



AUGUST 2011 - SHIPPING AND LOGISTICS – RECENT PPSA JUDGMENTS

In May 2011, the Court of Appeal rendered two judgments in relation to the Personal Property Securities Act 1999 (“PPSA”) which are relevant to the warehousing and logistics industry and other maritime and transport operators.

Packers’ lien

The facts in *Toll Logistics (NZ) Limited v McKay*, Court of Appeal, 16 May 2011, were as follows: The warehouse was storing \$2.5m worth of goods for a customer who owed the warehouse \$300,000 in fees for storage, packing and arranging for carriage of the goods. The customer went into receivership. The customer’s bank had a general security agreement over all of the customer’s assets. Its security interest was registered on the register established under the PPSA. The question was whether the warehouse could rely on a lien and keep some of the goods to satisfy its outstanding bills, or whether the customer’s bank was entitled to the entire value of the goods stored at the warehouse’s premises.

The warehouse claimed priority for its claim under section 93 of the PPSA on the basis of a packers’ lien at common law. Section 93 of the PPSA provides that a lien arising out of materials or services provided in respect of goods that are subject to a security interest in the same goods has priority over that security interest, if certain circumstances are met. The Court held that New Zealand law does not recognise a packers’ general lien at common law, in the absence of custom (and that no such custom exists in New Zealand).

The contract between the warehouse and the customer also contained a contractual lien. However, it was common ground between the parties that, if the warehouse could only rely on its contractual lien, its claim would be postponed to the bank’s interest. A contractual lien itself is a security interest in terms of the PPSA and ranks in priority behind any prior registered security interests. It is noted here that care should be taken with the drafting of contractual lien clauses, so as to avoid them being construed as excluding common law liens which might have priority under s93 of the PPSA.

We note that section 23 of the Carriage of Goods Act 1979 (“COGA”) provides that a carrier has a lien over goods in its possession, for recovery of freight and expenses incurred in respect of the carriage of those goods. Although the COGA generally applies to all services of carriage including services incidental to carriage (which may include warehousing), the lien is only available to persons who perform carriage in the ordinary sense of the word. The lien is not available to recover sums incurred with services incidental to carriage alone.

Bailment

Warehouses and carriers are commonly bailees of goods for reward. Bailment arises by operation of law, when a party (the bailee) knowingly has possession of goods that it does not own. Bailment can exist independently of contract.

In *Rabobank New Zealand Ltd v McAnulty*, Court of Appeal, 23 May 2011, the PPSA definition ‘a lease for a term of more than 1 year’ was discussed. Section 17 of the PPSA defines a security interest as including a lease for a term of more than 1 year. In turn, section 16 defines a ‘lease for a term of more than 1 year’ as including ‘a bailment for the term of more than 1 year, but excluding a lease by a lessor who is not regularly engaged in the business of leasing goods’.

In this case, the owners of a stallion entered into an agreement with a stud farm to care for the horse and arrange service nominations, for three years. The horse owners did not register a security interest in the PPSA against the farm. They did not receive any remuneration from the stud farm. Instead, they paid a portion of the service fees earned by the horse to the stud farm. The stud farm's bank had a general security agreement over the stud farm's assets and had registered its security interest on the PPSA Register. The stud farm went into receivership. The owners removed the horse from the farm. The bank argued that its security interest extended over the value of the horse and that the owners were liable in conversion by removing the horse from the farm.

In the circumstances, the Court had to decide whether the agreement between the horse owners and the farm was "a lease for the term of more than 1 year". If that was so, the horse owners should have registered a security interest in the PPSA and, by failing to do so, their interest in the horse would be postponed in priority to the bank's security interest. The Court first decided that the "lease for a term of more than 1 year, including a bailment for the term of more than 1 year, but excluding a lease by a lessor who is not regularly engaged in the business of leasing goods" must be interpreted by importing the words 'or bailment' into the sentence, as follows: "a bailment for the term of more than 1 year, but excluding a lease *or bailment* by a lessor (*bailor*) who is not regularly engaged in the business of leasing *or bailing* goods'.

The owners of the stallion argued that they were not regularly engaged in the business of bailing as they had only entered into this one agreement. In addition, they argued that they did not receive remuneration under the agreement from the farm to whom they had bailed the horse, but instead, that the farm received consideration for looking after the horse. The Court decided that the words 'in the business of leasing goods' should be read as importing a requirement that the owner actually intended to profit from the bailment or lease. This would exclude gratuitous bailments where the bailor was not receiving any payment for the use of the goods and bailments where the bailee, not the bailor, was in the business of bailments. The Court held that the owners of the horse were in the business of maintaining and profiting from their stallion, not in the business of bailing goods. With respect to the meaning of the word 'regularly' in section 16 PPSA, the Court held that each case would depend on its facts, although it may be difficult to say that "regular" includes a single isolated transaction.

For storage holders (and their banks), this decision may clarify the position with respect to goods stored in warehouses for a period longer than a year. Also, owners of ships under construction (often in a yard for a period exceeding one year) may find some comfort in the decision. However, any lessors and bailors for reward who lease or bail their goods for a period of more than 1 year (owners of vessels on bareboat charter and owners of leased out cargo handling equipment, for example) are reminded to register their interest on the PPSA register within ten days.

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