

PERSONAL PROPERTY SECURITIES: A NEW ZEALAND MARITIME LAW PERSPECTIVE

Geoff Brodie*

Introduction

In the judgment of the majority in *Waller v New Zealand Bloodstock Ltd*¹ there is an interesting observation:

Cautionary cases which Mr Dale's argument brings to mind include *Salomon v A Salomon & Co Ltd* [1897] AC 22, where at levels below the House of Lords there had been a failure to put aside old learning and to recognise that the provision for separate legal identity of the company (enacted by what is now s 15 of the Companies Act 1993) must be given literal effect. Likewise, in *Frazer v Walker* [1967] NZLR 1069 it was perhaps easier for the fifth member of the Board, Sir Garfield Barwick, to appreciate Sir Robert Torrens' concept of registration as the root of title than for the English Law Lords, to whom the notion that a forged mortgage could by registration deprive a landowner of his title was no doubt counterintuitive.

The learned President of the Court of Appeal dissented. He would have allowed the appeal. This divergence of views, and the fact that the majority thought it necessary to philosophise in this way, points to the radical rethinking of legal concepts which their Honours discerned in the *Personal Property Securities Act 1999* ('PPSA').

In essence, the judgments represent two conflicting views of the philosophy underlying the giving of security over personal property. The minority judgment was founded on the premise that, before the legislation came into force, the facts and documents underpinning this case could not, as a matter of law, have combined to create a valid and effective security; substantially on the grounds that, because the borrower had no legal interest at all in the charged property, the lender could not achieve a better position. The majority judgment holds that the underlying legal position is irrelevant. The statute is a radical reform which creates legal rights and obligations where none would otherwise exist. The statute significantly alters the former legal position.

In *Waller* a stud by the name of Glenmorgan obtained funding from New Zealand Bloodstock Ltd and New Zealand Bloodstock Finance Ltd to pay for a \$1,000,000 stallion called Generous. The particular financing instrument held by New Zealand Bloodstock was a document called a lease to buy. On the expiry of the lease Bloodstock would sell Generous to Glenmorgan at a price equal to the residual value under the agreement. Under the lease to purchase agreement Bloodstock retained ownership of Generous. Glenmorgan had possession and was required to make various payments. It did not, however, have the immediate ability to acquire ownership of Generous. Glenmorgan Ltd had previously charged all of its assets, both existing and future, under a familiar fixed and floating debenture.

The timing of the events which unfolded is important.

- On 17 November 1999 Glenmorgan granted its fixed and floating debenture to S H Lock charging all its present and future assets.
- On 19 November 1999 this debenture was registered under the *Companies Act 1993* (NZ).
- On 31 August 2001 Glenmorgan entered into the lease to purchase agreement with Bloodstock.
- On 1 May 2002 the PPSA came into force.
- On 1 May 2002 S H Lock Ltd registered a financing statement to perfect its security interest on the Personal Property Securities Register.

* Barrister, Christchurch, New Zealand. This is an edited version of a paper presented to the 34th Annual Conference of the Maritime Law Association of Australia and New Zealand in Canberra on 28 September 2007.

¹ [2006] 3 NZLR 629, 634, [18] (CA).

- On 6 July 2004 Bloodstock terminated the lease to purchase agreement.
- On 7 July 2004 it took possession of Generous by re-possession.
- On 23 July 2004 S H Lock Ltd gave notice of default to Glenmorgan under the terms of the debenture and appointed receivers over Glenmorgan's assets.

There was thus an outright contest between S H Lock Ltd and Bloodstock as to which had the better security.

In a nutshell, Bloodstock argued, and the President of the Court of Appeal agreed, that title to Generous was always vested in Bloodstock and that, accordingly, Glenmorgan never had any rights of property in Generous which were capable of being charged in favour of S H Lock Ltd. It did not have rights of ownership or any lesser rights. *Nemo dat quod non habet* prevailed such that there was nothing for S H Lock's debenture to attach to.

