

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2012-404-004767  
[2012] NZHC 3065**

UNDER Part 19 of the High Court Rules

BETWEEN DAMIEN GRANT AND STEVEN KHOV  
AS LIQUIDATORS OF JFK IMPORTS  
2007 LIMITED (IN LIQUIDATION)  
Applicants

AND KEVIN LENAGHAN  
First Respondent

AND ELIZABETH SARICH  
Second Respondent

Hearing: 6 November 2012

Appearances: B J Norling for Applicants  
M F Dreaneen for First Respondent  
D E Smyth for Second Respondent

Judgment: 16 November 2012

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**JUDGMENT OF VENNING J**

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**This judgment was delivered by me on 16 November 2012 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Waterstone Insolvency, Auckland for Applicants  
Karen Lindberg, Papakura for First Respondents  
Khan & Associates, Auckland for Second Respondent

## **Introduction**

[1] Damien Grant and Steven Khov are the liquidators of JFK Imports 2007 Ltd (JFK1). They seek directions in accordance with r 19.5 of the High Court Rules as to whether a 1956 Ford F100 truck VIN F10D6R11755 (the truck) in their possession is an asset of JFK1.

[2] The first and second respondents are shareholders of JFK1 and at various times were the directors of the company. Their position is that the truck is owned by JFK Imports Ltd (JFK2), a company they also have interests in. The respondents say the truck was imported by Mr Lenaghan, the first respondent, personally using funds advanced to him by Ms Sarich, the second respondent; that Ms Sarich was entitled to a charge over the truck; and that she exercised her rights in relation to the charge, sold the truck to JFK2 and currently holds a charge over that company with the truck as collateral.

## **Brief background**

[3] JFK1 was incorporated on 2 October 2007 as JFK Imports Ltd. On 1 June 2010 its name was changed to JFK Imports 2007 Ltd. Shortly after, on 10 June 2010, a new company, JFK2, was incorporated as JFK Imports Ltd.

[4] On 11 May 2011 JFK1 was placed into liquidation. The applicants were appointed liquidators.

[5] In the course of investigating the affairs of JFK1, the liquidators reviewed all the documents available to them and also conducted an interview with Mr Lenaghan, in reliance on the liquidators' powers pursuant to s 261 of the Companies Act 1993.

[6] As a result of their investigation the liquidators consider that the truck is an asset of JFK1 and have taken possession of it.

[7] However, given the challenge by the first and second respondents to the liquidators' position as to the ownership of the truck, the liquidators have sought directions from the Court as to whether it is the property of JFK1.

### **The liquidators' case**

[8] The liquidators rely on the following factors to support their claim that the truck in issue is an asset of JFK1.

[9] First, a financing statement registered on 13 November 2010, which records JFK1 as the debtor and owner of the collateral security, the truck. The financing statement was lodged by Mr Lenaghan. The secured party is stated to be Ms Sarich.

[10] Next, the liquidators refer to the draft financial statements prepared for JFK1 for the year ended 31 March 2010. Those draft financial statements record motor vehicles to the value of \$31,131 as assets of the company. The schedule of fixed assets and depreciation is slightly confusing but appears to refer to two Ford trucks having a total value of \$31,131. The liquidators seek to draw the inference that the Ford truck in issue in this proceeding is one of the two Ford trucks referred to in the draft accounts.

[11] Next, the liquidators refer to a sticker which is affixed to the front windshield of the truck in issue. It carries the following logo:

Proudly imported by JFK Import Limited

Phone Kevin 021 1068250 09 836 ... for your next rod.

As discussed with counsel I do not consider that sticker to be particularly probative of ownership of the vehicle in question. It is essentially an advertisement for the activities of JFK1 which included the importation of classic trucks from the United States. It says nothing about ownership. I do not propose to consider the sticker further.

[12] Next, Mr Norling for the liquidators referred to certain customs documents relied on by the respondents as evidence that Mr Lenaghan had imported the truck

personally (with, the respondents say, the financial assistance of Ms Sarich). Mr Norling submitted that the customs documents were not conclusive. I refer to that issue in more detail shortly.

[13] Mr Norling then referred to the interview the liquidators conducted with Mr Lenaghan. He submitted that although aspects of the interview were confusing, Mr Lenaghan appeared to accept that trucks he had imported were put into the company.

[14] Next, Mr Norling commented on the apparent similarity between a number of computer-generated invoices the respondents relied on. For example, he referred to the similarity between an invoice purporting to be issued by JFK2, and the invoice purporting to be the purchase invoice from David Desure Vehicle Liquidators in San Diego, California (David Desure) relating to the truck in question. Mr Norling pointed to a number of similarities between the invoices and also noted that the date on the invoice supposedly prepared by David Desure, the American entity, was in the New Zealand date format rather than the US date format, with the month preceding the day. He invited the Court to draw the inference the invoices had been prepared by the respondents to suit their case.

