IN THE HIGH COURT OF NEW ZEALAND
MASTERTON REGISTRY

CIV-2013-435-109
[2013] NZHC 3321

IN THE MATTER OF	a claim for conversion
BETWEEN	BANK OF NEW ZEALAND Plaintiff
AND	WAEWAEPA STATION 2002 LIMITED Defendant

Hearing: 10 December 2013

Appearances: G J Toebes for Plaintiff
D M Hughes for Defendant

Judgment: 12 December 2013

JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on 12 December 2013 at 11.00 am pursuant to Rule 11.5 of the High Court Rules.

.....
Registrar/Deputy Registrar

Solicitors:
JT Law (Justin Toebes) Wellington, for Plaintiff
Kensington Swan (D M Hughes/L M Van) Auckland for Defendant

[1] The Bank of New Zealand sues Waewaepa Station 2002 Ltd for conversion of 1,004 six and seven year old ewes, and 1,347 lambs. These sheep formed part of the collateral under a general security agreement given by Te Rimu Station Ltd to the bank under a general security agreement of 16 January 2008.

[2] The bank had lent Te Rimu $2,275,000 under a term loan. The principal under the term loan became due on 14 December 2012. The month before, on 21 November, Mr Shaun Currie, a director of both Te Rimu and Waewaepa, arranged for the sheep to be transported from Te Rimu to Waewaepa. The bank says that it became entitled to possession of the sheep after they had been transported off Te Rimu without its consent, and Te Rimu had defaulted in repaying the term loan. The bank made demands on Waewaepa on 25 January and 18 March 2013 to return the sheep or to pay the value of the sheep to the bank. The bank says that the failure to comply with these demands amounted to conversion. It claims damages being the value of the sheep – $196,530 plus GST. It has applied for summary judgment.

[3] Waewaepa opposes. It says that it bought the sheep from Te Rimu: the purchase was an authorised dealing under s 45 of the Personal Property Securities Act 1999. Te Rimu's sale of the sheep was in the ordinary course of business of Te Rimu under s 53 of the Personal Property Securities Act. It has taken the sheep free of the bank's security interest. It also contests the amount of the bank's claim.

[4] Waewaepa did not pay Te Rimu for the sheep. It says that it was entitled to set off the purchase price for the sheep against advances that it had made to Te Rimu. It had been funding Te Rimu's operations.

[5] Many of the facts are not in dispute. Waewaepa runs a dry-stock farming operation at Waitahora Road, in the northern Wairarapa. The company was incorporated in March 2002. Initially the directors of the company were Mr Shaun Currie and Mr Robert McVitty. Robert McVitty resigned on 9 April 2011. The shareholders are 50 % Currie family interests and 50% McVitty family interests.

[6] Other companies associated with Mr Robert McVitty are in some form of insolvency administration – McVitty Properties Ltd (in receivership and liquidation) and Patoka Dairies Ltd (in receivership and in liquidation).

[7] Te Rimu was incorporated in March 2005. It also operated a dry-stock farming operation. Its farm was at Rimu Road, Pongaroa, also in the northern Wairarapa. Its shareholders are Waewaepa as to 50% and the trustees of the McVitty Family Trust as to 50%.

[8] At the end of 2012 the directors of Te Rimu were Shaun Currie and James McVitty, son of Robert McVitty. James McVitty resigned on 23 January 2013. Mr Robert McVitty had been director but he resigned in April 2012 and was replaced by James, who apparently lives in Singapore.

[9] For this case it is relevant that Shaun Currie was the hands-on director for both Waewaepa and Te Rimu at the end of 2012.

[10] In late 2007 and early 2008 Te Rimu had arranged finance from the bank. It also arranged finance from Rabobank, but that aspect is not relevant to this case. The facilities provided by the bank comprised a revolving credit facility with an initial limit of $600,000 and a customised fixed rate term loan for $2,275,000 which was repayable on 14 December 2012.

[11] The term loan agreement required various securities to be given, including a perfected security interest in all present and after acquired property of Te Rimu. On 16 January 2008 Robert McVitty and Shaun Currie signed a general security agreement as directors of Te Rimu. The general security agreement includes provisions for livestock. In other respects, it has standard provisions for a general security agreement under the Personal Property Securities Act. Te Rimu granted the bank a security interest in "secured property", which is defined to include all of Te Rimu's present and after acquired property and in all personal property in which it has rights, whether now or in the future. The property over which security was granted includes livestock – including future-acquired livestock.

[12] The following provisions are relevant:

> 6.1 We (Te Rimu) will not do or attempt to do any of the following without your consent:
>
> > 6.1.1 dispose of, or part or deal with, any secured property (except as permitted by clause 6.2) ...
>
> 6.2 We may:
>
> > 6.2.1 dispose of, or part or deal with, any Inventory in the ordinary course of, and for the purpose of carrying on, our ordinary course of business, on ordinary arms-length commercial terms and for proper value, on the condition that we deposit any Proceeds of that inventory we receive in our usual working current account with you or such account as may from time to time be specified by you; and
> >
> > 6.2.2 dispose of, or part or deal with, any Livestock (whether Inventory or not) in the ordinary course of, and for the purpose of carrying on, our ordinary business (which for the avoidance of doubt does not include the disposal of, or the parting or dealing with, any pedigree, bloodstock, thoroughbred or other high value Livestock held by us as equipment), on ordinary arms-length commercial terms and for proper value, on the condition that we deposit any proceeds of that Livestock we receive in our usual working current account with you or such account as may from time to time be specified by you ...
>
> 9.1 Without limiting the generality of any other provision in this agreement, where any of the Secured Property is Livestock we will: ...
>
> > 9.1.1 Take all steps and use all means that a prudent person engaged in a similar business on undertaking to us would take or use to keep that Livestock free from disease, and in good condition.
> >
> > 9.1.2 Properly and skilfully manage that livestock and only employ properly skilled and qualified persons to assist us in doing so.
> >
> > ...
> >
> > 9.1.7 not, without your consent, move that livestock from the land where it is kept, or permit any other livestock to be kept on that land except where such livestock is clearly distinguishable from the livestock that is secured property, as described in the latest inventory we have provided to you. ...