The High Court at first instance and the majority of the Court of Appeal disagreed. In their view, the PPSA is a fundamental reform which creates entirely new concepts, so that the kind of rethinking required in *Salomon's* case and *Fraser v Walker* must also be deployed in the understanding of this legislation.

The Scheme and Structure Created by the PPSA

The *Chattels Transfer Act 1924* (NZ) system of registering securities provides a good example of the shortcomings which have driven the creation of this new legislation. Under the Chattels Transfer Act security interests in personal goods such as crops, machinery, livestock and the like were required to be registered in the office of the High Court nearest to the location of the goods; registration being effected by lodging a certified copy of the instrument. The system was cumbersome and inefficient. Documents were invariably out of date. Each of the thirty separate High Court registries throughout New Zealand had to be searched. The system was expensive and there could be delays between the granting of security and the appearance of the paper document in the registry.

These and many other complications were the driving force to the introduction of the PPSA in New Zealand. One of the aims of the PPSA was to do away with the myriad of formalistic distinctions that existed under prior law and to treat in like manner all transactions that in economic substance utilised personal property as collateral for the performance of an obligation.

The PPSA has introduced fundamental changes to the prior legislation or the common law. The legislation has created a unified, simplified, streamlined and accessible system of registering all security interests in personal property. The PPSA creates a regime for the registration of notices disclosing the existence of consensual security interests in personal property and for determining the priority of competing security interests in the same collateral.

The new law resembles in some respects the priority regime found in the *Land Transfer Act 1952* (NZ). However, unlike the Torrens system contained in the Land Transfer Act, the PPSA does not create a title-based system. Only *security interests* are recorded in the Personal Property Securities Register. The Register does not identify the owner of any particular item of personal property and does not provide indefeasibility of title. Generally, the notice registration system simply provides a warning that a debtor has granted a security in a particular item or type of collateral. Only brief particulars are registered by a secure creditor, and are revealed by a search of the register. If a searching party legitimately requires more information, the Act provides a mechanism by which this can be obtained from the secured party.²

Some of the most important features of the system, which now operates efficiently, are these:

- (a) It is internet-based and easily accessible at any time of the night or day.
- (b) Registration is cheap and efficient.

² Gedye, M, Cuming, R C C, and Wood, R J, *Personal Property Securities in New Zealand* (2002); and *Waller v New Zealand Bloodstock* [2005] 2 NZLR 549, 553, Allan J.

- (c) Registration can be carried out by creditors at the time a decision is made to grant accommodation and before funds are advanced.
- (d) With some minor exceptions, the system is universal in its application. If the security is not available for searching on the register, it does not exist and may be disregarded.
- (e) It completely replaces the former *Motor Vehicle Securities Act* Register, the *Chattels Transfer Act* registration system and registration of charges under the *Companies Act*.
- (f) Only relatively simple documents are registered. The notice of security interest is relatively simple.
- (g) There are provisions which enable debtors to require amendment or removal by the creditor and this process can be overseen by the Court.

The system has been introduced relatively painlessly, with the transitional provisions of the PPSA requiring pre-existing securities under other registers to be transferred by creditors over to the new register within a relatively short lead in time.

The PPSA very specifically provides that, even where title to collateral is in the secured party, rather than the debtor, the application of the Act is not affected.³ This section emphasises that the rights that a debtor holds in respect of leased goods or goods acquired under a conditional sale agreement are rights for the purpose of this section.

The security agreement may provide for a security interest in after acquired property.⁴ A security interest in after acquired property arises without specific appropriation by the debtor.⁵

Most importantly, the legislation creates a reasonably clear, precise and certain set of priority rules.

The System in Detail

So, the essential building blocks are:

- (a) A security interest as defined;
- (b) Attachment of the security interest;
- (c) Registration on the register.

Once these building blocks are in place, the consequences of the legislation will follow.

