nugen sale and leaseback arrangement, the 750 cows were described as "750 M/A cows" (M/A being a commonly used abbreviation of "mixed age"). In the High Court, White J found that this was an adequate description for the purposes of s 36(1)(b)(i) of the PPSA. The Receivers challenged this finding in their cross-appeal.

[20] So the fourth issue is, was the description of the 750 cows in the security agreement between StockCo and Nugen adequate for the security agreement to be enforceable against a third party?

Ordinary course of business: s 53

[21] We begin by setting out a brief factual history to provide a context for the discussion that follows. There is a thorough and comprehensive narrative of the factual background, with references to the relevant evidence, in the judgment under appeal. We have not replicated this, but have confined our summary to matters

relevant to the issue now before us. Reference should be made to the High Court judgment if further detail is required.

Facts

[22] The Crafar Group was placed into receivership on 5 October 2009. At that time the Security Group was in debt to the Banks by $194 million. Prior to receivership, the Crafar Group had been a successful dairy farm operator. It had undertaken conversions of dry stock land into dairy farms with a view to profiting from the increasing prices of dairy farm land. At the time of receivership, the Crafar Group was one of the largest rural enterprises in New Zealand, with approximately 20,000 head of livestock.

[23] The Banks provided the funds for the Crafar Group's growth, and held a General Security Deed under which all members of the Security Group had granted a security interest in all their personal property, including their livestock, and a charge over all their non-personal property. Those obligations were guaranteed by Crafar family members and trusts.

[24] In 2008, the Crafar Group saw an opportunity to buy more land that was being or could be used for dairying. Allan Crafar gave evidence in the High Court that he saw that the future in growth was owning dairy land, which he saw as undervalued. As part of this strategy, the Group was considering whether to sell livestock (which was then attracting very high prices) and to use the funds to purchase land. The decision to sell livestock was said also to have been influenced by a drought in the Waikato region, and animal welfare issues that the Crafar Group was facing at the time.

[25] StockCo became aware of the Crafar Group's plans, and on 31 January 2008 StockCo wrote to the Crafars with a proposal for the sale and leaseback of 8,000 cows owned by the Crafar Group. The purpose of this proposed transaction was to re-allocate $16 million of capital out of livestock and into further land acquisitions. To give StockCo the security it required for this transaction, the agreement of the Banks had to be obtained to the release of their securities over the 8,000 cows

subject to the proposal. It was envisaged that the Banks' position would be protected by giving them security over the farm properties purchased with the proceeds of the livestock sales. The proposal initially gained positive internal reaction from some of the Banks, but the Crafars ultimately decided not to proceed with the proposal due to concerns from the Banks.

[26] In expectation of the funds from the proposed sale and leaseback of 8,000 cows, the Crafars had entered into agreements to purchase a number of farms.[2] A Westpac internal memorandum of 20 May 2008 recorded that the Banks would finance the purchases and that the Crafar Group would liquidate some Fonterra shares and cows in the next two months in order to fund the purchase of those farms.

[27] On 28 May 2008, there was a meeting between the Banks and the Security Group. Records of the meeting show that the Banks were happy with the Crafar growth aspirations, but that they were reaching the limits of their loan facilities, with only about another $10 million available. The overall message from the Banks at the meeting was that it was a time for consolidation.

[28] After the 28 May 2008 meeting, further farm purchase transactions entered into by the Crafar Group were done in the name of Nugen, which, as indicated earlier, was owned by interests associated with Robert Crafar and was not a member of the Security Group. The High Court Judge listed seven farm purchase transactions entered into by Nugen in June–July 2008, in addition to the five purchases by the Security Group that had been financed by the Banks.[3]

[29] Three of these proposed farm purchases are particularly relevant to the disputed transactions in this case. The total purchase price for these three farms alone was $17.5 million, which gives an indication of the scale of the buying spree by the Crafar Group. The three proposed purchases were:

(a) The proposed purchase by Nugen of two farms near Norsewood (we will call these Norsewood (No 1) and Norsewood (No 2)

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2 See the High Court Judgment at [43], which lists four farm purchases in June and July 2008 financed by the Banks. Another had been purchased earlier, in March 2008.

3 High Court Judgment at [44].

respectively). The purchase price of Norsewood (No 2) was $7.5 million and a deposit of $375,000.00 was payable upon the agreement becoming unconditional, with settlement on 1 August 2008. The purchase price of Norsewood (No 1) was $2.5 million and a deposit of $125,000.00 was payable, with settlement on 20 May 2009.

(b) The proposed purchase by Nugen of a farm in the Far North (we will call this the Northland farm). The purchaser was originally Plateau (with Nugen being nominee). The agreement for sale and purchase was dated 20 June 2008. The purchase price was $7.5 million with a deposit of $750,000.00 payable on 20 June 2008 and settlement on 28 November 2008.

[30] On 20 June 2008, the Crafar Group's solicitors, Blackman Spargo, made arrangements for StockCo to fund the $750,000.00 deposit on the Northland farm that was payable on that day. The evidence was that Allan Crafar arranged for 750 cows to be "gifted" by the Security Group to Nugen on 20 June 2008. The same day, StockCo entered into a sale and leaseback transaction with Nugen relating to those same 750 cows. The purchase price was $1,000.00 a head plus GST, yielding to Nugen $843,750.00 (including GST). These funds were used to meet Nugen's obligation to pay the deposit on the Northland farm. A solicitor's certificate provided to StockCo by Blackman Spargo on 23 June 2008 recorded that no security interest was registered over those 750 cows.

[31] On 27 June 2008, StockCo agreed with Nugen to bring a further 520 cows within the 20 June lease at $1,000.00 a head. These were cows that were to be purchased in conjunction with the Norsewood (No 2) farm so they were not yet owned by Nugen. The proceeds from the "sale" of these further 520 cows ($500,000.00) was used to pay the deposit on the two Norsewood farms.

[32] On 30 June 2008, StockCo perfected its security interest in all livestock leased to Nugen, including livestock subject to later sale and leaseback transactions, by registration of a financing statement recording Nugen as debtor.

[33] In the June to July 2008 period, the Security Group also entered into a number of sharemilking proposals with StockCo's assistance, which involved the sale of the cows by the Security Group to StockCo and the leasing of those cows to sharemilkers. Mr Cooke QC for StockCo relied on these transactions as indicators of the nature of the Security Group's business and we will deal with them in more detail later.

[34] In mid-July 2008, the Banks made Allan Crafar aware that the proceeds from the sharemilking agreements and any further sales of livestock would need to be used to reduce the Security Group's indebtedness to the Banks. Therefore, Allan Crafar would need to get the funds to settle the purchase of Norsewood (No 2) on 1 August 2008 from elsewhere. On 16 July 2008 Allan Crafar stated to Mr Blackman, a principal of Blackman Spargo, words to the effect that he "will get the money from StockCo not the banks because they are useless".

[35] On 17 July 2008, Mr Kight of StockCo wrote to Blackman Spargo, outlining an understanding that Plateau wanted to enter into a sale and leaseback proposal with StockCo involving the 4,000 R1 heifers, to which we have referred earlier. The letter enclosed a proposed letter to Westpac, seeking the Banks' release of security over the 4,000 heifers. StockCo needed a release because a sale and lease of stock back to the vendor from which they are purchased does not create a purchase money security interest (PMSI) under the PPSA. Therefore, the Banks' release was required for StockCo to get first ranking security over the 4,000 heifers.

[36] On 21 July 2008, the Banks met with the Crafars and again told the Crafars that there would be no further loans for farm acquisitions. That same day the directors of Plateau resolved to sell 4,000 heifers to StockCo for $800.00 plus GST per heifer, and to enter into an agreement to lease them back for a term of five years. It was essential that the sale and leaseback of the 4,000 heifers be completed by or on 1 August 2008, because the proceeds were needed on that day for partial settlement of Norsewood (No 2). In total Nugen needed to find $7,538,998.69 on 1 August 2008 for partial settlement of Norsewood (No 2) for $4,726,498.69 and payment of GST of $2,812,500.00 for the purchase of Norsewood (No 1).

[37] Allan Crafar and Blackman Spargo knew that they needed a way to facilitate the sale and leaseback of the 4,000 heifers without the consent of the Banks, as the Banks would not consent unless the proceeds were used to pay down debt. The pressure to secure these funds led to a restructuring of the sale and leaseback on 1 August 2008. On that day, Allan Crafar suggested to Mr Blackman that the 4,000 heifers were the trading stock of the Security Group and that the sale was in the ordinary course of business of Plateau. Therefore, he believed that the transaction could go ahead without the consent of the Banks without breaching the security agreement with the Banks. It was also decided that the lease by StockCo of the 4,000 heifers would now be to Nugen, rather than Plateau. This meant that StockCo would get a PMSI over the 4,000 heifers because they would be leased to a party other than the party that had sold them to StockCo (Plateau). We record that Mr Blackman denied that the reason that Nugen was brought into the transaction was to achieve an outcome whereby StockCo would have a first ranking security interest in the 4,000 heifers without the Banks' knowledge or consent.