[13] The general security agreement includes these events of default:

> 14.1.1 If default is made in the payment of any secured amounts;

> 14.1.2 if we fail to perform or comply with any of our other obligations to you, whether under this agreement, any Collateral Security or any other agreement of any kind with you, or there is an event of default (however described) under any such agreement or security, or any Surety fails to perform or comply with any of that Surety's obligations to you ...

[14] Part 15 of the general security agreement sets out the bank's rights on enforcement.

> 15.1 At any time after an Event of Default occurs you may at your option, exercisable by notice in writing to us (irrespective of any agreement in writing or course of dealing to the contrary, or any concession or delay or previous waiver by you) treat the secured amounts as payable immediately and may immediately or at any later time (in addition to the exercise and enforcement of all or any of your other Rights) do all or any of the following things without giving us any or further notice of demand:
>
> 15.1.1.1 Take possession of and realise the Secured Property (and for this purpose take any proceedings in our name or otherwise as you think fit and give valid receipts).

The rights of enforcement also include the right to appoint receivers.

[15] It is not in dispute that the sheep the subject of this proceeding are livestock under the general security agreement. Under the general security agreement "inventory" and "proceeds" have the meanings given in s 16 of the Personal Property Securities Act. The bank's security interest under the general security agreement was perfected by registration of a financing statement on the Personal Property Securities register on 29 November 2007.

[16] Mr Currie says that even though he was a director of Te Rimu, in 2008 Robert McVitty took over the running of Te Rimu and he had little ability to review the farm's operations or management. In 2010 managers from the bank contacted him. They told him that Te Rimu was reaching its overdraft limit and that as director he needed to take responsibility for that. He says that he then became aware that Robert McVitty was not running the business in a proper manner. He took steps to become more involved in the management of Te Rimu. Waewaepa injected a substantial amount of money to allow Te Rimu to continue to operate. He says that with his assuming a greater role in running Te Rimu, the bank began reducing the

overdraft limit. That meant that Waewaepa had to continue to fund Te Rimu's operations from its own funds. He complains that the bank was being heavy–handed for no reason at all. The bank confirms that by the end of 2012 Te Rimu's overdraft had been reduced to next to nil. Te Rimu was not in default under the overdraft facility. In fact at one stage there were funds in credit that were applied against the term loan.

[17] Mr Currie has put in evidence draft 2012 financial statements of Waewaepa showing that in addition to its equity investment in Te Rimu, Waewaepa had made advances amounting to $244,015 as at 30 June 2012. Mr Currie says that there are further amounts to be taken into account.[1]

[18] On 14 December 2012, Te Rimu was required to repay the term loan of $2,275,000. Te Rimu did not repay. Its failure to pay the loan was an event of default under the general security agreement and entitled the bank to take enforcement steps.

[19] The bank made written demand on Te Rimu on 14 December 2012. In its demand the bank included this:

> We formally ask that either the sale proceeds from the 1,004 ewes, 1300 lambs and 70 mixed age cows recently moved off the farm be paid into Te Rimu Station Limited's account with the Bank of New Zealand and/or the stock returned to the farm forthwith.

[20] The bank appointed receivers of Te Rimu on 1 February 2013 under the general security agreement. The Official Assignee was appointed liquidator on 12 April 2013 on the application of the bank. Te Rimu has been sold, but the proceeds of sale have not cleared the debt to the bank. According to the statement of claim, the amount still owing is more than $1,000,000.

[21] The bank has registered a financing change statement under s 90 of the Personal Property Securities Act, but it is common ground that as far as the claim in conversion is concerned that does not add to the bank's rights.

---

[1] Transport – $2,000, accountant's fees – $2,700, grazing fees – $12,000, farm manager's holiday pay – $3,800, vet fees – $600, and his own wages and travel – $57,000.

[22] Mr Currie's evidence as to the removal of the sheep from Te Rimu is that he had visited Te Rimu to assess feed cover and had consulted with Te Rimu's farm manager, Mr Healey. Mr Currie says that the feed cover was poor and was insufficient to feed all the stock on Te Rimu. That resulted from dry conditions – this was near the start of the drought that was to hit most of New Zealand over the 2012/2013 summer. The bank had cut off funding to Te Rimu and there had been insufficient funds available to buy and apply fertiliser. He says that some of the stock on the land was in poor condition. That included the six to seven year old ewes, which had lambs on foot. Many of the ewes had little or no teeth and were rapidly losing condition. He would not be able to give the ewes more grass, without putting other stock on the farm at jeopardy. It was not possible to sell the stock on the market because the lambs were too light and small to obtain the prices normally expected. They were likely to be unsaleable. He did not consider the livestock to be in a condition to be transported to Feilding for sale because they were not fit to travel. Carrying the livestock and then holding them for sale would take about 30 hours. The lambs and ewes would require feeding every few hours. Deaths would have been inevitable. He decided to re-locate the sheep – that is the 1,004 ewes and the 1,349 lambs, to Waewaepa so that their condition would not deteriorate further. At the time there was other stock on the finishing block at Waewaepa. Because the Te Rimu sheep were deteriorating, he decided to put down the existing stock at Waewaepa to make room for the six to seven year old ewes. He says that was the only effective way of managing the transfer of livestock, to ensure that they remained in a healthy condition. Waewaepa carried the cost of putting down the existing livestock as they had to be killed at lighter weights. He says that resulted in losses to Waewaepa of approximately $30,000 because of the lambs being killed at lighter weights. To carry this out he had to enlist the help of Waewaepa staff at Waewaepa's cost. His case is that moving the sheep from Te Rimu to Waewaepa was governed by animal welfare concerns.

[23] In early November he had the sheep at Te Rimu valued by Mr Phillip Champion, a livestock agent with CMP Rangitikei Ltd. Mr Champion valued the livestock at $37.50 per head, giving a sum of $89,025 plus GST of $13,353.75, a total of $102,378.75. Valuing sheep is not ordinarily required to address animal welfare concerns, but may be done for business reasons. In this case the value was

applied to fix the price for the sheep to be transferred to Waewaepa. Waewaepa applied the $102,378.75 in reduction of the debt Te Rimu owed it. Waewaepa puts the date this was done as 9 November 2012. Trucking invoices show that the sheep were taken to Waewaepa on 21 November 2012.