The concept of a 'security interest' is central to the scheme of the legislation. There is an extensive definition of security interest:

- (a) An interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation without regard to:
 - (i) The form of the transaction; and
 - (ii) The identity of the person who has title to collateral;
- (b) Includes an interest created or provided for by a transfer of an account receivable or chattel paper, a lease for a term of more than one year and a commercial consignment (whether or not the transfer, lease or consignment secures payment or performance of an obligation).

³ Section 24.

⁴ Section 43.

⁵ Section 44.

A lease for a term of more than one year includes:

- (a) A lease or bailment of goods for a term of more than a year.
- (b) A lease for an indefinite term.
- (c) A lease for a term of one year or less that is automatically renewable.
- (d) A lease for a term of one year or less where the lessee with the consent of the lessor retains uninterrupted or substantially uninterrupted possession for a period of more than one year, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year.⁶

An interest created or provided for by a lease for a term of more than one year is deemed to be a security interest in that it is subject to the Act, regardless of whether it secures payment or performance of an obligation.

The definition catches not only traditional security arrangements such as mortgages and charges, but also other transactions which under prior law were often treated differently from traditional security devices. Under the new conception of security interest, it does not matter whether title is vested in the debtor or the creditor.⁷

This definition of a security interest is deliberately wide-ranging and travels way beyond conventional concepts of property rights which are capable of transfer.

The rights available to the debtor need not be the rights of ownership. A bare interest in possession as, for example, pursuant to a lease is sufficient to found the security interest. A security interest thus created exists irrespective of the vesting of title.⁸

In order to provide optimal protection for the holder of the interest, a security interest requires both attachment and registration or possession by the secured party.

Attachment

Attachment occurs when:

- (a) Value is given by the secured party; and
- (b) The debtor has rights in the collateral; and
- (c) The security agreement is enforceable against third parties.⁹

The Act then provides the circumstances under which the security interest will be enforceable. As against a third party the security agreement can only be enforced in respect of particular collateral if:

- (a) The collateral is in the possession of the secured party; or
- (b) The debtor has signed an agreement that contains an adequate description of the collateral or a statement that a security interest is taken in all of the debtor's present and after acquired property.¹⁰

Perfection

⁶ Section 16.

⁷ See above n 2.

⁸ See s 17(1)(b).

⁹ Section 40.

¹⁰ Section 36.

The last building block in the process is the perfection of the attached security interest. A security interest is perfected when:

- (a) The interest has attached; and
- (b) A financing statement has been registered or the secured party has possession of the collateral (other than by seizure or repossession).¹¹

Thus a security interest is not perfected until attachment and either registration of the financing statement or possession.¹²

When this state of attachment is achieved the security interest is perfected.

Priorities

The PPSA makes very clear the proposition that a perfected security interest has priority over an unperfected security interest in the same collateral where no other means of determining priority is established under the legislation.¹³

A conflict between perfected priority interests is resolved by reference to time of registration (not time of perfection).¹⁴

Priority between unperfected priority interests is determined by the order of attachment of the security interest.

PMSIs

A purchase money security interest can achieve a super priority which enables it to slip in ahead of an already perfected security interest in the same collateral. A secured creditor who has provided credit through which the debtor acquires the collateral in which the secured creditor has an interest, achieves super priority, provided the security interest is registered within 10 working days of the debtor acquiring possession of the collateral.¹⁵

Waller v Bloodstock

Returning then to *Waller v Bloodstock*, these building blocks can now be seen in practice.

The essential feature is that, because it had been registered, the Lock security interest had been perfected and took priority over any other unperfected interests.

The core arguments advanced by Bloodstock were:

1. The debenture specifically referred to 'property'; the rights which Glenmorgan had in the stallion were less than 'property' and accordingly not caught by the debenture.
2. Because Bloodstock had retrieved possession of the stallion, it was now an owner in possession and there was no longer any security interest which could be defeated as a matter of priority. Bloodstock stood as an absolute owner in possession.

Referring to an article by Gedye,¹⁶ his Honour at first instance approved this passage from the article:¹⁷

In essence, under the PPSA the lessor under a lease that comes within the definition of security interest is effectively no longer the 'owner' of the leased asset when it comes to a conflict with other security

¹¹ Section 41.