[38] Mr Blackman informed Mr Kight of StockCo of these new arrangements in two emails sent at 3.35 pm and 3.36 pm on 1 August 2008, and advised StockCo that a release from the Banks was no longer "necessary or desirable". Following this restructuring, the transaction proceeded later that day without notification to, or the consent of, the Banks.[4]

[39] Plateau received $3.6 million (including GST) from the sale of the 4,000 heifers. This was transferred by StockCo into the trust account at Blackman Spargo and credited to Plateau. The funds were then credited by a journal entry to Nugen. The proceeds were then combined in Blackman Spargo's trust account with $1,126,498.69 that was advanced to Plateau by its sister company Taharua Limited by way of an undocumented and unsecured loan and direct credited into the account of the solicitors for the vendor of Norsewood (No 2) in partial settlement of the purchase. At no time did the funds pass into or through the Crafar accounts with the lending Banks. The 4,000 heifers remained on farms owned and operated by members of the Security Group and were never moved to Nugen's farms.

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[4] See the High Court Judgment at [77]–[92] where these events are described in detail.

Relevant law

[40] Section 53(1) of the PPSA provides:

> (1) A buyer of goods sold in the ordinary course of business of the seller, and a lessee of goods leased in the ordinary course of business of the lessor, takes the goods free of a security interest that is given by the seller or lessor or that arises under section 45, 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.

[41] In the present case there is no suggestion that StockCo knew that the sale of the 4,000 heifers by Plateau to StockCo constituted a breach of the Banks' security agreement. So the only issue before the High Court, and now before us, is whether the sale was in the ordinary course of business of Plateau.

[42] A number of Canadian and New Zealand authorities were cited to us about the meaning of "ordinary course of business of the seller" in s 53 of the PPSA and in its Canadian equivalents (in some of those cases, the words "of the seller" are omitted in the relevant provision, and that creates a potentially significant difference between the provisions incorporating that phrase and those omitting it). However, we agree with White J that what is required is an objective factual assessment based on all the circumstances of the particular case.[5]

[43] Mr Stewart QC for the Receivers suggested that the analysis would be assisted by looking at other formulations of the statutory wording, such as "commonplace trade",[6] "straight forward deal in the mainstream" of the seller's business[7] and "part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation".[8]

[44] While the last of these seems to us to capture well the flavour of the analysis required by s 53, we doubt that much is to be gained by using synonyms of the

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5 High Court Judgment at [144]. See also *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353, [2011] NZCCLR 3 at [22].

6 *ORIX New Zealand Ltd v Milne* [2007] 3 NZLR 637 (HC) at [75].

7 *ORIX New Zealand Ltd* at [71].

8 *369413 Alberta Ltd v Pocklington* [2001] 4 WWR 423 (ABCA) at [21], citing *Aubrett Holdings Ltd v R* [1998] GSTC 17 (TCC).

statutory language. In the end the statutory words are everyday terms having common meaning and are reasonably clear in their own right. The hard part is applying them to the facts of the case. We do not think that the exercise is greatly assisted by applying the facts to similar but not identical wording.

[45] We also remind ourselves of the need to interpret the provision in light of its purpose.[9] In *Tubbs v Ruby 2005 Ltd*, this Court endorsed the following comments of Linden J in *Fairline Boats Ltd v Leger*:[10]

> The objective of [the equivalent to s 53], as I understand it, is to permit commerce to proceed expeditiously without the need for purchasers of goods to check into the titles of sellers in the ordinary course of their business. Purchasers 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.

[46] 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.

[47] However, there will be cases where the goods that are sold are not inventory and/or where the sale breaches the terms of the security agreement between the seller and the seller's financier. The fact that the sale is in breach of the security agreement does not affect the s 53 analysis. In essence, s 53 imposes on financiers the risk that the debtor will, in contravention of the security agreement, sell the goods in a manner which is found to be within the ordinary course of business of the seller, and

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9 Interpretation Act 1999, s 5(1).

10 *Fairline Boats Ltd v Leger* [1980] 1 PPSAC 218 (Ont HC) at 220–221.

in those circumstances the interest of the buyer will be preferred to that of the seller's financier. This is so even if the buyer was aware that there was a security agreement in place and takes no steps to inform itself as to whether the sale breaches that agreement.[11] Section 53 absolves the buyer of the need to make such inquiries. However, if the buyer actually knows that the sale is in breach of the security agreement, then the seller's financier's interest is preferred. There is no suggestion that StockCo knew that Plateau was acting in breach of the Banks' security agreement in the present case, though it was accepted by all parties that it had, in fact, done so.

[48] While the purpose of s 53 is to provide protection for buyers in the ordinary course of business of the seller, the necessary corollary is that a secured party is protected against a purported sale of goods subject to a security interest in circumstances other than in the ordinary course of the seller's business. As noted by the Alberta Court of Appeal in *369413 Alberta Ltd v Pocklington*, secured parties rely heavily on the protection against sales other than in the ordinary course of business when a debtor teeters on the brink of insolvency and the temptation to divest assets to raise cash looms large.[12] As the Court noted, too broad an interpretation of "ordinary course of the business of the seller" would mean that, just when the secured party's reliance on the covenant preventing sales outside the ordinary course of business is strongest, the restriction on the debtor's ability to dispose of its assets would disappear.

[49] What all of this tells us is that s 53 must be interpreted in a way which meets the commercial objective of facilitating commerce without undermining the equally important commercial objective of ensuring that those who provide credit on the security of the debtor's goods are not unfairly deprived of the benefit of that security.

[50] In dealing with s 53 in *ORIX New Zealand Ltd v Milne*, Rodney Hansen J suggested that a two step process would be warranted: the first to determine the business of the seller, and the second to determine whether the sale was made in the

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11 Michael Gedye, Ronald CC Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Thomson Brookers Wellington, 2002) at [53.4].

12 *369413 Alberta Ltd v Pocklington* at [29].

ordinary course of that business.[13] Counsel agreed that this provides a useful framework for analysis. But they differed considerably on the first component.

[51] We agree that this two stage process is appropriate. In assessing the first question, however, it needs to be remembered that the purpose of determining the nature of the seller's business is to provide a basis for determining whether a transaction was in the ordinary course of business. 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 Plateau "in the ordinary course". We would therefore modify the first step identified in *ORIX New Zealand Ltd v Milne* to a step identifying the ordinary course of the business of the seller.

What was the ordinary course of business of Plateau?

[52] Section 53 is clearly focused on the business of the seller. But in argument before us Mr Cooke sought to broaden this to encompass the business of the Security Group as a whole. He argued that the farms owned by members of the Security Group were run by Mr Allan Crafar essentially as a single business, and that it would be artificial to assess the business of Plateau without considering the way in which that business was integrated into the collective business of the Security Group. Mr Stewart accepted that there was a degree of artificiality about defining Plateau's business in isolation from the rest of the Security Group, given the integrated nature of the Security Group's farming operation. We accept that this is correct in the circumstances of this case, where the business of each member of the Security Group was essentially to play its part in carrying out the integrated business of the Security Group.

[53] More controversially, Mr Cooke suggested that the analysis also needed to take into account the business of Nugen, which, as discussed earlier, was a business associated with Allan Crafar's son, Robert. It had a different ownership structure from the members of the Security Group and, significantly in the present context, was not a member of the Security Group. Mr Cooke argued that Allan Crafar treated

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13 *ORIX New Zealand Ltd v Milne* at [66].

Nugen's farming operations as if they were operated by members of the Security Group, and that it would be artificial not to recognise this in defining Plateau's business. We see real difficulties in treating Nugen's activities as if they were activities of Plateau, given the different ownership and security structures, but we accept that, if the operations of the Security Group and Nugen were treated as a single operation then activities undertaken by Nugen may provide some guide to the business of Plateau at the relevant time. We will therefore include in our consideration of this issue the activities of Nugen, but in doing so we keep a firm focus on the words of s 53 itself, and in particular, its requirement that the assessment be of the business of the seller, which is, in this case, Plateau.