[15] Again I do not consider that point to be particularly compelling. The evidence taken overall discloses that Mr Lenaghan, either personally or using JFK1, imported a number of vehicles from the United States. It seems a number of the vehicles were imported from David Desure. Given the relationship between Mr Lenaghan and David Desure it is conceivable that Mr Lenaghan may have been authorised to prepare pro forma invoices on behalf of that company.

[16] I do, however, accept there is force in Mr Norling's related point that the respondents appear to have taken different positions at different times and have given contradictory explanations at various times in relation to the activities of JFK1.

[17] In summary, the strongest point for the liquidators supporting their position that the truck is an asset of JFK1 is the financing statement lodged by Mr Lenaghan in November 2010 who, as the person who imported the truck and who was also a

director of JFK1, could reasonably be expected to have known who owned the truck at that time.

### **The first and second respondents' position**

[18] Although the first and second respondents are separately represented, it evolved during the course of the hearing that their positions are now essentially the same. They contend that Mr Lenaghan imported the truck personally. They say Ms Sarich advanced him the money to enable him to do so, the money was never repaid, the registration of the financing statement recording the truck to be an asset of JFK1 was a mistake, and that when the mistake was discovered a new financing statement was prepared in the name of JFK2, recording the truck as an asset of that company. The respondents support their case by reference to an invoice which records that Ms Sarich sold the truck to JFK2 but left the purchase price outstanding, hence the security.

[19] At this point I note that a number of issues potentially arise out of the financing statements before the Court. However, counsel agreed that the only issue for determination by the Court on this application for directions was the ownership of the truck.

### **Decision**

[20] I accept that the documentation before the Court supports the respondents' position that the truck was initially imported by Mr Lenaghan in his own name. There is a purchase invoice dated 14 September 2008 purporting to be issued by David Desure for the truck in issue in the sum of US\$3,700. Even if that invoice is put to one side, because of the concerns Mr Norling raised about the similarity of the various invoices supposedly issued by a number of different parties, there are further customs documents which support Mr Lenaghan's argument that he imported the truck himself. The bill of lading dated 21 September 2008 identifies the truck in issue. It records the port of loading as Los Angeles and Mr Lenaghan as the consignee. There is then a bio-security clearance by the Ministry of Agriculture and Fisheries dated 13 October 2008 which again records that the authority is issued to

Kevin Lenaghan. Further there is a customs agent's import certificate addressed to Mr Lenaghan relating to the truck charging, in addition to the purchase price of US\$3,700, CIF and GST sums. Finally, there is an import delivery order directed to Mr Lenaghan from the New Zealand Customs Service confirming the date of importation as 4 October 2008.

[21] None of the relevant documentation refers to JFK1. I accept that, as Messrs Dreaneen and Smyth submitted, on behalf of the respondents, the Ford truck was imported by Mr Lenaghan personally. Mr Smyth referred to the case of *Berg v Anglo Pacific International (1988) Ltd.*<sup>1</sup> Mr Berg operated a car import business. He purchased a number of second-hand cars in Japan for family members and friends in New Zealand. The respondent had obtained judgment against Mr Berg's father for customs duties and charges in relation to the importation of Japanese cars. When it received documentation relating to the importation of certain cars that referred to the importer as S C Berg & Co, the respondent took the view Mr Berg was in partnership with his father. The respondent refused to allow Mr Berg to take delivery of the cars until the full amount of the judgment against his father was paid. The Master had declined summary judgment. The Court of Appeal allowed the appeal, noting that it was sufficient for the appellant to succeed if he could establish he was entitled to immediate possession of the cars and had a right of property in them. The evidence established he fulfilled those criteria. He had paid for the cars and the bill of lading naming him as consignee was evidence of his title to them. Possession of the bill of lading was equivalent to possession of the goods themselves.<sup>2</sup>

[22] It follows that as at October 2008, Mr Lenaghan had both prima facie ownership and possession of the truck personally. However, it seems he borrowed the money to buy and import the truck from Ms Sarich. Both Mr Lenaghan and Ms Sarich have deposed that the purchase and importation of the truck was funded by Ms Sarich. Ms Sarich says she drew down moneys from a finance company and then advanced those moneys to Mr Lenaghan.

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<sup>1</sup> *Berg v Anglo Pacific International (1988) Ltd* (1989) 1 PRNZ 713 (CA).

<sup>2</sup> At 716, citing *Halsbury Laws of England* (4<sup>th</sup> ed) vol 3 at [494].