[24] Mr Edwin Read, of Osborne Read of Masterton, accountant for Te Rimu, said in an email of 12 December 2012 to the bank:

> Please note that 1004 five year ewes and 1600 lambs sales to Waewaepa were included in the previous budget released two weeks ago. They show as income in the month of December to the company and repayment of 'inter-company borrowings'. The sales appear to be at market values although no value has been sighted by us. The sale of this stock has not flowed into the TRL bank account, which I assume is the issue BNZ have given their security over stock.

[25] Waewaepa says that it bought the sheep from Te Rimu at the price fixed by Mr Champion. It has not paid Te Rimu or the bank for the sheep but has applied the purchase price of $102,378.75 against Te Rimu's debt to it.

[26] The bank made further demands by writing on 25 January 2013 and 18 March 2013. These demands were addressed to Waewaepa Station and called for return of the sheep. The first was sent by email. The second was also delivered physically and attached to the front door of the main residence of Waewaepa Station. Waewaepa did not return the sheep and has not paid for anything to the bank for the sheep.

[27] In February 2013 the receivers appointed by the bank received a proposal sent on behalf of Mr Currie to buy various assets of Te Rimu, including the sheep in this case. Nothing came of that proposal.

The plaintiff's claim in conversion

[28] Before considering the affirmative defences raised by Waewaepa, it is necessary to set out how the bank makes out its claim in conversion. In *Kuwait Airways Corporation v Iraqi Airways Co*, Lord Nicholls said: [2]

---

[2] *Kuwait Airways Corporation v Iraqi Airways Co (Nos. 4 and 5)* [2002] 2 AC 883, 1084 at [39].

> [39] Conversion of goods, can occur in so many different circumstances that framing a precise definition of universal application is well nigh impossible. In general, the basic features of the tort are threefold. First, the defendant's conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference. If these cause damage they may give rise to claims for trespass or in negligence, but they do not constitute conversion.
>
> ...
>
> [41] Whether the owner is excluded from possession may sometimes depend upon whether the wrongdoer exercised dominion over the goods. Then the intention with which acts were done may be material. The ferryman who turned the plaintiff's horses off the Birkenhead to Liverpool ferry was guilty of conversion if he intended to exercise dominion over them, but not otherwise. ...
>
> [42] Similarly, mere unauthorised retention of another's goods is not conversion of them. Mere possession of another's goods without title is not necessarily inconsistent with the rights of the owner. To constitute conversion, detention must be adverse to the owner, excluding him from the goods. It must be accompanied by an intention to keep the goods. Whether the existence of this intention can properly be inferred depends on the circumstances of the case. A demand and refusal to deliver up the goods are the usual way of proving an intention to keep goods adverse to the owner, but this is not the only way.

The bank's right to possession

[29] To be able to sue in conversion, the bank must have either actual possession of the goods in issue or the immediate right to possession of the goods at the time the act of conversion was committed.

[30] There are a number of matters that support the bank's right to possession of the sheep. There were relevant events of default under clause 14 of the general security agreement. These were the failure of Te Rimu to repay the term loan on 14 December 2012 and the fact that Te Rimu, through the acts of its director (Mr Currie) and farm manager (Mr Healey) allowed the sheep to be removed from Te Rimu without the bank's consent. Upon those defaults, and having given notice on 14 December 2012, the bank became entitled to take possession of the secured property, which includes the sheep in this case, under clause 15.1.1.1 of the general security agreement.

[31] The bank's security interest in the sheep continued notwithstanding the sale of the sheep to Waewaepa. For this part of its case the bank relies on s 45 of the Personal Property Securities Act:

> **45 Continuation of security interests in proceeds**
>
> (1) Except as otherwise provided in this Act, a security interest in collateral that is dealt with or otherwise gives rise to proceeds—
>
> (a) continues in the collateral, unless the secured party expressly or impliedly authorised the dealing; and
>
> (b) extends to the proceeds.
>
> (2) The amount secured by a security interest in collateral and the proceeds is limited to the value of the collateral at the date of the dealing that gave rise to the proceeds, if the secured party enforces the security interest against both the collateral and the proceeds.

It is to be noted at this stage that that aspect is subject to Waewaepa's claim that it has a defence under that section in that the bank authorised the sale to Waewaepa. That affirmative defence will be considered later.

[32] The bank has a right to possession under s 109 of the Personal Property Securities Act 1999. It can invoke Te Rimu's defaults under the general security agreement. The sheep were also relevantly at risk under s 109(1)(b) because they had been removed.

[33] The bank says that it was not required to give a notice under ss 128 and 129 of the Property Law Act 2007. For that, it relies on s 135. Section 128(1) says:

> **128 Notice must be given to current mortgagor of mortgaged goods of exercise of powers**
>
> (1) No amounts secured by a mortgage over goods are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise any power to sell the mortgaged goods, by reason of a default, unless—
>
> (a) a notice complying with section 129 has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor; and
>
> (b) on the expiry of the period specified in the notice, the default has not been remedied.

[34] The matters restrained under s 128 are the power to accelerate a loan under a mortgage of goods and to exercise any power of sale under a mortgage of goods. The matter in question in this case is the power to take possession of goods. Where there is a mortgage of land, a notice requiring defaults to be remedied is required for three matters: acceleration, possession of the land and sale of the land – see ss 119 and 120 of the Property Law Act. For a mortgage of goods there are only two matters: acceleration and sale, but not possession - see ss 128 and 129 of the Property Law Act.

[35] Section 135 of the Property Law Act provides that notices under s 128 are not required in certain cases. One of those cases is when the mortgage over goods arises under a mortgage debenture – s 135(1)(e). "Mortgage debenture" is defined in s 4:

> An instrument creating a charge on property of a body corporate that comprises all, or substantially all, of the assets of the body corporate.

[36] The bank's general security agreement is a mortgage debenture within that definition. Section 135 provides an additional ground for not requiring the bank to give notice under s 128.