[54] What was Plateau's business at the time of the sale of the 4,000 heifers to StockCo on 1 August 2008? In the High Court, White J said there was no doubt that Plateau was involved in the business of dairy farming on a substantial scale as part of the Security Group.[14] He also said there was no doubt that Plateau's dairy farming business included the production of milksolids and the buying and selling of categories of livestock, including rising one year heifers (as the 4,000 heifers subject to the sale to StockCo were).

[55] The Judge did, however, accept the submission made on behalf of StockCo that the Crafars were "entrepreneurial" in that they purchased and developed dairy and drystock farms, entered into arrangements with sharemilkers and considered proposals for the sale of significant numbers of livestock. But he said that care needed to be taken to avoid jumping from a description of the Crafars as "entrepreneurial" to the conclusion that the ordinary course of their substantial dairy farming business automatically included any transaction, no matter how unique or unusual, that Allan Crafar decided that one of the security companies or one of the companies associated with Robert Crafar should enter into. The Judge rejected the submission on behalf of StockCo that the ordinary course of Plateau's business included any commercial deal making in the dairy sector that Allan Crafar decided on.

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[14] High Court Judgment at [149].

[56] Mr Cooke argued that the Judge had not determined what the ordinary course of Plateau's business was, and had therefore failed to follow the two-step approach he had set for himself earlier in the judgment under appeal. We do not consider that submission sustainable in light of the analysis to which we have just referred. In our view, it is clear that the Judge determined that the business of Plateau at the relevant time was that of a substantial dairy farming operation, which involved production and sale of milksolids and also some buying and selling of calves, heifers, cows and other livestock.

[57] White J took into account the fact that the Banks' security documentation provided that the Banks' consent was necessary before any change was made to the general character of Plateau's business, and that therefore the security documentation served to limit the authorised scope of Plateau's ordinary course of business. Mr Cooke was critical of this: he said that s 53 protected buyers in the ordinary course of the seller's business even where the sale was contrary to the terms of the secured party's security agreement. We accept that submission as far as it goes, but we do not see the Judge's comment as contradicting it. However, we agree that the objective assessment of the ordinary course of the seller's business is unlikely to be assisted by reference to the secured parties' security agreement. In the present case, if Plateau had changed the ordinary course of its business in breach of the Banks' security agreement, that would not have altered the fact that Plateau's business was a new business it had undertaken, rather than the business operation permitted by the security agreement.

[58] The essence of StockCo's case on this issue is that, while Plateau's business may have been as described by the High Court Judge prior to February 2008, a series of events after that time led to a change in the nature of that business to that of an entrepreneurial dealer in dairy farming assets, characterised by the realisation of value in livestock in order to free up capital to purchase farms that were either dairy farms or were drystock farms capable of being converted to dairy farms.

[59] The evidence before the High Court was that dairy farming operations of the kind operated by the Security Group could normally expect to generate approximately 90 per cent of their revenue from milk production and sales. While

the operation would buy and sell livestock, this would normally amount to only about 10 per cent of total revenue, and the livestock sales would normally be of bobby calves, male weaners and cows that were to be culled. The Finance and Administration Manager of the Crafar operation confirmed that this was broadly consistent with the Crafar Group's business.

[60] The evidence before the High Court of stock sales transactions involving Plateau and other members of the Security Group prior to the transactions involving stock was also broadly consistent with this description. In particular, it was notable that, while some sales of heifers including rising one year heifers had taken place, they had typically been multiple transactions involving relatively small numbers.

[61] Mr Cooke described the livestock trading activities of the Crafar Group prior to 2008 as "opportunistic". He emphasised that livestock were bought and sold with a view to making a profit so that sales of livestock were commonly made in the ordinary course of the business of members of the Security Group. But, as mentioned earlier, his primary argument was that there was a change of strategy in 2008, and that as a result of this the business of the Security Group, including Plateau, changed. He relied on the evidence of the proposed large scale sale of livestock referred to earlier, and a number of transactions and proposed transactions involving the realisation of livestock in order to fund the purchase of farms by either the Security Group or Nugen as evidence of this new business, which was said to be essentially that of an entrepreneurial dealer in dairy farm assets, using funding provided by realisation of livestock to fund farm purchases.

[62] The transactions or proposed transactions on which he relied were:

(a) *February 2008*: proposed sale by the Security Group of 8,000 cows to StockCo for $16 million, and subsequent leaseback of those cows to the Security Group. The consent of the Banks was sought for this but the transaction did not ultimately proceed.[15]

[15] See [25]–[26] above.

(b) *June 2008*: joint presentation by Crafar Group and StockCo to sharemilkers, proposing that StockCo purchase cows owned by the Security Group and lease them to sharemilkers.

(c) *20 June 2008*: gifting of 750 cows by the Security Group to Nugen, and subsequent sale and leaseback transaction between Nugen and StockCo, realising $843,750.00 for Nugen which was used as partial funding for the deposit on the Northland farm.[16]

(d) *23 June 2008*: sale by Taharua Limited of 4,950 cows and 195 bulls to Milk Pride and subsequent 50/50 sharemilking arrangement between Milk Pride and the Security Group.

(e) *27 June 2008*: further sale and leaseback between StockCo and Nugen of 520 cows due to be purchased as part of the Norsewood farms transactions.[17]

(f) *7 July 2008*: sale of 2,100 cows by Plateau to OK Dairies, and subsequent sale and leaseback between OK Dairies and StockCo. OK Dairies and Plateau then undertook a 50/50 sharemilking arrangement.

(g) *11 July 2008*: gifting of 1,500 dairy cows by Plateau to Vision View Limited (a company formed for the benefit of the Crafar's children) and subsequent 50/50 sharemilking arrangement. We were told that the Banks released their security over these cows to facilitate this gift.

(h) *18 July 2008*: letter by Blackman Spargo to Westpac as agent for the Banks advising that the Security Group intended to sell all its livestock.

(i) *1 August 2008*: settlement of the transactions mentioned at (c), (d), (e), (f) and (g) above.

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16 See [30] above.
17 See [31] above.

(j) *20 August 2008*: sale and leaseback transaction between Nugen and StockCo involving 206 heifers, raising about $216,000.00.

[63] Mr Cooke said that these transactions involved the disposal of more than 8,600 cows through sale and leaseback transactions, being approximately 42 per cent of the cows that the Security Group owned at 31 May 2008.

[64] Mr Cooke asked us to deduce from the above transactions that:

(a) the Security Group was a large and entrepreneurial dairy farming enterprise;

(b) it was engaged in significant dairy land acquisition and conversion and significant livestock trading;

(c) from early 2008 it had decided to dispose of ownership of livestock by sale and leaseback to provide additional funding;

(d) it therefore did not need significant numbers of R1 heifers as replacements for its dairy herd; and

(e) a sale of 4,000 heifers would therefore make business sense because it yielded money for further farm purchases and obviated a difficulty in feeding the large numbers of stock.

[65] We see a number of problems with this analysis. Stating that the Security Group was "entrepreneurial" adds little to the general description of its operation as dairy farming. It is uncontroversial that dairy farming involves some trading in livestock.

[66] The fact that the business strategy had been devised to acquire more dairy farms, or farms capable of being converted to dairy farms does not change the business of dairy farming to one of purchasing farms and selling livestock to fund the purchases. It seems that if the Banks had been prepared to provide further loan funding, the selling of livestock to fund farm purchases would not have occurred.

[67] The transactions on which Mr Cooke relies are one-off transactions that were not capable of becoming a business which would be operated in the ordinary course, which, as indicated earlier, involves some anticipated repetition of business activities. Indeed, if the stock sales had continued for much longer with the same frequency, the Security Group would have had no stock left.

[68] The transactions described at (c), (e) and (j) of [62] above were undertaken by Nugen, not by Plateau or even sister companies of Plateau. It appears they were undertaken by Nugen because the Banks' security did not permit members of the Security Group to undertake them. Apart from the transaction in issue, the only transaction involving a sale of livestock by Plateau was that involving OK Dairies, and that was to facilitate a sharemilking arrangement.[18]

[69] Nor do we see that s 53 should be interpreted in a way that allows a debtor to make a sudden change of business strategy and thereby broaden the freedom provided by s 53 (and narrow the protection provided to the secured party by s 53). That exposes the secured party to undue risk. It would, for example, allow a wholesaler to decide unilaterally to cease its wholesaling operation and become a warehouse owner, and sell its entire stock in one or two major transactions free of the security interest of a holder of a general security agreement. We see such a sudden change as contrary to the concept of the "course" of business.