[23] Ms Sarich referred to a statement of account which showed that on 10 March 2008 she had drawn down \$11,467. Mr Lenaghan referred to a bank statement of his which showed that on 26 August 2008 there were two deposits into his account of \$1,000 and \$12,000 respectively and on the same day he withdrew \$14,399.01. However, the bank accounts do not establish very much at all. First, the car was imported pursuant to a sales invoice dated 14 September 2008. There is no proper explanation as to why Ms Sarich would have drawn down \$11,467 on 10 March, some six months earlier, in anticipation of that transaction. Nor is there a copy of her account for 26 August, so there is no independent evidence that the deposit of \$12,000 on 26 August into Mr Lenaghan's account came from Ms Sarich. Next, the \$14,399.01 withdrawn by Mr Lenaghan on 26 August 2008 was withdrawn approximately six weeks before the truck was landed in New Zealand. Finally I note that no attempt has been made to reconcile the \$14,399.01 to the purchase price, CIF and GST for the truck.

[24] However, I accept that, on the authority of *Berg* and the New Zealand Customs Service documentation, as at October 2008 Mr Lenaghan had title to the truck.

[25] The issue then becomes what happened to the truck after it was imported. Did it become the property of JFK1?

[26] The problem the liquidators and the Court face in resolving that issue is the way Mr Lenaghan and Ms Sarich, as directors of JFK1 from time to time, operated the business of JFK1. Mr Lenaghan appears to have had little understanding of the difference between the company and his own affairs. It seems that he mixed his own assets with the assets of JFK1. During the course of the interview Mr Lenaghan gave a number of confused answers to the questions put to him by the liquidators' solicitor. In relation to another vehicle which was apparently sold to an L Guzman, the evidence was:

Q. So you purchased that vehicle on behalf of the company?

Mr Lenaghan: I purchased it with my own money.

Q. Ok so how did the vehicle come in the financial statement of JFK?

Mr Lenaghan: Well I asked the accountant to put it in. What was happening was that when the vehicle got sold I was actually putting money into this vehicle, I paid about \$5,000.00 into it doing it up. When the vehicle was all done up, registered, warranted, and yeah \$8,000.00/\$9,000.00. What's happened is I get paid back my money that I put in and the business keeps the rest.

And then later:

Q. So firstly, do you have proof that you paid for these vehicles out of your own personal money?

Mr Lenaghan: Well I mean the proof that there is a company and you pay for it, if the company paid for it it would be in the company's accounts so in the company's accounts there is \$23,500.00, the company's never had that kind of money I mean it literally was my money that I paid and there is an invoice which says that I bought it from there.

Then in relation to the operation of JFK's bank account:

Q. Ok, can you show me that? Does JFK have the same bank account?

Mr Lenaghan: No.

Q. So operated out of your bank account?

Mr Lenaghan: No.

Q. So how did that work?

Mr Lenaghan: Set up a separate bank account.

Q. So it did have a bank account.

Mr Lenaghan: Yep. I close it down every now and then when it started costing too much.

Q. When you closed it down what happened to the company's....like when you shut down a company bank account were you using your bank account as the ...

Mr Lenaghan: I'm not too sure when I shut it down um I think I shut it down on hmmm when did I shut it down? I can't recall when I actually shut it down I think it was just whenever the company just didn't have enough money. We spent shit loads of money on lawyers um and yeah. It's just like a



never ending sort of fucken [indistinct]. A sum like that but um at the end of August 2000 and [indistinct].

And then dealing with the financing statement:

Q. So you have this financing statement which was registered on a PPSR against um the debtor was [JFK1], your contact there and the secured party is Elizabeth Sarich um the collateral is that vehicle that we would have in our possession. Did you register that or did Elizabeth?

Mr Lenaghan: No I put that on.

Q. Ok. So, so this vehicle the collateral vehicle is what we have out there right?

Mr Lenaghan: That vehicle yep.

Q. Ok. Um so on 9<sup>th</sup> July 2011, which is after the liquidation of JFK.

Mr Lenaghan: Yep.

Q. The debtor is changed to [JFK2]. So did you change that?

Mr Lenaghan: Yep.

Q. What was the reason for that?

Mr Lenaghan: Um well got a call from what's her face?

Q. Sarah [an employee of the liquidators].

Mr Lenaghan: And she asked about it and I totally forgotten all about it and you know this happened like a year or two ago when I registered it. What date did I register it?