[37] The bank has established that from 14 December 2012, when it gave notice to Te Rimu, it was entitled to immediate possession of the sheep. That claim to immediate possession of the sheep is, of course, subject to any affirmative defences that Waewaepa is able to put up. But for the present, subject to those defences, the right to immediate possession to the sheep had accrued. It is only necessary to record that the bank's right to possession had not accrued when Waewaepa removed the sheep from Te Rimu before 14 December 2012. That is not fatal because the bank can rely on later events to show it obtained a right to possession.

[38] In opposition Waewaepa submitted that by the time the bank's right to possession accrued Te Rimu no longer had the sheep. The bank could not accordingly sue in conversion. Instead Te Rimu through its receivers or liquidator should bring any claim in conversion. The bank is the wrong plaintiff.

[39] That submission misses the point. As a secured creditor the bank has a range of remedies and it may generally choose which remedies to take and in which order to take them. By way of illustration only, if a mortgagee of land also has the power to put the mortgagor into receivership (as when the borrower is a company that has given securities providing for receivership as a remedy for default), the mortgagee may appoint receivers, who may take possession or sell the land, or it may exercise those powers directly itself. If the original mortgagor has transferred the land subject to the mortgage, the mortgagee may still exercise its rights against the land. It does not lose its rights to enforce the mortgage if a default only occurs after the change of ownership. There is no reason why the rights of a mortgagee of goods should be more limited. The rights of enforcement arise on default. Those rights include the right to possession. Under the Personal Property Securities Act the mortgagee may lose its security in some cases after a transfer to a third party, but that is not the matter in issue at this point. Where a right to possession arises only on default under some security, that right to possession may provide the basis for a claim for a subsequent conversion, even if the chattel in issue had passed to a third party before there was a relevant default under the security. A third party purchaser may face a claim for conversion, even if the plaintiff is a secured creditor relying on a default that occurred after the purchase.

The acts of conversion

[40] The act of conversion that the bank relies on in its pleadings is Waewaepa's refusal to comply with the bank's demands in January and March 2013 for the return of the sheep. It is not disputed that Waewaepa did not return the sheep and has not paid for them. That refusal to comply with the bank's demands amounts to the assertion of a right adverse to the bank's right to immediate possession of the sheep.

[41] There are two further aspects to this. In an affidavit in April 2013 in support of Waewaepa's application to set aside a statutory demand issued by the bank, Mr Currie said that the sheep are not identifiable (in part) because they were never tagged or earmarked by Te Rimu. It would not be possible to return the livestock to the bank. That shows that Waewaepa has not kept the sheep it removed from Te Rimu separate and apart from its own livestock. By allowing them to become

inter-mixed, Waewaepa has prevented the sheep from being traceable. That is dealing with the sheep in a manner inconsistent with any right to possession held by the bank. It is an act of conversion of the sort Lord Nicholls had in mind in *Kuwait Airways*.

[42] Further, Waewaepa has claimed that it took the sheep clear of the bank's security interest. If that plea is sound, that is a sound defence to the claim. But if it is not a sound defence, advancing that defence without a proper basis may be an act of conversion as well.

[43] It is common ground that the Bank did not consent to Waewaepa keeping the sheep. Subject to Waewaepa's affirmative defences, the bank has established that Waewaepa converted the sheep.

How should the transfer of the sheep to Waewaepa be characterised?

[44] Before the merits of the defences can be considered, it is necessary to work out the legal effect of transferring the sheep from Te Rimu to Waewaepa. The parties are apart on how the transfer of ownership of the sheep should be characterised. The bank's case is that Waewaepa indulged in self-help – the kind of unilateral action that an unsecured creditor might take to improve its position when a debtor is insolvent.

[45] It relies on these:

(1) Mr Currie was one of two directors of Te Rimu. He had left the running of Te Rimu to Robert McVitty. He had no authority to sell Te Rimu's sheep without a board resolution and James McVitty, the other director, disapproved the sale.

(ii) In December 2012 accountants acting for Te Rimu had recorded the transfer by way of journal entry but there was otherwise no document evidencing the transaction.

(iii) It takes Mr Currie's statement in his affidavit, "Waewaepa subsequently decided to purchase the livestock", as referring to an intention formed after the sheep had been moved to Waewaepa.

(iv) The offer to purchase in the letter of 2 February 2013 is inconsistent with Waewaepa have already bought the sheep.

(v) Although James McVitty resigned as director at the end of January 2013, Mr Currie could not sell the sheep then, because the bank immediately appointed the receivers.

[46] For Waewaepa it is arguable for summary judgment purposes that Te Rimu agreed to sell the sheep to Waewaepa. Mr Currie was on both sides of the transaction. He was director of both companies. He was the director on the spot. It is arguable that a director of a farming company who is involved in day-to-day management of the farm has implied authority to buy and sell livestock without having to call a directors' meeting. The other director was overseas. Mr Currie had had to become more involved in the management of Te Rimu after the bank alerted him to its problem. He arranged for Waewaepa to fund Te Rimu's operations, when the bank cut the overdraft. The bank does not take the point that he had no authority to incur credit on behalf of Te Rimu. Nor does the bank contend that he did not have authority to send other lambs to the Feilding sales – for which the bank received the proceeds. His participation as agent for both sides of the transaction means that he could bring about the transaction on behalf of each side. He supplied the requisite assent.

[47] The lack of documents evidencing the sale is a weakness in the case for a sale, but for summary judgment purposes it is not fatal. At the hearing Mr Hughes tendered a photocopy of a handwritten document that may have been an invoice issued to Waewaepa for the sheep. It had not been put in evidence. For this part of the case I disregard it. Even so, it remains arguable that there was a sale of the sheep rather than a unilateral seizure. The finding that it is arguable that there was a sale still leaves open other issues under ss 45 and 53 of the Personal Property Securities Act.

Waewaepa's defences

[48] The bank has shown liability for conversion on the part of Waewaepa, subject to the defences raised under ss 45 and 53 of the Personal Property Securities Act. Those defences are based on Te Rimu having sold the sheep to Waewaepa. As this is a summary judgment application, the bank has the overall onus to show that they cannot be arguable defences.

Does Waewaepa have a defence under s 53 of the Personal Property Securities Act?