¹² Section 41.

¹³ Section 66.

¹⁴ Section 66(b).

¹⁵ Section 72.

¹⁶ Gedye, M, 'What's Yours is Mine: Attachment of Security Interests to Third Party Assets' (2004) 10 *New Zealand Business Law Quarterly* 203, 206.

¹⁷ *Waller v New Zealand Bloodstock* [2005] 2 NZLR 549, 568-569, [91].

interests. The leased asset is merely collateral of the lessor and the lessor's rights vis-à-vis third party claims to the leased asset are only those of a secured party. The corollary of this concept is that the lessee/debtor is effectively considered to be the owner of the collateral. The lessor's interest in the collateral is then prioritised according to the Act's priority rules. It is these priority rules that determine whether the lessor will win and not the common law notion of *nemo dat*. This recharacterisation of the lessor's and lessee's rights allows both third party security interests to attach and the lessee to pass good title to the leased assets, even though the lessee had no contractual right to acquire title itself. When Rodney Hansen J stated: 'A security interest can therefore attach to the *lessee's interest* in the goods,' (emphasis added) he was not referring to the lessee's leasehold interest as traditionally conceived. He made it clear that he was referring to the lessee's interest as reconceptualised by the PPSA when he said: 'the lease is treated as a security agreement and the lessee is treated as the owner of the goods for registration and priority purposes.' It is the lessee's interest as reconceptualised as owner of the goods to which a security interest can attach.

His Honour noted:¹⁸

[t]he fact that [Bloodstock] may have legal title to Generous is simply irrelevant in a situation where, as here, [Bloodstock] holds an unperfected security interest and is in competition with a party which has a perfected security interest. The lessor's interest in the collateral takes or cedes priority as the case may be according to the Act's priority rules, not according to the dictates of the common law relating to legal title. It is the lessee who is to be treated as the owner goods for registration and priority purposes, and not the lessor.

In the Court of Appeal, Lock sustained its claim to prior security. The Court emphasised the radical nature of the legislation.¹⁹

[W]ith respect to priority of competing security interests under the PPSA the *nemo dat* principle is ousted. The consequence is to empower Glenmorgan to add to the security passing to Lock under Lock's debenture, a proprietary interest in the stallion, even though the agreement between Bloodstock and Glenmorgan had provided to the contrary.

The major lessons of the case are twofold: the statutory altering of the proprietary rights of a lessor; and the crucial importance of registration. These are policy choices which have been made and significantly alter what would otherwise have been the position.

Although immediately prior to registration under the PPSA the Lock debenture did not secure rights in favour of Lock as a matter of law (the stallion was not owned by Glenmorgan), upon the coming into force of the PPSA Glenmorgan nevertheless acquired 'rights in the stallion' pursuant to section 40(3) on the day the Act came into force, and those rights were charged by the all-embracing Lock debenture.

Effectively, the PPSA created a sufficient property right to Glenmorgan where none previously existed.

Other Cases under the PPSA

*Graham v Portacom New Zealand Ltd.*²⁰ Portacom leased five portable buildings to NDG Pine Ltd (In Receivership). NDG granted a debenture to a bank. The debenture was perfected. NDG had nothing more than rights of possession (not ownership) under the owner's standard terms and conditions of hire. The Court held that the registered security interest gave the debenture holder absolute title to the portable buildings notwithstanding Portacom's retention of ownership. This case likewise emphasises the importance of registration.

*Agnew v Partington.*²¹ This Court of Appeal judgment dealt with a drafting error in the legislation which appears to suggest that, upon sale of the collateral by a secured creditor, the subsequent security holders lose their priority and rank along with the general body of unsecured creditors. Whilst this is the effect of the literal construction of section 30A of the *Receivership Act 1993* (NZ), the Court construed the section so that its effect was limited to the effect on the purchaser. Securities are to be regarded as extinguished from the purchaser's point of view, but not from the point of view of the remaining secured and unsecured creditors.