Q. It was on 13<sup>th</sup> November 2010 and it was changed on 9<sup>th</sup> July 2011.

Mr Lenaghan: Oh yeah no like um I was trying to let loose because I owed her a lot of money and yeah, I mean I just totally forgot about it and yeah look, yeah can they can take care of their own vehicle out of the company, I can take my own vehicle out of the company and carry it on you know. The idea was that I was going to sell this vehicle for profit and I paid \$86,000.00 for it whilst in their possession and I can't get my money because you've got my vehicle. So I mean you know when Liz wanted security,

Q. Yep.

Mr Lenaghan: And Liz told Corban Revells to put it on the PPSR and i'm \_\_\_ to this shit so..

Q. So did anybody advise you to register the financing statement on the PPSR?

Mr Lenaghan: Yeah it was Corban Revell that said oh you know why don't you put, cause its personal property but apparently its company property isn't it? I mean like companies use the PPSR?

Q. Yep.

Mr Lenaghan: And I was always um personal you know like but my car, I bump it on their [sic] because I own it sort of thing, but apparently you had to put it under a company's name or something. Its just I don't know too much about the PPSR but that's my understanding of it.

[27] Mr Lenaghan's suggestion the truck was put in the name of JFK1 because he was advised it had to be under a company's name is unconvincing. The Personal Properties Securities Act 1999 does not require that.

[28] Ms Sarich set out her position on the reason for the change in the financing statement from JFK1 to JFK2 in the following email sent to Sarah Duncraft, an employee of the liquidators, in response to an inquiry:

To Sarah Duncraft, this letter is to inform you that the motor vehicle was repossessed from the company last June 2010 due to it not been paid for or any money paid on this vehicle. The vehicle was sold to my new company we formed and it was sold through that company. This has nothing to do with this liquidation so information can't be provided as it's the new company information. ... The vehicle was sold is all that I can tell you back in June 2010 to my new company and I now hold the security over the vehicle until the new owner makes final payment which is very small to what it sold for.

[29] In that letter Ms Sarich argues that she was entitled to repossess the truck for non-payment, but that argument seems to accept the truck was owned by JFK1 and that company owed her money for it. That is consistent with the liquidators' position, at least as to ownership of the truck. The difficulty for the respondents is that the replacement financing statement which they apparently had backdated as an amendment was not actioned until after the liquidation of JFK1 and after the liquidators had drawn their attention to the financing statement. Mr Lenaghan's email of 22 June 2011 makes that clear:

I've amended the [finance] statement so to take jfk 2007 limited off it as the debt now has nothing to do with that company and has be given to the new

company to on sell for me. As jfk imports 2007 never owned this vehicle nor paid any money on it, we decided to sell to our new company, and that's the end of the matter, thanks.

[30] It is also of note the invoice Ms Sarich seeks to rely on as proof of the sale to JFK2 purports to be dated 11 June 2010, one day after JFK2 was registered. Despite that, the financing statement is said to have been created only in November of that year. Further, the sum on the invoice, \$31,131, coincides exactly with the sum shown in JFK1's accounts for the Ford trucks owned by it as at 31 March 2010. The coincidences are not credible.

[31] The explanations advanced by the respondents are confused. They are not satisfactory. On the face of the information before the Court there has, at the least, been inadequate attention to the separation of Mr Lenaghan's personal interests and those of the company. There appears to have been a failure to keep proper records for JFK1.

### **Summary**

[32] In summary, the evidence discloses that as at October 2008 the Ford truck belonged to Mr Lenaghan. However the evidence also discloses that from time to time Mr Lenaghan transferred assets into the company when it suited him to do so. Consistent with that I infer that he transferred the truck into JFK, but to secure Ms Sarich's position in that she had advanced the initial money to purchase it, he recorded the financing statement in November 2010.

[33] Mr Lenaghan ran a current account with the company. No doubt, after taking accounting advice, the issues of the value of the transfer of the asset into the company by him (to the extent there was equity) could have been dealt with by recording them as shareholders' current account advances. I note there were substantial increases in the current account advances, for example, in the draft accounts to March 2010.

[34] In the circumstances I consider the security documentation to be the most recent and compelling evidence of ownership. Ms Sarich's explanation as to what

occurred thereafter is not convincing. It is also inherently inconsistent in itself. She suggests she retook possession because she had not been paid, but then apparently immediately transferred the truck to JFK2 on the basis that company would pay her. The liquidators are entitled to regard with real suspicion the after event actions of Mr Lenaghan and Ms Sarich in attempting to transfer the truck to JFK2.

### **Conclusion**

[35] The position is unsatisfactory. However, on balance, I accept that the liquidators have established that as at November 2010 the truck was owned by JFK1 and that was the position that still applied as at the date of liquidation. The subsequent actions of Mr Lenaghan and Ms Sarich, and the documents they created after liquidation of JFK1, do not change the position.

### **Result**

[36] Declaration as sought by the liquidators.

[37] Costs in favour of the liquidators on a 2B basis.

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Venning J