

KEYBANK NATIONAL ASSOCIATION v THE SHIP “BLAZE”

Aisha Lala*

In *KeyBank National Association v the Ship “Blaze,”*¹ Baragwanath J considered competing securities over the ship *Blaze* in the High Court. The mortgagee plaintiff’s security comprised a United States (US) registered mortgage. The intervener had purchased the vessel from the mortgagor in New Zealand and further protected its title by registration of a financing statement on the Personal Properties Securities Register (the PPSR).

In determining the paramount claim the Court had to reconcile the *Personal Property Securities Act 1999* (PPSA) with the *Ship Registration Act 1992* (SRA); both of which provide a framework for security interests to be registered, but talk past each other in terms of the mechanics for determining the priority of competing interests on the other register. The SRA provision (s 70) used to give effect to KeyBank’s mortgage was judicially considered for the first time and illustrated that, due to its wording, the provision will save foreign securities executed over a ship in a limited set of circumstances.

1 The Facts

The *Blaze* was a 63-foot ocean-going sloop originally built in New Zealand and sold to a US resident (Bishop). Bishop borrowed money from KeyBank National Association (KeyBank), a US lender, which secured its loan against the vessel by a US-registered mortgage entered on the United States Coast Guard Ship register.

The *Blaze* later arrived in New Zealand and mortgage payments to KeyBank ceased. Bishop then attempted to sell the vessel while berthed at Westhaven marina in Auckland. No action was taken by KeyBank despite knowledge the vessel was for sale. The *Blaze* was later purchased by Mr. Walters, who transferred the vessel to his company Barrington Charters Ltd (the intervener). The intervener registered a financing statement on the PPSR securing its ownership, followed two days later by KeyBank registering their security interest in the form of a mortgage over the *Blaze* on the PPSR.

KeyBank sought an application for summary judgment against the intervener to enforce its US-registered mortgage over the newly purchased yacht.

2 Background

The SRA and the PPSA provide for two independent registries whereby security interests can be registered against ships. The SRA securities regime functions in concert with the process of ship registration. Ships requiring flagging tend to be those that travel outside New Zealand waters and are typically more than 24 metres in length (hereinafter referred to as “large ships”). Flagging of the ship itself, and mortgages registered over a ship, are not, however, confined to ocean-going ships or large ships, and a voluntary system of registration exists under the SRA for ships less than 24 metres in length (“small ships”). The *Blaze* is less than 24 metres long.

Section 70 of the SRA is a provision enacted in response to the heavily criticised decision of the New Zealand Court of Appeal in *The Ship “Betty Ott” v General Bills Ltd.*² The provision was designed to recognise foreign mortgages and afford them the same priority as if they had been created in New Zealand, with respect to other security interests in the same vessel.

Section 70 of the SRA provides:

* Aisha Lala is a final year conjoint Bachelor of Science and Bachelor of Laws student at the University of Auckland.

¹ HC Auckland, CIV 2006-404-2266, 9 February 2007.

² [1992] 1 NZLR 655 (CA).

Where a question arises in New Zealand as to the priority of instruments creating securities or charges in respect of a ship registered under the law of a foreign country, instruments creating securities or charges in respect of the ship and duly registered in respect of the ship under that law shall –

- (a) Have the same effect as a mortgage registered in respect of a ship under this Act; and
- (b) Be accorded the priority that they would have been accorded if they had been registered under this Act.

The *PPSA* is the primary national securities register for chattels in New Zealand. Notwithstanding the Law Commission's recommendation prior to its assent to preclude *all* ships from the *PPSA* to avoid conflicts between regimes,³ only large ships were expressly excluded by Parliament from constituting a security interest capable of being registered under the *PPSA*.⁴

Section 23(e)(xi) excludes from the scope of the *PPSA*:

- (e) An interest created or provided for by any of the following transactions:

...

- (xi) A...mortgage...of a ship (within the meaning of the Ship Registration Act 1992) that exceeds 24 metres register length (within the meaning of that Act),...

The *PPSA* has strict and ordered provisions pertaining to priorities for security interests registered over a chattel,⁵ and protects bona fide purchasers for value where a prior security interest has not been perfected by registration on the *PPSA*.⁶

With this overlap between the two registration regimes, the potential for conflict arises between the more recent *PPSA* only precluding large ships from forming security interests on the PPSR (and not expressly precluding small ships); and the *SRA* which additionally permits small ships to have mortgages registered against them on the *SRA* register. Here the disputed securities over the *Blaze* fell into a legislative "no-man's land" calling for analysis of the mechanics of both of these statutes.

