



MCCLOY V MANUKAU INSTITUTE OF TECHNOLOGY [2013] NZHC 936

FACTS

The case involved a dispute between the receivers to a New Zealand construction contractor (**Mainzeal**), and a principal (**Hobson Gardens**, 2nd respondent) over equipment that Mainzeal had been using to complete some works for Hobson Gardens, on Hobson Gardens' property, the Manukau Institute of Technology. The construction contract provided that if Mainzeal entered receivership, and the receiver did not take over the works, Mainzeal's interest in the equipment would be transferred to Hobson Gardens and Hobson Gardens could terminate the contract.

Mainzeal did enter into receivership and its receiver (**McCloy**), who was appointed by the Bank of New Zealand (**BNZ**) which had a registered interest in the equipment, declined to take over the works. Hobson Gardens then terminated the contract, and asserted that it now owned the equipment. McCloy claimed that it was entitled to the equipment as a result of BNZ's registered interest, and applied to the Court for directions.

ISSUE

It was established that BNZ had a valid registered security interest in the equipment. The receivers claimed that Hobson Gardens' 'step-in' rights under the construction contract were a security interest under the New Zealand *Personal Property Securities Act 1999* (NZ) (**NZ PPSA**), but under the priority rules, BNZ's interest in the equipment had priority over Hobson Gardens' interest.

Hobson Gardens resisted this argument and submitted that its step-in rights were not a security interest and accordingly the NZ PPSA priority rules did not apply. If this were correct, Hobson Gardens may then have been able to maintain its rights under the contract to the equipment.

FINDING

The Court held that the intent and the wording of the 'step-in rights' clause of the contract amounted to a security interest in accordance with s 17 of the NZ PPSA which provides that a security interest means '*an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation*'.

The priority rules in the NZ PPSA provide that a perfected security interest prevails over an unperfected security interest. BNZ's security interest was perfected by virtue of its registration, but Hobson Gardens had not registered. Therefore BNZ's security interest prevailed.

QUOTE

Collins J at [31]:

"When both the test and purpose of cl 16.7.1 [the step-in rights clause] of the construction contract is understood it becomes clear that the clause is a 'transaction that in substance secures payment or performance of [Mainzeal's] obligation^() to Hobson Gardens. I therefore conclude that Hobson Gardens acquired a security interest in the hoists when cl 16.7.1 was invoked by Hobson Gardens on 21 February 2013."*

(*) Per Section 17(1)(a) NZ PPSA

IMPACT

The *McCloy* judgment strongly supports the view that the Australian step-in clauses are likely to give rise to a security interest under the Australian *Personal Property Securities Act 2009* (Cth) (**PPSA**). Any rights over personal property should be perfected and protected by registration on the Personal Properties Securities Register as soon as possible.

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