[70] In his oral submissions, Mr Cooke described Plateau's business as including "structured sale and lease back deals to dispose of stock and raise funds for the purchase of farms by entities controlled by Mr Crafar". We consider that this confuses what business Plateau carried on in the ordinary course with the chosen method of funding a farm acquisition strategy by interests associated with Mr Crafar. In our view, the High Court Judge was correct to define Plateau's ordinary course of business by reference to dairy farming on a substantial scale, involving production of milksolids and buying and selling of livestock, and noting the entrepreneurial nature of the business. We do not accept that the developments in 2008 described above changed the ordinary course of Plateau's business in the manner described by Mr Cooke.

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[18] See [62](f) above.

[71] We consider that Mr Stewart captured the real nature of the activity of the Group described above when he pointed out that Mr Crafar made offers to buy a number of farms in June–July 2008, despite having been told by the Banks on 28 May 2008 that the Banks would not finance future acquisitions and that debt reduction was required.[19] Mr Stewart described this colourfully as a "brain snap". He said that all of the transactions that followed were desperate attempts by Mr Crafar's associates to find the funding necessary to keep these farm purchase contracts on foot. In some cases Nugen could not settle. In others, it on-sold at settlement. The Northland and Norsewood (No 2) transactions were the only two that settled and were held by Nugen. The transaction involving the 4,000 heifers was a case in point. Rather than being evidence of a new course of business, the transactions were the desperate machinations of a group trying to raise money to perform a contract to which it had committed itself without having the necessary funding. In the end, this involved succumbing to the use of transactions that effectively used livestock that were already subject to the Banks' security interest as security for a second time.

Was the sale of 4,000 heifers in the ordinary course of the business of Plateau?

[72] Having determined what the ordinary course of business of Plateau was, we now turn to the second question, namely whether the transaction in issue was within that ordinary course of business.

[73] In the High Court, White J highlighted a number of unusual features of the transaction, which he said meant it was not a simple or straightforward stock-yard or farm-yard sale of livestock.[20] In particular, it involved a purchaser that was a financier; it was designed to raise finance for a farm purchase by Nugen; lawyers were involved; the price was discounted; Plateau provided an undocumented loan to Nugen; and the proceeds of the sale did not become subject to the Banks' security interest.

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19 At [27]–[28] above. These transactions are listed in the High Court Judgment at [44] (the transactions listed at [43] of the judgment were all entered into before the 28 May meeting. Also, one of the transactions at [44] was entered into in 2006).

20 At [152].

[74] The High Court Judge found that the transaction was not in the ordinary course of Plateau's business because:[21]

(a) it was a unique and unprecedented transaction;

(b) it involved a raising of funds in a unique manner (previous farm purchases having been financed by bank finance);

(c) the way in which the transaction was negotiated and implemented, involving last minute negotiations between Plateau's lawyer and StockCo's principal director, and the directing of the proceeds through the lawyer's trust account rather than through Plateau's bank account, made it unusual;

(d) the advancing of the proceeds of sale by Plateau to Nugen was not only a breach of the Banks' security agreement but also not in the economic interests of Plateau because Plateau did not derive the benefit of the cash yielded from the sale; and

(e) the leaseback of the heifers by StockCo to Nugen, with the heifers continuing to graze on Security Group farms at the expense of the Security Group confirmed that there was no economic benefit from the transaction for the Security Group.

[75] We agree with the High Court Judge that the transaction was highly unusual. The events of 1 August, during which the transaction was restructured to provide a way of avoiding the need to obtain the consent of the Banks, highlighted this.

[76] Counsel referred us to a number of criteria that have been emphasised in Canadian cases that provide a useful check list of matters to consider in the context of this issue. We will address those matters now.

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[21] At [153].

[77] We start with the factors identified as potentially relevant by Linden J in *Fairline Boats Ltd v Leger*.[22] These factors are:

(a) *Where the agreement is made*: Linden J said that if the agreement is made at the business premises of the seller, it is more likely to be in its ordinary course of business. In the present case the ordinary place of business for a stock sale would be in the sale yards, as White J noted. The present transaction was, in fact, concluded through negotiations between Mr Blackman, Plateau's lawyer, and Mr Kight, the principal director of StockCo. As noted earlier the funds were directed through Blackman Spargo's trust account. It was undertaken using documentation prepared by lawyers and with specific authorisation of the directors of Plateau. This degree of formality and involvement of external advisers does not suggest a transaction in the ordinary course of Plateau's business of dairy farming, including livestock trading.

(b) *Parties to the sale*: Linden J said that if the buyer was an ordinary everyday consumer, as opposed to a dealer or a financial institution, then that would be more likely to indicate a sale in the ordinary course of business. In the present case the buyer, StockCo, was operating essentially as a provider of property finance to assist the Crafar interests (in this case) Nugen to keep on foot a farm purchase transaction. Again that points away from a transaction in the ordinary course of Plateau's business.

(c) *Quantity of goods*: Linden J suggested that if one or a few articles are sold in the ordinary way, this was more likely to be in the ordinary course of business as compared with a sale of a large quantity perhaps forming a substantial proportion of the stock of the seller. In the present case the sale of 4,000 heifers was unprecedented and constituted nearly 15 per cent of the Security Group's herd.

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[22] *Fairline Boats Ltd v Leger*, above n 10, at 222–223. See also Gedye, Cuming and Wood, above n 11, at [53.4].

(d) *Price charged*: White J mentioned that a discounted price was paid, and that would also indicate against the sale being in the ordinary course of Plateau's business. This was contested by Mr Cooke on appeal, who argued that despite there being a discount, the price paid was a fair market price. We are prepared to proceed on the basis that the price was a fair market price, in which case this is a neutral factor.

[78] In *369413 Alberta Ltd v Pocklington*, the Alberta Court of Appeal identified a number of other potentially relevant points including the following:[23]

(a) *The nature and significance of the transaction*: In particular, could it be carried out at a manager's own initiative without referring back to his or her superiors? As noted earlier this transaction was done through lawyers and with a specific directors' resolution authorising it.

(b) *The reason for the transaction*: In particular, was it in response to financial difficulties or in suspicious circumstances? In the present case, the deadline for settlement under the contract for the purchase of the Norsewood (No 2) farm meant that the transaction was entered into in a situation of some desperation on the part of the Crafar interests. This appears to have led to the last minute decision to proceed with a transaction involving a sale by Plateau to StockCo and a lease by StockCo to Nugen, which appears to have satisfied StockCo that it would obtain a first ranking security interest, but which involved a clear breach of the Banks' security and, in effect, the use of the same 4,000 heifers as apparently first ranking security to two different financiers. We see the transaction therefore both as in response to a financial difficulty (the potential loss of the Norsewood (No 2) transaction and forfeiture of the deposit of $375,000.00) and as being in suspicious circumstances.

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[23] *369413 Alberta Ltd v Polklington*, above n 8, at [22].

(c) *The frequency of the transaction*: In this case this was a one-off transaction, not a routine stock sale.

(d) *The arms length nature of the transaction*: Here the parties to the sale, Plateau and StockCo, were at arm's length.

[79] In our view these factors point strongly to a conclusion that this transaction fell a long way outside the ordinary course of Plateau's business. Therefore, the Banks' security interest continued in the 4,000 heifers after they were sold to StockCo. This aspect of the appeal therefore fails.

Was StockCo's security interest subordinated under s 88?

[80] As noted earlier, the 4,000 R1 heifers that were the subject of the Plateau/StockCo/Nugen sale and lease transaction remained on Plateau's land even after they were sold to StockCo and leased to Nugen.[24] After a review of the Crafar operations by financial consultants, steps were taken to regularise this position by documenting this arrangement as a bailment between Nugen and the members of the Security Group.

[81] On 5 April 2009, Nugen and the Security Group entered into an agreement called "Bailment (Lease) of Livestock" in respect of the 4,000 heifers.[25] We will call this the bailment/lease agreement. The bailment/lease agreement recorded that Nugen was in possession of the livestock and wished to graze the livestock on the Security Group's land from 1 August 2008 (more than eight months earlier than the date of the agreement) to 31 May 2010. It also provided that the members of the Security Group would lease the 4,000 heifers following the end of the grazing agreement, which would be from 1 June 2010 (at which time, it was anticipated, they would be milk-producing cows). In reality, the heifers had never left the Security Group's land at any stage. The Security Group agreed to pay $5.00 per head per week rent for the period from 1 August 2008 to 31 May 2010, all payable on 31 May

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[24] Some may also have been on land owned by other Security Group companies.

[25] The bailment document recorded all members of the Security Group as bailees. It was not explained in what capacity they could all be bailees of the same livestock at the same time. Mr Gollin suggested that they must have been tenants in common.