[49] It is convenient to deal with s 53 first:

> **53 Buyer or lessee of goods sold or leased in ordinary course of business takes goods free of certain security interests**
>
> (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.
>
> (2) This section prevails over section 3 of the Mercantile Law Act 1908 and section 27 of the Sale of Goods Act 1908 where this section applies and either or both of those sections apply.

[50] In this case it raises three questions:

(a) What was the ordinary course of business of Te Rimu?

(b) Was the sale of sheep to Waewaepa made in the ordinary course of that business?

(c) Did Waewaepa know that the sale of the sheep constituted a breach of the general security agreement under which the bank's security interest in the sheep was created?

[51] There is guidance on the application of s 53 in decisions of the Court of Appeal in *Tubbs v Ruby 2005 Ltd* and *StockCo Ltd v Gibson*[3] and in decisions of Canadian courts under provincial legislation from which New Zealand's Personal Property Securities Act 1999 is drawn. In *Tubbs v Ruby 2005 Ltd* and *StockCo Ltd v Gibson* the Court of Appeal quoted with approval the comments of Linden J in *Fairline Boats Ltd v Leger*:[4]

> 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, so the Legislature exempts buyers in the ordinary course of business from these onerous provisions, even when they know that a lien is in existence.

[52] In *StockCo Ltd v Gibson* the Court of Appeal also helpfully gave this fuller explanation:[5]

> 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.
>
> 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 in those circumstances the interest of the buyer will be preferred to that of the seller's financier. This is

---

3 *Tubbs v Ruby 2005 Ltd* [2010] NZCA 353, (2010) 9 NZBLC 103,051; *StockCo Ltd v Gibson* [2012] NZCA 330, [2012] 11 CLC 98-010.

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

5 *StockCo Ltd v Gibson*, above n 3, at [46]–[51].

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.[6] 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.

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* (at [29]), 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.[7] 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.

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.

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 ordinary course of that business.[8] ...

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.

[53] I take a Canadian case to illustrate how these principles are applied, *Estevan Credit Union v Dyer*.[9] The facts in the headnote are:

---

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

7 *369413 Alberta Ltd v Pocklington* [2001] 4 WWR (ABCA) at [29].

8 *ORIX New Zealand Ltd v Milne* [2007] 3 NZLR 637 at [66], (2007) 3 NZCCLR 1000.

9 *Estevan Credit Union v Dyer* (1997) 146 DLR (4th) 490 (Sask) QB.

> A credit union held security on the inventory of a car dealership. The dealership was in financial difficulties and sold 13 used cars to a friend. It paid the proceeds to the manufacturer's credit agency, rather than to the credit union to reduce its line of credit. The credit union brought an action for a declaration that it had priority over the buyer.

The court held that the sale was not in the ordinary course of business because the buyer knew that the car dealership was in financial difficulties, the buyer was helping out a friend, and the buyer was aware that the proceeds of sale were paid to the manufacturer's credit agency which was not entitled to the proceeds of sale of used cars.

What was the "ordinary course of business" of Te Rimu?

[54] Mr Currie describes the business of Te Rimu as a "sheep and beef business" farming in the Wairarapa. In the course of Te Rimu's business, it is usual for it to breed, but also buy, rear and sell livestock.

[55] No doubt that includes sales effected through stock and station agents, and purchases made by agents on behalf of meat companies. I also accept that it might include paddock sales between farmers, without involving agents. Such transactions are typically subject to the taxing provisions of the Goods and Services Tax Act 1985 and are documented with tax invoices under that act. Typically, appropriate accounting records of such transactions are also made and kept.

[56] It is also necessary to recognise that dry-stock farming is a seasonal business, and that changes to the normal pattern of doing business may arise because of seasonal and unseasonal changes, particularly adverse weather conditions. Farmers have to be able to cope with adverse conditions, such as storms, floods and droughts. Those events may require departures from the normal pattern of doing business, but they do not mean that transactions to deal with those conditions are outside the ordinary course of business. If weather changes reduce the carrying capacity of a farm – temporarily or permanently – the farmer may have to make fresh stocking arrangements. De-stocking the farm may include sales. For present purposes, for Waewaepa it is arguable that a sale of livestock by Te Rimu dictated by drought conditions may be in the ordinary course of business.

[57] The bank submitted that only sales of livestock at the Feilding sales could be in the ordinary course of business, but that takes too narrow a view of the ordinary course of business.

[58] It is important to note however that all these sales of livestock involve dispositions to third parties. Waewaepa has not suggested that it was part of the ordinary business of Te Rimu to transfer livestock to related parties.

Was the sale of the sheep in the ordinary course of business of Te Rimu?

[59] In *StockCo Ltd v Gibson*, the Court of Appeal referred to two Canadian decisions mentioned above: *Fairline Boats Ltd v Leger*[10] and *369413 Alberta Ltd v Pocklington*[11] to identify potentially relevant factors:

(a) where the agreement was made;

(b) parties to the sale;

(c) quantity of goods;

(d) price charged;

(e) the nature and significance of the transaction;

(f) the reason for the transaction;

(g) the frequency of the transaction; and

(h) the arms-length nature of the transaction.

[60] It is important to recognise that that is not a mandatory checklist. It is no more than a guide to the matters that may arise for consideration. Not all these matters may be relevant; and in some cases, other matters may require consideration. The case must be considered in the light of the purpose of the test identified by the Court of Appeal in *Stockco Ltd v Gibson*.

---

10 *Fairline Boats Ltd v Leger*, above n 4, at 220–221.
11 *369143 Alberta Ltd v Pocklington*, above n 7.

[61] For Waewaepa there are some matters that are arguable for it and that I put to one side as not counting against it.

(a) Mr Currie's authority. The bank contended that Mr Currie was only one of two directors of Te Rimu until 23 January 2013, when Mr James McVitty resigned. The bank's argument is that Te Rimu could not sell the sheep to Waewaepa because that would require a resolution of both directors. For Waewaepa it is arguable that Mr Currie did have authority to decide alone to deal with sheep on the station. Mr James McVitty was in Singapore. Mr Currie was the man on the spot. Decisions by farming companies to sell livestock are matters typically delegated – e.g. to a director or to the farm manager. The fact that Mr Currie acted alone has not been shown to take the transaction out of the ordinary.