3 The High Court Decision

Baragwanath J's concern for the need for New Zealand to "conform with the international obligation of legislatures and courts to contribute to a 'just and seamless' system of private international law" was a potent influence on his Honour's reasoning. This policy concern seems to have permeated his Honour's analysis of the statutes, resulting in, it is respectfully suggested, an extreme interpretation of the *PPSA*, and a strained application of s 70 of the *SRA*.

Recognition of the US mortgage in New Zealand was affirmed by the Court applying s 70 of the *SRA*.⁷ KeyBank's lone US mortgage, with no other mortgage or charge to compete against, was accommodated by reading the word "instruments" in s 70 subject to s 33 Interpretation Act 1999.⁸ The Interpretation Act thus allowed s 70 to include an "instrument" in addition to the plural. Academic criticism of *The Betty Ott*⁹ was then cited in order to promote the need to recognise and give effect to foreign security interests against vessels in New Zealand. This policy provided the momentum to deem the intervener's perfected security interest on the PPSR (confirming his title over the *Blaze* as bona fide purchaser) as a competing security interest over the ship, despite there being no actual competition between securities¹⁰ as contemplated by s 70 of the *SRA*. The result was KeyBank's US mortgage was held to

³ Clause 4(5) Law Commission Report (No.8): *A Personal Property Security Act for New Zealand* (NZLC R8, April 1989).

⁴ Section 23(e)(xi).

⁵ A perfected (by registration of a financing statement on the PPSR) security interest has priority over an unperfected security interest (s 66(a)), priority between security interests in the same collateral is determined by order of when registration of the first financing certificate occurs (s 66(b)).

⁶ Section 52. The rationale is to provide with certainty to the purchaser that the good(s) they intend to buy are not securing some other arrangement.

⁷ See paragraph [40] of the judgment.

⁸ Where "the meaning of an enactment must be ascertained from its text and in light of its purpose".

⁹ Myburgh, P., "Recognition and Priority of Foreign Ship Mortgages: *The Betty Ott*" [1992] *Lloyd's Maritime & Commercial Law Quarterly* 155, Jackson, DC, *The Enforcement of Maritime Claims* (4th Ed, 2005) 23.89.

¹⁰ Refer to the section titled 'Comments' and fn 14.

- (1) *enjoy the status* of an SRA registered mortgage in New Zealand on a wider reading of s 70; and,
- (2) was *capable of competing* against a perfected security interest of a bona fide purchaser, on an independent securities register, notwithstanding the intervener was promised clean title to the *Blaze* by s 52 of the *PPSA*.¹¹

The next obstacle in asserting KeyBank’s mortgage over the *Blaze* was the *PPSA*. The policy factors of avoiding invalidation of existing *SRA* securities, adherence to the conflict of laws foreign flag doctrine, and the practical consequence that visiting yachts would be required to file a financing statement once in New Zealand waters were seen to provide sufficient grounds to subordinate the *PPSA* to the *SRA* in this case. In light of that preamble, his Honour held that s 23(e)(xi) of the *PPSA* should be construed on the basis of *generalia specialibus non derogant*; that the more general but more recently enacted *PPSA* exclusion did not impliedly repeal the earlier *SRA* which provided a more specific registration regime for ships. This had the effect of expanding the exclusion on large ships to additionally exclude small ships from the effect of the *PPSA*. Baragwanath J thus held that s 23(e)(xi) of the *PPSA* had no application¹² when in conflict with securities¹³ on the *SRA* register.

The consequence of interpreting the *PPSA* exclusion expansively was that the *PPSA* did not affect KeyBank’s mortgage, but the intervener’s ability to rely on the s 52 *PPSA* provision entitling it to protection from later *PPSR* perfected security interests was frustrated. With the *PPSA* rendered inapplicable against the intervener’s interest, KeyBank’s security was protected by the *SRA*¹⁴ and the purchase of the vessel would therefore have been taken subject to KeyBank’s mortgage. KeyBank’s application for summary judgment was adjourned for further consideration of the intervener’s defence of acquiescence and competing equities.