2010. This was surprising as the Security Group was paying the cost of feeding and tending the heifers and earning no income from them, so from an objective viewpoint the Security Group was providing an agistment service to Nugen rather than Nugen providing a service of hire to the Security Group. No rent was ever paid, in fact. Rent of $120.00 per week was to be payable under the lease from 1 June 2010, but only for those of the 4,000 heifers that had become in-milk cows.

[82] On 20 April 2009, Blackman Spargo wrote a letter to StockCo advising that the 4,000 heifers "may" be depastured on Crafar farms, and seeking consent to the lease of livestock by Nugen to members of the Security Group. A copy of the bailment/lease agreement was enclosed. StockCo acknowledged receipt of the letter on 23 April 2009, but no further response was made. It seems the letter was then mislaid in StockCo's office and no further action was taken in response to it.

[83] On 5 October 2009, the Receivers were appointed to the Security Group. On 6 October 2009, StockCo sought further details to enable it to consider the request for consent in the 20 April letter. On 7 October 2009, StockCo registered a financing change statement, noting the presence of the Security Group companies as debtors. On 15 October 2009, StockCo wrote to the Crafar Group's solicitors advising that it did not consent to Nugen's sublease, which was in breach of the head lease with StockCo.

[84] The Receivers say that the bailment/lease agreement evidenced a bailment for a term of more than one year. This is not disputed. Both the bailment (grazing) arrangement and the proposed lease at the end of the grazing arrangement were for terms exceeding a year. The Receivers say that the bailment/lease agreement was, therefore, in PPSA terms, a transfer of an interest in the 4,000 heifers by Nugen to Plateau.[26] That, they argue, engages s 88 of the PPSA, under which a secured party has 15 days from becoming aware of a transfer to register a financing change statement showing the transferee as the new debtor. The Receivers say StockCo did not do this and that its security interest therefore became subordinated to that of the Banks in relation to advances made by the Banks after the end of the 15 day period.

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[26] "Transfer" is defined in s 87(3) of the PPSA to include creation of a security interest. Under s 17(1)(b), a "lease for a term of more than 1 year" is a security interest. See [105] below.

The amount of those advances exceeds the value of the 4,000 heifers, so the Banks' prior interest would exhaust the security.

[85] StockCo resists the Receivers' argument on two bases. First, it says that the entry into the bailment agreement by Nugen did not amount to a transfer of an interest in StockCo's collateral for the purposes of s 88(1). Secondly, it says that the letter sent to StockCo by Blackman Spargo on 20 April 2009 did not provide to StockCo the information it required to register a financing change statement.

[86] We will deal with the second argument first, as, on the approach we take, it is determinative.

[87] As the essential context is s 88 itself, we set out its text in full:

> **88 General priority of security interest in transferred collateral over security interests granted by transferee**
>
> (1) If a debtor transfers an interest in collateral that, at the time of the transfer, is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee, except to the extent that the security interest granted by the transferee secures advances made or contracted for—
>
> (a) after the expiration of 15 days from the date that the secured party who holds the security interest in the transferred collateral had knowledge of the information required to register a financing change statement disclosing the transferee as the new debtor; and
>
> (b) before the secured party referred to in paragraph (a) took possession of the collateral or registered a financing change statement disclosing the transferee as the new debtor.
>
> (2) Subsection (1) does not apply if the transferee acquires the debtor's interest free of the security interest granted by the debtor.

[88] Transfers of a debtor's rights to collateral are expressly permitted by s 87 of the PPSA.

[89] The reference to "knowledge" in s 88 cross-refers to s 19 of the PPSA, which defines that term. In the present case, the relevant part of s 19 is s 19(1)(b)(ii), which says that an organisation has knowledge of a fact in relation to a particular transaction if the organisation receives a notice stating the fact. In this case, the

Receivers say the letter of 20 April 2008 stated the fact that the 4,000 heifers had been bailed to the members of the Security Group under a document that constituted a transfer of the collateral in PPSA terms.

Did the 20 April 2009 letter give notice to StockCo?

[90] The material part of the letter of 20 April 2009 from Blackman Spargo to StockCo said:

> In the meantime, we have received advice from our client [Nugen] that the stock [the 4,000 heifers leased to Nugen by StockCo] may be depastured on land owned by other entities in the Crafarms Group and as a result we have prepared a Grazing Agreement. Upon the termination of this Grazing Agreement on 1 June 2010 Nugen Farms Limited wishes to sub-lease the livestock to other entities in the Crafarms Group.
>
> We note that clause 4(a) of the terms and conditions of the [StockCo/Nugen] Lease prohibits further hire of the herd. We therefore seek your consent to such a lease occurring and an acknowledgement that the stock may be depastured on other farms.
>
> We enclose for your information a copy of the Bailment document.

[91] The copy of the bailment/lease agreement that was enclosed was signed by all parties to it. The Receivers say that the combination of the text of the letter and the fact that a copy of the signed bailment/lease agreement was enclosed is such that StockCo was put on notice that the 4,000 heifers had been bailed by Nugen to the members of the Security Group. They say that the request for consent at the end of the letter relates only to the intended lease that would have commenced on 1 June 2010, and not to the bailment or grazing arrangement that was said to have commenced on 1 August 2008.

[92] For StockCo, Mr Cooke strongly disputed this. He said the key phrase in the letter was "may be depastured", which could mean either that such depasturing may happen in the future or that it may already be happening, but the writer is not sure. He said in circumstances where the letter was seeking StockCo's consent, the former meaning makes more sense. He submitted that the consent sought by Blackman Spargo related to the whole arrangement, not just to the lease that would come into effect on 1 June 2010, but even if this were not so, the letter still sought StockCo's

"acknowledgement" that the heifers "may be depastured", which again appeared to be seeking a prior acknowledgement of a future possibility.

[93] Mr Cooke said the letter had to be read in the context of the terms of the lease between StockCo and Nugen. Clause 4(a) of that agreement required StockCo's consent not only to a sub-leasing of the herd, but also to any parting with possession of any of the heifers, so the reference to cl 4(a) in the 20 April letter could have applied to both the bailment and the subsequent lease under the bailment/lease agreement. He accepted that the bailment/lease agreement enclosed with the letter was a signed document, but noted that its terms were also equivocal. In particular, the first recital said that Nugen was in possession of the 4,000 heifers (taken literally, this meant Nugen was in possession on 5 April 2009 when the bailment/lease agreement was signed), but the third recital said that it wished to graze them on land owned by the Security Group from 1 August 2008 to 31 May 2010. The first covenant said that Nugen "shall graze" the heifers on the Security Group's land.

[94] The exact nature of the request for consent was also ambiguous. What was sought was consent "to such a lease occurring", which could refer back to the reference to the sub-lease (commencing 1 June 2010) in the previous paragraph, but could also refer back to the whole of that paragraph, which describes both the "Grazing Agreement" and the subsequent "sub-lease". Both required consent under cl 4(a), which required consent for any hire of the livestock. Both the initial bailment and the subsequent lease could be described as the hire of the livestock in return for rent. So both arrangements could fairly be described as "such a lease occurring", which is what the letter sought consent for.

[95] Mr Gollin, who conducted this part of the argument for the Receivers, supported the High Court Judge's reasoning. Mr Gollin said that the consent that was sought related only to the leasing arrangement from 1 June 2010 (described earlier in the letter as a "sub-lease") and not to the earlier arrangement that was described as a "Grazing Agreement". He said that the "acknowledgement" clearly related to an existing state of affairs, not to a future event. And the agreement itself unequivocally said that the bailment had begun on 1 August 2008.

[96] The Receivers' case requires us to find, in terms of s 19(1)(b)(ii), that StockCo had received a notice "stating the fact" that a lease for a term of more than one year had been entered into. The letter itself does not say this. Rather, it uses the term "may be depastured" twice, without ever saying that depasturing is not a matter of speculation or a future event, but something that has been the status quo for more than eight months. If the intention of Blackman Spargo was to communicate that there had been a transfer of collateral which potentially jeopardised StockCo's position and required StockCo to take immediate action, this was a very unusual and equivocal way of imparting that information.

[97] In our view, a party relying on s 19(1)(b)(ii) needs to be able to point to a "statement of fact", not an equivocal, ambiguous and arguably misleading statement of the kind that appeared in the 20 April 2008 letter. It is true that the bailment agreement itself is reasonably clear in its terms (notwithstanding Mr Cooke's argument to the contrary) but the covering letter, which is what was intended to draw the nature of the arrangement to StockCo's attention, described the enclosed document incorrectly.