¹⁸ Ibid, 569, [93].

¹⁹ [2006] 3 NZLR 629, 649, [74] (CA).

²⁰ [2004] 2 NZLR 528.

²¹ [2006] 2 NZLR 520.

*Simpson v NZ Associated Refrigerated Food Distributors Ltd.*²² Service Foods applied for a trading account with Food Distributors. The trading account was registered, recording that the collateral type included all present and after acquired property, the description thereof being all the debtor's personal property and all other property. Service Foods had previously given a general security agreement in favour of Westpac which had previously been registered.

Food Distributors' security was registered second in time, but takes priority in respect of goods which are subject to title retention until paid for, providing the security was perfected by registration in a timely way. The court rejected arguments that the particular arrangement in this case was not a security interest and that the description, 'all present and after acquired property', did not correctly describe the collateral.

The Court of Appeal confirmed that Food Distributors retained a valid and enforceable security interest in the product which had been sold to Service Foods, but not yet paid for. That interest extended to the proceeds of sale held by the bank's receivers.

*Dunphy v Sleepyhead Manufacturing Company Ltd.*²³ A creditor holding an unperfected security interest in goods the subject of a retention of title arrangement, yielded priority to the holder of a perfected security. This was a consequence of the failure to comply with the requirement that the instrument relied on should be evidenced in writing. Otherwise the super priority available to the holder of a PMSI would have prevailed. Nevertheless, the unperfected security remained effective as against the unsecured creditors of the company, and for that matter the liquidator.

Inter-Relationship with the Ship Registration Act 1992

The ideal of a simple, universal and effectively codified security system rather founders when it comes to ship securities.

International law obligations mean the existing regime for registration of ship mortgages cannot be simply discarded. The *Ship Registration Act 1992* (NZ) ('SRA') provides a system for registration of interests in New Zealand-owned ships. The SRA establishes a register divided into Part A and Part B. Registration in Part A affords New Zealand nationality, is evidence of title and allows for the registration of mortgages. Registration in Part B only confers nationality. With some exceptions, vessels that are over 24 metres register length must be registered in Part A. Pleasure vessels are an exception.²⁴

Any New Zealand-owned ship, whether large or small, may be registered under Part A and accordingly a registered mortgage may be granted to a lender. If registered under Part A an owner may only dispose of the vessel subject to any registered mortgage. An equitable interest such as an equitable charge may not be registered and will rank behind any registered mortgage, even if granted prior in time (SRA, s 46). Registered mortgages rank in order of registration. The date of execution of the mortgage is irrelevant in determining priority.

Obviously, this system is inconsistent with the universal application of the PPSA. The definition of personal property under that Act is of course wide enough to include ships, but the PPSA specifically did not abolish the SRA.

To meet this conflict s 23(e)(xi) of the PPSA provides that the PPSA does not apply to an interest by way of transfer or charge in relation to a ship exceeding 24 metres in register length.

The potential for conflict between the two systems is immediately obvious. A pleasure vessel over 24 metres in length does not have to be registered under the SRA but, equally, the PPSA does not apply. In this circumstance, priority of the charges, and their validity, will need to be determined according to common law and equitable principles.

²² Unreported, Court of Appeal, CA 36/06, 16 November 2006.

²³ Unreported, Court of Appeal, CA 63/06, 14 June 2007

²⁴ SRA, s 6.

There could be a charge registered under the PPSA and the SRA at the same time in respect of a ship which is less than 24 metres in length. Which Act applies? The exemption from the application of the PPSA created by section 23 does not resolve the conflict. It might therefore seem that a security under the PPSA should take priority. However, that would appear to cut across the purpose of the SRA. There is nothing specific in either legislation for resolving the conflict between two apparently valid mortgages, one registered under each piece of legislation.

Another difficulty. What if a valid charge is registered against a 23 metre vessel and registered under the PPSA? Subsequently the vessel is modified and extended beyond 24 metres. The PPSA, according to definition, would cease to apply. Certainly charges registered after the modification to the ship would not be capable of registration under the PPSA.