(b) Quantity of sheep. There is very little evidence about the size of Te Rimu's farming operation. There is no evidence about the quantities of sheep Te Rimu would sell in a year or on any single occasion. The financial statements of Waewaepa for the year ending 30 June 2012 give some indication of livestock transactions by a substantial Wairarapa station. Waewaepa's sheep trading account for the year ending 30 June 2012 shows 16,396 sold altogether, including 8,427 trade lambs. There were no sales of mixed-age ewes, but 1,674 mixed-age ewes were sold the year before. Waewaepa's closing stock included 27,361 sheep. It is arguable that if Te Rimu was on the same scale, then the sale of the sheep in December 2012 was not out of the ordinary.

(c) The condition of the sheep. The bank refers to Mr Currie's statement that the lambs were likely to be unsaleable, because they were too light and too small. That may be taking his statement out of context. A sale of those lambs, even in that condition, to a third party could still be in the ordinary course of business. On the other hand, I also

make the point below that the condition of sheep does not count as bringing this sale within the ordinary course of business.

(d) Value of sheep. For reasons that I will give when dealing with the matter of quantum, for Waewaepa it is arguable that the prices at which the sheep were transferred were not out of the ordinary.

[62] On the other hand, these factors do count: Te Rimu was in serious financial difficulties; this was a related-parties transaction; Mr Currie had a full appreciation of the situation and his knowledge can be attributed to Waewaepa; the effect of the transaction was to enable Waewaepa to receive more in reduction of the debt that Te Rimu owed than it would in the liquidation; the bank was deprived of the proceeds of sale of the sheep to which it was entitled under its security and Mr Currie knew it. Associated with these matters are these features: Mr Currie acted on both sides of the transaction; and there was not the documentation that would go with a sale in the ordinary course of business. These two features are telltale signs that this was not ordinary. When these matters are all taken together, this sale was not in the ordinary course of business.

[63] Te Rimu was in very serious financial difficulties. The term loan to the bank was about to fall due and it did not have funds in hand to repay it. Te Rimu faced enforcement action from the bank on default in repaying the term loan. For its day-to–day activities, it was reliant on Waewaepa for finance, but could not repay it.

[64] Waewaepa was a related party. It was a 50% shareholder and had also made significant advances to fund Te Rimu's operations. It was at best an unsecured creditor and had no prospect of being repaid. Mr Currie had no love for the bank. He had every reason to try for a better result for Waewaepa.

[65] Mr Currie was in a position to bring about the transaction for both sides. He could and did control both seller and buyer. In sales in the ordinary course of business to third parties, it should not be necessary to call in a valuer to fix the price. The parties' bargaining will set the price. The fact that Mr Currie called in

Mr Champion to set the price is recognition that by himself Mr Currie was hardly in a position to set a price that could withstand scrutiny.

[66] The result he achieved was that the bank did not receive any of the proceeds of the sale of the sheep. Instead they were applied against Te Rimu's debt to Waewaepa, notwithstanding the bank's security.

[67] The absence of any GST invoices for the sale is a symptom of this sale being outside the normal course of business.

[68] This case is further out of the ordinary than the *Estevan* case. There the buyer was a friend, but he raised his own funds for the purchase. The sales proceeds went to another creditor, not the one with the security. Here the relationship between buyer and seller was even closer – Mr Currie was in control of both. The proceeds of sale that ordinarily would go to the bank were applied to the benefit of the buyer, to improve its position as an unsecured creditor.

[69] There is one matter that Waewaepa puts forward by way of justification or explanation for the sale – the shortage of feed and the worsening condition of the sheep with the onset of drought. That may provide an explanation for moving the sheep off Te Rimu, but by itself it does not assist in explaining this preferential transaction as being within the ordinary course of business of Te Rimu.

Did Waewaepa know that the sale of the sheep was a breach of the general security agreement?

[70] Even if the sale were in the ordinary course of business of Te Rimu, it will be no defence to Waewaepa if it knew that the sale of the sheep was a breach of the general security agreement. The terms of the general security agreement the bank relies on are 6.2.1 and 6.2.2. The relevant breaches of the terms are the failure to pay the proceeds of sale of the sheep into the Te Rimu's account at the bank. The fact that the sale was engineered so that instead of funds being paid to the bank, a set-off was applied to reduce Te Rimu's debt to Waewaepa goes to the breach.

[71] The question is: did Waewaepa know that the sale was a breach? Mr Currie's knowledge counts. His evidence is silent whether he knew or not, but inferences can be drawn from other evidence. Mr Currie was both a director of Waewaepa and director of Te Rimu. As a director of Te Rimu, he had signed the general security agreement. Te Rimu had been in active negotiations with the bank about refinancing before 14 December 2012. Mr Currie was clearly aware of the bank's interest over the assets of Te Rimu including the livestock. He is a farmer.

[72] Mr Currie is not a lawyer. It is not possible to credit him with knowing the meaning of "ordinary course of business" as it is used in the Personal Property Securities Act and the general security agreement. Not even every lawyer would know.

[73] But as a farmer he knows that when a financier has security over livestock, any proceeds of sale of livestock must be paid to meet any debts to the financier. Every farmer knows it. Mr Currie would also know that a disposition of the livestock, which was arranged in such a way that the financier does not receive the proceeds of sale is a breach of the financier's security arrangements. In this case, the facts speak for themselves that Mr Currie did know that the sale of the sheep to Waewaepa was a breach of the security agreement, because it was designed to defeat the bank's interest in the proceeds of sale.

[74] Even if Waewaepa could show that the sale was in the ordinary course of business, its defence is defeated by the fact that Mr Currie knew that the sale was a breach of the general security agreement.

Does Waewaepa have a defence under s 45 of the PPSA?

[75] Waewaepa says that it also has a defence under s 45 because the bank authorised the dealing in this case. Because it authorised the dealing, the bank lost its security in the collateral, that is, the sheep.