[98] The fact of the matter was that Nugen was acting in breach of its lease with StockCo in entering into the bailment/lease agreement with the Security Group. The letter ought to have made it clear that the arrangement was one that had subsisted from the time the StockCo/Nugen lease had been entered into and asked for a waiver of the breach and an acknowledgement that the bailment arrangement was intended to continue on the terms set out in the attached document. It needed to specify to whom the "transfer" in terms of s 88 had been made, so that StockCo had the information it needed to file a financing change statement. Again the letter was vague about this, but we acknowledge the bailment/lease agreement specified all members of the Security Group as the counter parties to the bailment/lease agreement.

[99] As noted earlier, Blackman Spargo wrote again to StockCo after the Receivers had been appointed, following up on the 20 April 2009 letter. The follow-up letter, dated 7 October 2009, included the following paragraphs:

> In [the 20 April 2009 letter], we advised you that the leased stock may be depastured on land owned by other entities in the Crafarms Group and as a result we had prepared a Bailment recording the grazing arrangement. Upon expiration of the grazing arrangement, Nugen Farms Limited had intended to sublease the livestock.
>
> We therefore sought your consent to the sublease pursuant to clause 4(a) of the lease. We note that we have not received a reply to our letter. A further copy is attached for your information.
>
> We advise that certain companies in the Crafarms Group have recently been put into receivership and the livestock secured under the Deed of Lease is depastured on properties owned by these entities. Our client is anxious to ensure that the position under your Deed of Lease is secured.
>
> We therefore repeat our request for your urgent consent to the proposed sublease and the depasturing of the livestock on the land owned by the entities in the Crafarms Group.

[100] The last paragraph of this letter makes it clear that Blackman Spargo was seeking consent not only to the proposed lease commencing on 1 June 2010, but also to the depasturing of the livestock (presumably from 1 August 2008) (though two paragraphs earlier the letter says consent is sought only for "the sublease"). The last paragraph supports the position taken by StockCo, that the original letter was seeking consent to both the bailment/grazing arrangement and the subsequent lease. In addition, it makes a clear distinction between the reference in the earlier letter to the fact that stock "may be depastured" and to the position at the time of the 7 October 2009 letter ("is depastured"). This also supports StockCo's submission that the term "may be depastured" when used in the 20 April 2009 letter could fairly be interpreted as describing a future possibility rather than an existing situation.

[101] In StockCo's response to the 7 October 2009 letter, it refused consent for the "sublease" and pointed out that Nugen was in breach of the StockCo/Nugen lease agreement. This could indicate that it understood that the only consent it was being asked to give was to the lease from 1 June 2010 or it could be a reflection of the reality that the bailment/grazing arrangement had gone ahead in breach of the Nugen/StockCo lease so it was too late to give or refuse consent.

[102] We conclude, contrary to the view of the High Court Judge, that the letter of 20 April 2009 did not "state the fact" that an event had occurred that brought into play s 88, and required StockCo to take action to protect its position. What was

required was a clear statement that the stock actually were depastured on the land of the Security Group and that the bailment/lease agreement documented that arrangement and provided for the subsequent lease arrangement.

[103] We uphold StockCo's appeal on this point.

Was the bailment/lease agreement a transfer of Nugen's rights in the collateral?

[104] Our finding in favour of StockCo on the "knowledge" issue means that this issue becomes academic. But we will give a brief indication of our views in any event.

[105] There was no dispute that, if the bailment/lease agreement was "a lease for a term of more than 1 year" from the time it was entered into (or its "deemed" commencement date of 1 August 2008), then it would have amounted to a transfer of Nugen's interest in collateral for the purposes of s 88(1). This is because the term "transfer" is defined in s 87(3) to include "the creation of a security interest" and the term "security interest" is defined in s 17(1)(b) as including "a lease for a term of more than 1 year".

[106] The High Court Judge found that the bailment/lease agreement was a lease for a term of more than 1 year because it came within para (a) of the definition of that term in s 16(1) of the PPSA. The relevant parts of that definition provide as follows:

> **Lease for a term of more than 1 year—**
>
> (a) means a lease or bailment of goods for a term of more than 1 year; and
>
> ... but
>
> (c) does not include—
>
> (i) a lease by a lessor who is not regularly engaged in the business of leasing goods; or
>
> (ii) a lease of household furnishings or appliances as part of a lease of land where the use of the goods is incidental to the use and enjoyment of the land; or

(iii) a lease of prescribed goods, regardless of the length of the lease term

[107] In this case the bailment/lease agreement created a "bailment" from its commencement and therefore the reference to "bailment" in para (a) applied. White J said that, as the term "bailment" was not defined in PPSA, it had to be given the meaning it had at common law, which would include an agistment arrangement of the kind provided for in the bailment/lease agreement.

[108] The High Court judgment on this point has now been superseded to some extent by a subsequent decision of this Court in a case having some factual similarities to the present case, *Rabobank New Zealand Ltd v McAnulty.*[27] In *Rabobank*, this Court found that an agistment arrangement relating to a stallion that was a one-off transaction and which involved a bailment for a term of more than one year did not come within the defined term "lease for a term of more than 1 year" because the exclusionary language in para (c)(i) of the definition applied: it was a lease by a lessor who was not regularly engaged in the business of leasing goods. This Court found that the references to "lease" in para (c) had to be read as a shorthand reference back to "lease or bailment of goods" in para (a).

[109] In the present case, the evidence does not deal with the question as to whether Nugen was regularly in the business of bailing goods. Mr Gollin suggested that Nugen was intending to profit from the bailment and that it should be seen as "regular" because the planned lease at the end of the bailment period meant that the bailment was the first of a planned series of transactions.

[110] We see the bailment/lease as a composite transaction rather than as two separate transactions. So we would need to know if Nugen had entered into other similar transactions in order to determine whether it was regularly in the business of bailing goods for profit. If we had needed to decide this point we would have wished to receive evidence on that point. But assuming that the new bailment/lease agreement was an isolated transaction and not part of Nugen's regular business activities, then the bailment/lease agreement would be excluded from the definition of lease for a term of more than 1 year by the application of para (c)(i) of the

[27] *Rabobank New Zealand Ltd v McAnulty* [2011] NZCA 212, [2011] 3 NZLR 192.

definition. A finding that the bailment/lease agreement was not a lease for a term of more than one year as defined in s 16(1) would necessarily lead to the conclusion that the bailment/lease agreement was not a transfer of Nugen's interest in collateral for the purposes of s 88. So StockCo would be successful on this second issue as well.

[111] Our conclusion on the subordination issue is that s 88 does not apply and that, if StockCo had established that it held a security interest in the 4,000 heifers to the exclusion of the Banks' security interest in those heifers, StockCo's security interest would not have been subordinated by the application of s 88.

Ascertainment

[112] We now turn to the third issue. This relates to the 750 cows that were the subject of a sale and lease back transaction between Nugen and StockCo.[28] The focus of this issue is not on the transaction between Nugen and StockCo, but on a prior transaction under which the 750 cows are said to have been transferred to Nugen by the Security Group.[29]

[113] There are two aspects to this issue. The first concerns the transaction whereby the Security Group is said to have transferred the 750 cows to Nugen prior to the Nugen/StockCo sale and leaseback transaction. Did the Security Group actually transfer any property rights in 750 cows to Nugen? The second arises if the answer to that question is "no". In essence, Mr Cooke argued that it was sufficient that the Security Group created a right for Nugen to call for delivery by the Security Group of 750 cows. He said that the transaction between the Security Group and Nugen did give Nugen that right, and that was sufficient for the purposes of the PPSA. So the second question we must answer is: does it matter that Nugen did not have property rights to 750 identified cows?

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[28] See [30] above.

[29] The evidence was that the cows were owned by various members of the Security Group, but it seems most were owned by Plateau. We will use the collective "Security Group" for simplicity.

Did the Security Group transfer property rights to 750 cows to Nugen?

[114] In order to answer this question, it is necessary to resolve exactly what happened between the Security Group and Nugen.

[115] The motivation for the transaction was the need to raise money urgently to pay the deposit on the Northland farm purchase. The transaction involved a sale by Nugen to StockCo of 750 mixed age cows for $1,000 plus GST per head, and a lease of those cows back to Nugen by StockCo for a five year period. The problem with the transaction was that Nugen did not have 750 cows to sell. There was some confusion at the trial about the genesis of these cows. The High Court Judge summarised the position as follows:[30]

> Mr Allan Crafar gave evidence that to enable Nugen to sell 750 cows to StockCo they were "given" to Robert Crafar on 20 June 2008 in return for his unpaid farm services over the previous 15 years. Under cross-examination, Mr Kight [of StockCo] said that StockCo did not require the 750 cows to be identified or tagged as required by the terms and conditions of StockCo's standard dairy herd lease agreement, but instead relied on Blackman Spargo's solicitor's certificate dated 23 June 2008 that a search of the PPSR Registry disclosed no security registered over the Nugen cows.