Also, what of a foreign registered mortgage over a ship of less than 24 metres? The PPSA might appear to, in those circumstances, create a charge which defeats the foreign registered mortgage.

One can think of many other examples of conflict between the two enactments. The legislation might have more satisfactorily provided in an unambiguous rule that, in the case of any ship, registration under the SRA, or an equivalent overseas enactment, always prevails.

The Blaze²⁵

The High Court has considered one case involving a tension between a registered ship mortgage and a security under the PPSA.

The *Blaze* was a 63' ocean going sloop, originally built in New Zealand and sold to one Bishop, a United States resident. He borrowed money from KeyBank, a United States 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 West Haven. No action was taken by KeyBank, despite knowledge that the vessel was for sale. The *Blaze* was later purchased by Mr Walters, who transferred the vessel to his company, Barrington Charters Ltd. That company then registered a financing statement on the PPSR securing its ownership, followed two days later by KeyBank registering its security interest in the form of a mortgage over the *Blaze* on the PPSR. KeyBank sought summary judgment against Barrington to enforce its US-registered mortgage.

Expert evidence established that the mortgage was a valid and effective mortgage under United States law, duly registered against the Central Federal Register of Ships. Under s 70 of the SRA a foreign registered mortgage is treated for the purposes of New Zealand law as having the same effect as a New Zealand registered mortgage.

Counsel for the purchaser Walters, borrowing on the logic in *Waller*, argued that the PPSA was effective to grant the holder of the affected registered security interest an unimpeachable right of ownership. The argument ran that the underlying ownership (as evidenced by the registered ship's mortgage) was irrelevant. Registration under the PPSA prevailed.

The Judge concluded that the US mortgage was to be regarded as having the same effect as a New Zealand registered mortgage.

It was contended by Walters that the buyer takes free of any prior interest unless it has been perfected by registration. Section 23(e)(ix) of the PPSA excludes vessels beyond 24 metres from the operation of the Act. It was argued that, accordingly, vessels under 24 metres such as the *Blaze* are subject to the PPSA. The *Blaze* was subject to a perfected security and accordingly the PPSA should prevail. Whilst this is literally correct, the Court was not prepared to hold that the SRA is excluded for security purposes in the case of vessels under 24 metres and that the PPSA prevailed.

As the Judge noted, this interpretation would effect a virtual appeal of the SRA for vessels under 24 metres. The evidence was that of the 1806 vessels registered under Part A, 1604 were less than 24 metres and 19 per cent of

²⁵ *KeyBank National Association v The Ship Blaze* [2007] 2 NZLR 271, Baragwanath J.

all these ships were subject to registered mortgages. Perhaps not surprisingly, the Court was not prepared to construe the PPSA in such a way as to override the SRA, notwithstanding the literal words of the statute. In short, this would allow the later general statute to override the earlier but specific statute.

The alternative, that each owner and mortgagee of a foreign registered ship under 24 metres in length accompanying the America's Cup event in Hauraki Gulf ought, to protect their position, to file a New Zealand PPSA financing statement immediately the vessel enters New Zealand waters was bizarre. If such an approach were taken in other PPSA states such as Canada or the United States, the result would be chaotic. Such a construction would be at odds with the current initiatives to invite the United Nations Commission on International Trade Law to propose use of the PPSA concept internationally as a means to facilitate commerce. The Judge concluded 'these reasons of policy satisfy me that the PPSA can have no application to securities that fall directly or (via section 70) indirectly within the Ship Registration Act'. KeyBank's security accordingly prevailed.

Conclusion

The PPSA legislation is radical and beyond doubt a major improvement on the previous hotch potch. There are shortcomings in the legislation which will need to be remedied over time in New Zealand. Australia is however in a good position to learn from, and avoid, these anomalies.

Persons who are likely to be effected by the legislation, and their advisers, will be well advised to gain an early familiarity with it and stay well ahead of it as it comes into force.

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