4 Comments

While Baragwanath J’s commitment to international comity in recognising foreign maritime claims is certainly a laudable goal, the extent to which the plain wording of the two statutes was manipulated is a cause for concern and poses additional problems. With respect, his Honour’s enthusiasm to give effect to the US mortgage exceeds the ambit and intent of s 70 of the *SRA*; a provision narrowly and specifically enacted to recognize and give foreign registered mortgages the status that they would otherwise have had if registered under the *SRA*.

4.1 Section 70 of the SRA

It is doubtful whether s 70 should have been applied in this case. First, the provision applies to “questions arising as to the priority of *instruments creating securities or charges*”. While the US mortgage would certainly be covered, the intervener’s title over the vessel cannot constitute *an interest creating a security or charge*. Title over the *Blaze*, either by virtue of s 52 of the *PPSA* and/or the sale and purchase agreement, entitles the intervener to exclusive possession of the yacht. As such, the intervener’s rights cannot be diminished by ranking title equivalent to a charge or security under s 70 of the *SRA*.¹⁵

Secondly, priority is defined as “the status of being earlier in time or higher in degree or rank; precedence”.¹⁶ For a “priority” issue to arise there must be at least two competing maritime claims to confer a preferential status one over another. Parliament obviously intended the provision to apply where two or more interests creating securities or charges were involved. Here, there is only one — KeyBank’s mortgage.¹⁷ In the absence of another competing security or charge, the provision is simply not applicable. This precludes KeyBank’s ability to assert its mortgage over the *Blaze* via s 70 of the *SRA*.

¹¹ The latter is largely irrelevant since the *PPSA* is decided to be non-applicable later on in the judgment.

¹² Paragraphs [81]-[82].

¹³ Which was held at paragraph [82] to include national registered *SRA* securities and foreign mortgages given effect via s 70 of the *SRA*.

¹⁴ The reference to the *PPSA* in paragraph [82] of the judgment is clearly a typographical error.

¹⁵ Contending that the intervener’s registration of the financing certificate in order to protect his ownership over *Blaze* is a security interest will not be readily inferred from s 17 of the *PPSA*. To rely and succeed under s 70 of the *SRA* by this argument is contingent on the *PPSA* applying which would then be still limited by s 52 of the *PPSA* — a double-edged sword. The *PPSA* was in any case considered non-applicable by Baragwanath J at paragraphs [81]-[82].

¹⁶ Garner, BA, *Black’s Law Dictionary* (8th Ed, 2004) 1231.

¹⁷ Contrast this with *The Betty Ott* involving an equitable New Zealand debenture and an Australian registered mortgage.

Thirdly, even if KeyBank's mortgage is to be regarded as having equivalent status to a New Zealand registered mortgage by virtue of s 70 of the *SRA*, the *SRA* is silent as to whether mortgages given such status under s 70 of the *SRA* are enforceable against bona fide purchasers for value. As the *SRA* merely provides guidance on the priority between two New Zealand registered mortgages in Part 3 of the Act, KeyBank should have been required to rely on common law and equitable principles to assert the priority of its maritime claim. For those reasons s 70 of the *SRA* does not appear to be a tool available to KeyBank in enforcing the US mortgage.

4.2 Section 23(e)(xi) of the PPSA

Expansive interpretation of s 23(e)(xi) to preclude small ships from the effect of the *PPSA* was, with respect, an erroneous construction of a provision clearly intended to preclude large *SRA* registered ships but permit interests in ships such as *Blaze* to be lodged as security interests on the PPSR.¹⁸

Subordinating the *PPSA* on the basis of the *generalia specialibus* constructive canon is difficult to reconcile with the clear wording of s 23(e)(xi) or the legislative background to the provision. Qualifying the s 23(e)(xi) exclusion so precisely to ships longer than 24 metres is evidence enough of Parliament specifically and deliberately considering the relevance and objective in precluding *only* large ships. Accordingly s 23(e)(xi) of the *PPSA* cannot be read as being expressed generally at all, and the interpretative doctrine has scant grounds for application.

The more logical premise of statutory interpretation applicable here is *expressio unius est exclusio alterius*.¹⁹ Following this rule, and guided by common sense, the express omission of large ships from the effect of the *PPSA* impliedly *includes* small ships as capable of being subject to a *PPSA* security interest. Baragwanath J asserts that this implied inclusion is merely a default provision that operates only where the vessel is not registered on the *SRA*. However, there is no section expressly pointing to this in either statute. If Parliament had intended this outcome, it would have been easy enough to say so.