[116] The Judge did not expressly make a finding of fact that the cows had been gifted to Robert Crafar (or, perhaps more correctly, to Nugen). This was a matter on which there was considerable uncertainty and, possibly, some after-the-fact rationalisation of what was, on the face of it, improper use of 750 cows as security to StockCo when they were already security to the Banks. We are satisfied that there is no evidence that the 750 cows were transferred to Nugen other than by way of gift, so we deal with the present issue as an issue about the effectiveness of this gift. Counsel agreed that this was appropriate. This is in contrast to the way the matter was dealt with in the High Court, where the argument focussed on the requirements for ascertainment in s 18 of the Sale of Goods Act 1908, in that the analysis assumed the Security Group had sold (rather than gifted) 750 cows to Nugen.

[117] The High Court Judge found that the 750 cows had not been ascertained for the purposes of s 18. He said that the evidence of both Allan and Robert Crafar was

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[30] High Court Judgment at [48].

that the 750 Nugen cows were mixed in with the rest of the herd on the farms owned by members of the Security Group.[31] The Judge found that there was no evidence that the 750 cows had ever subsequently been specifically or separately identified, and that there was therefore no unconditional appropriation of cows to the (oral) contract of sale between Plateau and Nugen.

[118] We agree with the High Court Judge that the evidence shows that no effort had ever been made to work out which of the Security Group's cows were being transferred to Nugen. The question for us, therefore, is whether an oral gift of 750 cows, in circumstances where the donor owned a considerably greater number of cows and never identified which ones were subject to the gift, is effective in the absence of physical delivery of 750 cows.

[119] A gift can be made in three ways:[32]

(a) by deed or other instrument in writing;

(b) by delivery where the subject matter is open to delivery; or

(c) by declaration of trust.

[120] In this case there was no deed or written instrument, and no declaration of trust. At best, there was an oral promise to gift made by Allan Crafar on behalf of the Security Group to Robert Crafar, apparently in his capacity as a director of Nugen with the intention that the cows be gifted to Nugen.

[121] In *Williams v Williams*, the then Supreme Court held that the three essential elements of a valid inter vivos gift of chattels are:[33]

(a) the expression of intention by the donor to make the gift;

(b) the assent of the donee to the gift; and

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31 High Court Judgment at [224].
32 Laws of New Zealand Gifts (online ed) at [4].
33 *Williams v Williams* [1956] NZLR 970 (SC) at 972.

(c) the actual or constructive delivery of the chattel to the donee.

[122] Assuming that the first two elements are established in the present case, the effectiveness of the gift depends on the satisfaction of the third requirement: actual or constructive delivery. In this case, not only were the cows not delivered (they remained on the Security Group's farms), they were never even identified or separated in a way that could be fairly characterised as a constructive delivery. The gift was, therefore, never completed and Nugen did not obtain any proprietary right to any cows.

Does this matter?

[123] Mr Cooke argued that it did not matter if the gift was not effective to transfer a proprietary interest in 750 identified cows to Nugen. In essence, his argument was that, as long as Nugen had some rights in the cows (he said this was a right to call for delivery of them in order to give effect to the oral gift that had been made), this was sufficient to allow Nugen to create a valid security interest in the cows in favour of StockCo, which StockCo had perfected by registration of a financing statement.

[124] We see a real difficulty with that argument. We do not think there can be any doubt that, as between Nugen and the Security Group, Nugen's "rights" in relation to the 750 cows were, at best, a right to call for performance of the gift by delivery of 750 cows. We will proceed on the basis that it had such a right, without deciding the point. What Mr Cooke is asking us to accept is that once Nugen enters into a security agreement with a third party (StockCo in this case), that somehow elevates Nugen's rights in 750 cows to the extent that StockCo as the holder of the security interest has greater rights in the cows than the Security Group (and, by extension, the holder of any security interest in the cows granted by the Security Group). He did not explain how that metamorphosis could occur, and we do not believe that it could.

[125] Mr Cooke's argument was that the requirements for creation of a security interest under s 17(1)(a) of the PPSA are:

(a) the transaction must be related to personal property;

(b) the secured party takes an interest in the relevant personal property;

(c) that interest is created by a transaction; and

(d) the interest must secure the performance of an obligation.

[126] While we accept that is so, it begs the issue as to what personal property is covered by the transaction. If Nugen does not have 750 cows, it cannot create a valid security interest in 750 cows. At best it could create an interest in the personal property it does have, namely whatever rights it has against the Security Group under the gift. But in the present case, the form of the transaction between Nugen and StockCo purported to be a sale of 750 cows, followed by a lease by StockCo of the same cows to Nugen, which StockCo said was a security interest not within s 17(1)(a) of the PPSA, but under s 17(1)(b), which extends the concept of a security interest to cover a lease for a term of more than one year. There is an obvious absurdity in suggesting that there can be an effective sale of 750 cows followed by a contemporaneous leasing back of the same cows where the purported seller and lessee is a party that does not own 750 cows but has some inchoate right to call for another party to identify and deliver to it 750 cows in circumstances where that right is never articulated or enforced.

[127] The orthodox argument in this context would have been that, even if the gift had been effective, it would have been a purported dealing with the collateral subject to the Banks' security interest, and under s 45 of the PPSA, the Banks' security interest would have continued in that collateral and therefore ranked in priority to that of StockCo. This was not argued in the High Court and was raised only late in the day in this Court and we did not allow the argument to be developed. We will come back to this later.

[128] We conclude that the purported gift of 750 cows to Nugen was ineffective because the cows were never identified or delivered (or constructively delivered by some form of separation/identification). All of the cows in the Security Group's herd remained its property, notwithstanding the Security Group's apparent commitment to gift 750 cows to Nugen, and all of that herd was subject to the Banks' security

interest. The Banks are entitled to enforce their security interest notwithstanding the purported transactions between the Security Group and Nugen and, subsequently, between Nugen and StockCo. This aspect of StockCo's appeal therefore fails, although for slightly different reasons than those given by the High Court Judge.

Adequacy of description: s 36

[129] We now turn to the fourth issue, which is the only issue remaining in the Receivers' cross-appeal (the other ground of the cross-appeal was abandoned). It also concerns the 750 cows subject to the sale/leaseback arrangement between StockCo and Nugen. Our resolution of the third issue against StockCo means that this issue is only academic, and we will deal with it briefly.

[130] The issue concerns the adequacy of the description of the 750 cows in the lease agreement between StockCo and Nugen. In that agreement, the collateral was described as follows:

No. Head	**Breed & Type**
750	M/A Cow

[131] The relevant provision of the PPSA is s 36(1), which relevantly provides:

> (1) A security agreement is enforceable against a third party in respect of particular collateral only if—
>
> ...
>
> (b) the debtor has signed ... a security agreement that contains—
>
> (i) an adequate description of the collateral by item or kind that enables the collateral to be identified;

[132] This issue is important because compliance with s 36 is a requirement for attachment of security interests under s 40(1)(c).

[133] In the High Court, White J held that a general description of "kind" can be adequate as long it is sufficient to enable identification, if necessary by extrinsic evidence. He stated that the purpose of s 36 was only to provide evidence consistent with a claim that a security interest had been taken in particular collateral. If a third

party requires further information about a particular item of property, additional details can be sought using the procedure set out in s 177(1)(c) of the PPSA.[34] Section 177(1)(c) provides that a person with a security interest in personal property of the debtor (among others) may request that the secured party send or make available "written approval or correction of an itemised list of personal property indicating which items are collateral, unless the security interest is over all of the personal property of the debtor".

[134] An important component of White J's analysis was his acceptance of the evidence of Allan Crafar that, if he had been required at any time to identify specifically and separately the 750 mixed aged cows purportedly given to Nugen and subsequently subject to the sale/leaseback between Nugen and StockCo, he would probably have been able to do so. The Judge said that, as Mr Crafar never actually did this, the 750 cows were not identified for the purpose of s 18 of the Sale of Goods Act (or, we interpolate, for the purposes of the gift), but Mr Crafar's ability to do so would have met the requirements of s 36(1)(b)(i) of the PPSA.

[135] There is some artificiality about dealing with the adequacy of the description of collateral in circumstances where we have already found that the 750 cows had never been identified or separated from those of the Security Group. Thus, at the time the sale and lease transaction between Nugen and StockCo took place, no one had ever identified the collateral, so it is difficult to see how the security agreement could include an adequate description allowing such identification.