[76] In *Gibson v Stockco Ltd* White J helpfully set out the test under s 45:[12]

---

12 *Gibson v Stockco Ltd* [2011] NZCCLR 29 (HC) at [165].

a) The purpose of the provision is to enact the common law principle that no one can give a better title than he or she has (nemo dat quod non habet): M Gedye, R C C Cumming QC & R J Wood *Personal Property Securities in New Zealand*[13] and *Garrow and Fenton's Law of Personal Property in New Zealand* at [12.8.2]. When collateral is "dealt with", a security interest in it continues after the dealing. A perfected security interest persists in the collateral even though the debtor may no longer own the collateral. Subject to the other provisions of the Act, the security interest is not affected by a sale or other disposition and can be enforced against the buyer.

b) As s 45(1)(a) makes clear, however, the security interest will be lost if the secured party "expressly or impliedly authorised the dealing".

c) In order to "authorise" a dealing, whether expressly or impliedly, the secured party would need to be aware of the specific "dealing" or, at least, previous dealings of the same type, and either have expressly authorised the dealing or by its conduct be taken as having done so impliedly: *Royal Bank of Canada v Canadian Commerical Corp, National Livestock Credit Corp v Schultz* and *Motorworld Limited (In Liquidation) v Turners Auctions Ltd.*

d) Whether in a particular case the secured party did "expressly or impliedly" authorise the dealing will be a question of fact in that case.

e) As the use of the word "authorised" in s 45(1)(a) indicates, the authorisation of the dealing needs to be given before the relevant dealing has taken place: *Lanson v Saskatchewan Valley Credit Union Ltd* at [9] and *Royal Bank v Ag-Com Trading Inc*.[14]

f) In contrast to s 53 where the focus is on the dealings between the seller (debtor) and the purchaser, s 45 focuses on the arrangement between the security holder and the debtor: *Ford Motor Credit Co of Canada v Centre Motors of Brampton Ltd* at 525 and *Motorworld Limited (In Liquidation) v Turners Auctions Limited* at [39].

[77] Waewaepa does not rely on the bank having authorised the sale as a specific dealing in the way that White J had in mind. Waewaepa does not say that for this specific transaction the bank allowed Te Rimu to sell the sheep to Waewaepa. Instead it says that the authority for the dealing can be found in the words of the general security agreement itself. It relies on 6.2.1 and 6.2.2. Here they are again:

> 6.2 We may:
>
> 6.2.1 dispose of, or part or deal with, any Inventory in the ordinary course of, and for the purpose of carrying on, our ordinary course of business, on ordinary arms-length commercial terms

---

13 M Gedye, R C C Cumming QC and R J Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at [45.1].

14 *Royal Bank v Ag-Com Trading Inc* (2001) 2 PPSAC (3d) 1 at [92].

> and for proper value, on the condition that we deposit any Proceeds of that inventory we receive in our usual working current account with you or such account as may from time to time be specified by you; and
>
> 6.2.2 dispose of, or part or deal with, any Livestock (whether Inventory or not) in the ordinary course of, and for the purpose of carrying on, our ordinary business (which for the avoidance of doubt does not include the disposal of, or the parting or dealing with, any pedigree, bloodstock, thoroughbred or other high value Livestock held by us as equipment), on ordinary arms-length commercial terms and for proper value, on the condition that we deposit any proceeds of that Livestock we receive in our usual working current account with you or such account as may from time to time be specified by you ...

[78] The authority these provisions give for dealings is for Te Rimu to sell livestock in the ordinary course of business, with some added terms as to payment of proceeds. Ordinary course of business has the same meaning as in s 53 of the Personal Property Securities Act. As I have already held that the sale of the sheep to Waewaepa was not in the ordinary course of business of Te Rimu, Waewaepa cannot rely on these provisions to say that the bank authorised the sale, even if it did not do so specifically. Accordingly, there is no defence under s 45.

[79] There is an additional aspect. As I have already decided against Waewaepa on the ground that the sale was not in the ordinary course of business, this aspect is not crucial to the decision. It will be seen that the terms Waewaepa relies on require that the proceeds of sale of livestock or inventory be paid into Te Rimu's account with the bank. Te Rimu did not do that in this case, because Waewaepa applied a set-off. On the face of it, Te Rimu did not comply with the terms as to payment of the proceeds and therefore the transaction is outside any authority given by 6.2.1 and 6.2.2 in the general security agreement. Waewaepa says that it has an answer for that. It relies on North American case law to say that there is a distinction between a conditional authorisation and an authorised sale subject to conditions that the proceeds of sale be remitted to the secured party. It cites *Lanson v Saskatchewan Valley Credit Union Ltd*.[15] Gedye Cumming and Wood also note the distinction.[16] A conditional authorisation is a condition precedent to the authority taking effect and

---

15 *Lanson v Saskatchewan Valley Credit Union Ltd* (1998) 14 PPSAC (2d) 71 (Sask CA).

16 M Gedye, R C C Cumming QC and R J Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at 177.

is valid under s 45. Canadian and United States case law does not accept that terms requiring proceeds of sale to be remitted should be effective against the purchaser because that would pass on to the purchaser the risk of the proceeds not being paid to the security holder. The policy of s 53 makes it clear that the secured creditor should carry that risk, as can be seen in the dictum from *Fairline Boats Ltd v Leger* cited above.

[80] It is important not to fall prey to legal formalism here. It is necessary to have regard to the policy supporting the distinction made in cases such as *Lanson v Saskatchewan Valley Credit Union Ltd*. The policy has regard to the interests of innocent purchasers. That can be seen in one of the leading United States judgments in this area, *First National Bank and Trust Company of Oklahoma City v Iowa Beef Processors Inc*.[17] That was a case where the proceeds of sale of cattle were not paid to the security holder. The Tenth Circuit said:

> Consent to sell in the debtor's own name "provided" the seller remits by its own check to the bank is not a true conditional sales authorization. In essence, such a condition makes the buyer an insurer of acts beyond its control. The bank has made performance of the debtor's duty to remit proceeds to the bank a condition of releasing from liability *a third party acting in good faith*. IBP could not ascertain in advance whether this condition would be met, as it could if a condition precedent was involved; nor did IBP have any control, as long as it paid Wheatheart. A secured party has an interest in protecting its security by conditioning its consent, but it can place conditions that would afford it protection *without great unfairness to the good faith purchaser*.