The Court's concern about the invalidation of all *SRA* mortgages if the application of the *PPSA* to small ships is upheld also appears to exaggerate the threat of endangering current securities beyond that which is likely to occur in practice. Small ships are typically less likely to have more than one mortgage executed over the vessel and diligent lenders would be well alerted to a prior mortgage through a search of the relevant registers. Furthermore, if the judgment is to be followed seriously, there is an even more problematic risk that all prior securities over vessels on the *PPSA* could be invalidated by later *SRA* entries over the same vessels.

4.3 Renovating the New Zealand foreign maritime claims regime?

In Admiralty, recognition of the status given to a foreign maritime claim by the forum is an important determination since recognition of the claim's status affects its priority; and priority is critical when the Court is dealing with a limited fund and a large pool of creditors. A common problem evident in this case and others²⁰ dealing with foreign maritime claims is that the Court allows priority to drive recognition of status, whereas in fact recognition of the legal status of the claim should be determined first.²¹

At present *The Betty Ott* is an important New Zealand authority regarding application of the majority approach in *The Halycon Isle* for determining status of foreign maritime claims.²² It has been suggested, however, that the New Zealand Court of Appeal in *The Betty Ott* misapplied this principle and was not actually bound by *The Halycon Isle*,

¹⁸ Parliament's intention to allow some vessels to comprise securities on the PPSR is clear from the reluctance to import proposed clause 4(5) of the Law Commission Report (No.8): *A Personal Property Security Act for New Zealand* (NZLC R8, April 1989) and at (1998) 574 New Zealand Parliamentary Debates 14423 (Max Bradford). Small ships such as recreational and other non-commercial vessels would be attractive collateral for professional lenders to secure private loans.

¹⁹ As counsel for the intervener submitted at [62] of the judgment.

²⁰ *The Betty Ott*, *ABC Shipbrokers v The Ship "Offi Gloria"* [1993] 3 NZLR 576, *Fournier v The Ship "Margaret Z"* [1999] 3 NZLR 111.

²¹ This is most evidently observed with enforcement of foreign maritime liens in forums which do not recognize that claim as holding lien status. Maritime liens, by their nature, are inchoate and substantive proprietary rights. These attach to the vessel and accordingly should be given the inherent recognition they hold - *Harmer v Bell (The Bold Buccleugh)* (1851) 7 Moo PCC 267, [1843-60] All ER Rep 125.

²² In *Bankers Trust International v Todd Shipyards Corporation (The Halycon Isle)* [1981] AC 221 (PC) the majority applied a *lex fori* approach in determining both the status and the priority of a foreign maritime lien. The *lex fori* approach in the *Halycon Isle* was applied in *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 (CA) and *The Offi Gloria*.

the ratio of which only applied to foreign maritime liens.²³ So far as the issue of recognition of foreign mortgages was concerned, therefore, the Court in *The Blaze* could have followed the more sound reasoning in *The Colorado*²⁴ which looked to the law of the ship's flag (the *lex causae*) in determining the status of a foreign registered mortgage.

KeyBank's US mortgage is recognised in the US as also holding maritime lien status. Admiralty law deems that this lien attaches to the *Blaze* and cuts across even the rights of a bona fide purchaser for value without notice. In the current state of New Zealand law, the status of KeyBank's legitimate right under US law is distorted when the *lex fori* approach of the majority in *The Halcyon Isle* is applied. Instead of the Court being free to recognise the true maritime lien status of KeyBank's mortgage claim at the *lex causae*, US law, it felt constrained to give effect to it by an inelegant, confusing and messy construction of domestic law.

While s 70 of the *SRA* has the merit of allowing recognition to be afforded to a number of security interests which would otherwise be unenforceable in New Zealand, as this case illustrates, its ambit and effect is limited. Baragwanath J's acknowledgment of the primary issue of comity in private international law certainly does not justify his strained interpretation of the *SRA* and the *PPSA*. But it does usefully signpost that perhaps a broader reconsideration of New Zealand's conflict of laws approach to foreign maritime claims is in order.

²³ Myburgh, above n 8.

²⁴ 16 Asp MLC 145; [1923] P 102 (CA).