[136] The wording of s 36 is important. What it requires is that the security agreement include "an adequate description of the collateral ... that enables the collateral to be identified". It is the description of the collateral that must enable identification, not some externality such as an after-the-event selection process by a director of the party that purportedly gifted the 750 cows to Nugen.

[137] The reality in the present case was that the 750 cows that were meant to be described in the security agreement were part of a larger herd belonging to other companies and secured to another financier. They were commingled before the

[34] High Court Judgment [229] and [231].

security agreement was entered into and remained commingled afterwards. Whereas s 36 is normally concerned with identifying collateral of a debtor as other goods owned by the debtor and secured to another financier, in the present case the identification was between cows owned by the Security Group and those purportedly owned by Nugen.

[138] We do not consider that s 177 assists in this case. It contemplates that a list of items will be presented, and those coming within the security agreement will be then identified. In this case there was no possibility of creating such a list because no one had ever identified which cows were included within the Security Group/Nugen and subsequent Nugen/StockCo arrangements. Although it appears that some of the cows owned by the Security Group had ear tags there was nothing in the evidence that indicated that anyone had ever attributed animals with certain ear tags to Nugen and animals with other ear tags to the Security Group, and it seems that many animals did not have any ear tags at all, notwithstanding that they were legally required to have them, both under statute and under the security documents.

[139] We conclude that the description of the collateral in the security agreement in this case was not sufficient for the purposes of s 36(1)(b)(i). However, we emphasise that this a conclusion based on the highly unusual facts of the present case. We see the adequacy of description for the purposes of s 36 as being a matter that depends very much on the circumstances. For example, if Nugen had only 750 mixed aged cows, then the description would clearly have been sufficient to enable identification of them. And we also emphasise that, in the present case, this position is reached in circumstances where our conclusion on the third issue is such that the discussion of the requirements of s 36 is of no consequence in the overall outcome.

[140] In the result, we take a different view on this issue from that of the High Court Judge and, therefore, allow the Receivers' cross-appeal.

Issues not dealt with

[141] We mention briefly two other issues that were discussed during the hearing before us, but not ultimately pursued.

Commingling

[142] At the time of the receivership, stock (including the 750 cows) in respect of which StockCo claimed a security interest were depastured on farms owned by members of the Security Group. That meant that, if StockCo was successful in establishing that it had a prior security interest in those cows, then stock belonging to the Security Group and subject to the Banks' security interest would be mixed in with the stock subject to StockCo's security interest. White J found that, in that situation, the Banks and StockCo had an interest in the combined herd in proportion to their respective shares. In doing so, he applied the common law, recording that the parties had agreed that s 82 of the PPSA, which deals with security interests in commingled goods, did not apply.

[143] The Receivers contested White J's finding that StockCo was entitled to a proportionate share of the combined herd in its cross-appeal. The written submissions of counsel addressed this issue on the same basis as had the High Court Judge, namely that s 82 did not apply, and that the matter had to be decided under common law. At the hearing, we indicated to counsel that we wished to have submissions on the applicability of s 82 to this situation. Later in the hearing, counsel for the Receivers, Mr Stewart QC, informed us that the Receivers had decided to abandon this aspect of their cross-appeal.

[144] The abandonment of this aspect of the cross-appeal means we need not resolve the s 82 issue. We record that we raised the issue with counsel because we thought that the text of s 82 seemed to cover the situation where goods (here, cows) had become commingled with other goods of the same kind (more cows) in circumstances where identification of individual cows was not possible. So their identity was lost in a greater mass (herd) of cows. We recognise that there is Canadian authority that the equivalent of s 82 applies only where two different kinds

of goods are mixed and become a different product, but we question whether that should be followed in New Zealand.[35] The High Court Judge noted that StockCo did not rely on s 82 and cited two authorities to which he had been referred by counsel.[36] Having considered both, we query whether they do stand for the proposition attributed to them.[37] However, as we have not heard submissions on the point, we leave the matter for resolution in a case where the point is argued.

Application of s 53 to the 750 cows

[145] The argument both before this Court and before the High Court in relation to the 750 cows was focused on the issue of ascertainment described above[38] and the adequacy of the description of the cows in the StockCo security agreement. During the course of the hearing we asked counsel how the Banks' security interest in the 750 cows had been extinguished on the purported transfer of those cows by Plateau to Nugen. We had assumed that the absence of any argument about this was because the Banks had consented to the transfer. It turned out that this was not the case.

[146] Subsequently Mr Gollin, who conducted this part of the argument for the Receivers, sought leave to raise an argument not put to the High Court, namely that the Banks' security agreement in the 750 cows continued even after their transfer to Nugen, and that this security agreement therefore outranked the subsequent security agreement created by Nugen in favour of StockCo. The obvious answer by StockCo to this argument would be that the 750 cows were sold by Nugen to StockCo in the ordinary course of business, which would have given rise to a debate similar in nature to that arising in relation to the 4,000 heifers under the first issue described above.

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35 *Massey-Fergusson Industries Ltd v Melfort Credit Union Ltd* (1987) 8 PPSAC 1 (SKCA). The example given in s 82 of the PPSA reflects this approach, but we do not see it as excluding cases where two quantities of goods of the same kind are mixed together or into a larger mass.

36 *Re Service Foods Manawatu Ltd (in Rec and Liq)* HC Wellington CIV-2007-485-1563, 20 June 2008 at [21]–[25] and Gedye, Cuming and Wood above n 11, at [82.1].

37 In *Re Service Foods*, the issue appeared to turn on the fact that the goods had not lost their identity. Gedye, Cuming and Wood appear to support the interpretation that we tentatively favour at [82.1]. See also Roger Fenton *Garrow & Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis, Wellington, 2010) vol 2 at 630.

38 At [15].

[147] Recognising that the evidence had not addressed that point, Mr Gollin accepted that he would have to proceed on the basis that the sale by Nugen to StockCo was in the ordinary course of business, because StockCo had not had the opportunity to resist an argument to the contrary. However, he said that even if the sale of the 750 cows to StockCo by Nugen was in the ordinary course of Nugen's business, the Banks' security interest would have subsisted because under s 53(1) a buyer in the ordinary course of business takes the goods purchased free of security interests given by the seller, but not those given by a prior owner that continue in force. Mr Gollin argued that StockCo, as a buyer in the ordinary course of business, would take the 750 cows free of a security interest given by Nugen as seller, but would not take the 750 cows free of a security interest created by a previous owner (in this case, the security interest created by the Security Group in favour of the Banks).

[148] That argument raises an issue about the interpretation of s 53(1), and in particular, whether a buyer in the ordinary course of business takes the goods free of all security interests over those goods, or free only of those created by the seller.[39] The orthodox view is that the latter is the correct position.[40] However, Mr Cooke indicated that, if the matter had been raised in the High Court, he would have argued that the cross-reference in s 53(1) to a "security interest ... that arises under s 45" means that the buyer in the ordinary course also takes the purchased goods free of any security interest created by a previous owner that continues in the goods under s 45.

[149] Mr Cooke strongly objected to this matter being raised on appeal. Ultimately we decided that we would not permit the argument to be raised and we said that we would give reasons for this in this judgment. We do so now.

[150] The first reason is that, on the view we take of the case, this point is of no significance to the outcome. It was not therefore necessary to resolve it. There was little point in putting counsel to the trouble of further submissions in those circumstances.

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[39] See Fenton, above n 37, 534–535.

[40] Gedye, Cuming and Wood, above n 11, at [53.2].

[151] We were also concerned that we could not be confident that we had a firm factual footing on which to found our analysis. We suspect that, if the issue had arisen in the High Court, it may well have been resolved by a factual analysis of the sale of the 750 cows by Nugen to StockCo, which would have led to a finding that the sale was not in the ordinary course of Nugen's business. So the legal point now raised would have been academic.

[152] We also considered that the issue would be best dealt with in the context of properly prepared written submissions and full oral argument, with the benefit of the considered views of the High Court Judge. That was not possible, given the late stage at which the point was raised.

[153] We therefore express no view on the argument outlined above.[41]

Result

[154] Although StockCo has had a measure of success, it has not succeeded in overturning the primary findings of the High Court. The appeal is therefore dismissed. The Receivers' cross-appeal on the s 36 point succeeds, but this has no practical effect on the outcome of the case. The Receivers abandoned the other ground of their cross-appeal.

Costs

[155] At the time at which Mr Stewart announced the abandonment of the commingling ground of the cross-appeal, counsel agreed that we should reserve the question of costs. We do so. We indicate that we consider the appeal is a complex appeal justifying two counsel. Counsel may file memoranda if agreement cannot be reached.

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Minter Ellison Rudd Watts, Auckland for First and Second Respondents

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41 At [148].