[81] That policy does not apply here. Waewaepa is not a good faith purchaser who needs to be protected. Its director, Mr Currie engineered the transaction to ensure that the bank would not be paid the proceeds, but that Waewaepa would benefit instead. As Waewaepa knew all too well that it was acquiring the sheep in such a way that there would be no proceeds for the bank, it cannot claim any unfairness. The events were entirely within its knowledge and control. It arranged the sale in such a way that it was outside the terms of the bank's general security agreement. It cannot claim that the bank authorised the dealing and that it was acting in good faith.

---

[17] *First National Bank and Trust Company of Oklahoma City v Iowa Beef Processors Inc* 626 F. 2d 764 (1980) (emphasis added).

[82] The bank has shown that Waewaepa cannot rely on its defences under ss 45 and 53 of the PPSA, primarily because the sale was not in the ordinary course of business of Te Rimu. I accordingly find that the bank has proved that Waewaepa Station converted the sheep in December 2012.

Amount of the bank's claim

[83] There is a conflict in the evidence as to the value of the sheep removed from Te Rimu to Waewaepa. Both sides have tendered affidavits by experienced stock and station agents. For the bank, Mr Harding says that at 25 January 2013 the ewes had an average value of $55.00 per head with a range of $45.00-$68.00, all plus GST, and lambs had an average value of $54.00 per head, with a range of $34.00-$58.00, all plus GST. To give this valuation, he not only referred to Feilding livestock sales records from December 2012 to March 2013, but he also visited Te Rimu Station on 19 February 2013, and 5 and 6 March 2013, and inspected the sheep (including lambs) at Te Rimu.

[84] For Waewaepa, Mr Champion deposes that he valued the ewes and lambs at Te Rimu in early November 2012. These were the actual sheep that were removed from Te Rimu to Waewaepa. His evidence is that the sheep were in light to average condition and many of them had missing or no teeth. He says that the lambs were aged between 3-6 weeks and were in average condition for milk lambs.

[85] In reaching his net valuation of $37.50, Mr Champion took into account that this was not a normal sale. Under a normal sale, the vendor would pay transport, yard fees and commission.

[86] I have only lightly summarised the effect of their evidence. There is a genuine conflict between the evidence of Mr Harding and Mr Champion as to the value of the livestock. Mr Champion's evidence is directed at the value of the livestock in early November 2012, Mr Harding's at the date of conversion, 25 January 2013. On the other hand, Mr Harding did not inspect the actual sheep, but inspected other sheep.

[87] There may be sound arguments for the discounting made by Mr Champion because the vendor would not have to pay the costs of sale and transport, but it remains arguable whether he applied the appropriate discount. For Waewaepa it may arguable that it should have some allowance for any increase in value of the sheep between November 2012 and January 2013 on account of grazing.

[88] The bank submitted that when the evidence was examined closely, it could be seen that in many respects that there were matters on which Mr Harding and Mr Champion were not far apart. Mr Champion accepted that Mr Harding was in the right range with his figures for ewes in January 2013. Mr Champion's values for lambs were comparable with those Mr Harding gave for ewe hogget lambs.

[89] At this stage I cannot resolve this conflict between the experts.[18] Even if I accepted the bank's arguments I would still need to consider whether to make an allowance for grazing and how much that should be. What I can say is that the sheep had a minimum value of $37.50 per head or $89,025 altogether, being the value given Mr Champion in November 2012. For the valuation at that date it is not necessary to make any allowance for grazing because the sheep had not been moved to Waewaepa.

[90] There is also the question of GST. The bank has claimed damages as the value of the sheep plus GST. The bank's claim is for conversion, because Waewaepa has asserted rights in the sheep inconsistent with the bank's rights to possession of the sheep. The bank did not consent to Waewaepa having the sheep. In that situation, there is no supply under the GST Act. What is missing is the element of reciprocity required for a supply under that Act.[19] As there has been no supply, any payment Waewaepa may make to the bank cannot be for a taxable supply. Damages should therefore be assessed on the basis that the bank will not have to pay GST on them.

---

18 *MacLean v Stewart* (1997) 11 PRNZ 66 (CA).
19 *Chatham Islands Enterprise Trust v CIR* (1999) 19 NZTC 15,075.

[91] There is support for this in an IRD article "GST treatment of court awards and out of court settlements":[20]

> *Where there has been no supply*
>
> For a supply to take place, something of value must be "furnished or provided" (*Databank*). The supply must additionally involve enforceable reciprocal obligations (*Chatham Islands*). If something has been used, but there was no agreement for its supply between the relevant parties, any payment subsequently received by the aggrieved party is not consideration for the supply. The receipt of payment does not involve any reciprocal obligations between the parties, and cannot be retrospectively linked to there having been a "supply" for GST purposes. Any payment received relating to a previous use of an item where there has been no agreement to supply will be by nature compensatory, and thus outside the scope of GST. (eg, of theft and wrongful use of trade name).

[92] On the matter being raised, the bank accepted that the damages should be calculated on the basis that there is no GST component.

Outcome

[93] I give summary judgment for the Bank of New Zealand against Waewaepa Station 2002 Ltd in the sum of $89,025.00 plus interest from 1 February 2013 to 12 December 2013 at 5% per annum, but without prejudice to its rights to prove that it has suffered a greater loss.

Costs

[94] The bank is entitled to costs but on the District Court scale – r 14.13. As this case would be high-end litigation in the District Court, costs are to be fixed under category 3. If the parties cannot agree costs, memoranda may be filed for me to decide costs on the papers.

Further directions

[95] The Registrar is to allocate a telephone case management conference for further directions. For that conference the parties should advise whether it is proposed that this proceeding should stay in this court or should be transferred to the

---

[20] "GST treatment of awards and out of court settlements" (September 2002) Inland Revenue Interpretation guidelines and interpretation statements <www.ird.govt.nz> at 28.

District Court. If the case is to stay in this court, they should submit as to directions required to take the matter to a hearing to fix any further damages claimed by the bank.

.....

Associate Judge R M Bell