When property passes

Swindle v Matakana Estate

Facts

- Who were the key parties involved in the winemaking process?
  - Matakana (winemaker company) owns the vintage companies which were responsible for specific vintages of wine.
  - Wine had come from grapes that had been funded by vintage companies. But Matakana bought directly off the grape growers, who made the grapes into wine.
  - Money to fund grape purchase by vintage came from third party financiers Aorangi.
  - Once Matakana made and bottled the wine they sold it to Goldridge for sale to the public.
- What were each of these parties seeking to get out of this arrangement?
  - Growers: want security in goods they're selling (or what it turns into) if not getting paid immediately.
  - Matakana: want supply of grapes, want funding, want to repay growers as late as possible (once they have money from selling wine), want a market for the wine.
  - Goldridge: want supply of wine, want to not have to pay until sold, want a market to buy the wine.
  - Aorangi: want security over the goods bought with their funding.
- Who were the V companies and why were they set up?
  - Business needed funding, so brought in third party funder, Aorangi, who would channel funding through V companies through a loan facility document.
  - V companies would then enter a supply agreement to sell the wine to Goldridge, who would then sell the wine for them, which assumed they had ownership at some point of the wine.
- How were the interests of the funder protected?
  - All of the assets of the V companies were covered by security agreement to protect Aorangi.
- Did the arrangements in practice correspond with what the legal documentation contemplated would happen?
  - In reality, Vintage gave the money advanced by Aorangi to Matakana (effectively an unsecured loan) who used that money to buy grapes from the growers, and make the wine. Then M would on-sell grape juice to V companies, who would sell that wine to Goldrige, although they never took actual possession of the wine, M was always in possession. Then Goldbridge would pay VA and VB, who would then pay Aorangi for funding.
  - There was no formal arrangement between V companies and Matakana.
  - V companies didn't intend to make a profit themselves, they are just a conduit for funds to go through.
  - They had this arrangement because it shields Aorangi from having their security interests displaced by other credit claims Matakana was subject to (e.g. bank GSA)

  Legal arrangement:

  [Aorangi-Funders] ← → Fund/Pays back ← → [V companies-"buy grapes, produce wine"]← → Onsells/Pays ← → [Goldridge]

  Reality of arrangement:

  [Aorangi-Funders] → Funds → [V companies] → Give funds - unsecured loan (grape)→ [Matakana-buys grapes, produces wine] → transfers ownership of wine → [V companies] → sells → [Goldrige] → Pays → [V companies] → pays back → [Aorangi].
- What was the involvement of the grape growers?
  - Grape growers delivered grapes to Matakana in March/April 2009 and growers invoiced M.
  - The grape growers had a retention of title security over the grapes, but the K said M could sell the grapes in the OCB because the nature of business was ongoing and parties were constantly producing and selling wine in OCB and security transfers to proceeds received in sale of grapes are in OCB.
- What happened in 2010?
  - In 2010, Matakana and Goldrige went into voluntary liquidation because too much wine was produced, prices were low, and companies ran out of money.
  - Liquidator of M took possession of all wine in factory because M was in possession of all the wine stock.
  - M had granted a GSA over all of its present assets to the bank.
- What did V companies' receiver want?
  - Two weeks later V companies went into receivership.
  - V companies had no physical possession of anything, only title on paper.
  - Receivers wanted the wine to sell to pay debt.

Issues

- The growers didn't register their retention of title agreement under the PPSA, so they lose priority to anybody else with a perfected security interest in the goods. GSA trumps their security interest.
- What did the legal arrangements between the parties contemplate?
  - Financing arrangements contemplated that V companies would purchase grapes, produce wine and sell the wine.
  - Even though his didn't happen in reality, M purchased grapes and produced wine, the arrangement contemplated that ownership of the grapes transferred at some point to V companies because K with G specifically said ownership transferred from V to G when wine was sold.

        - V argues: V gained ownership of wine at the time M invoiced vintage for funding to pay for grape juice. M generated matching invoices to the V company for the cost of grapes. (May 2009)
        - Liquidators for M argue: when wine was finished (bottled) and about to be sold to G, that is when ownership passed to V, not at the time of invoicing. [Because the wine never reached that point the property never passed from M to V before M went into liquidation].
- Some of the winestock had been blended with wine that had not been invoiced to the V companies. Who owns this?

Held

- Ascertain the intention of the parties
    - Conduct:
        - V was intended to have ownership at some point to sell to Goldridge.
        - Grapes were sold to M, but M was permitted to sell grapes in OCB, so they appeared to sell grapes to V.
        - Invoices appeared to show an exchange of goods.
        - V companies had to give some security to Aorangi, so parties must have contemplated V had assets for Aorangi to have security over.
    - Ownership of the wine was intended to pass in May 2009, when the invoices were, even though M still had possession.
- What about the winestock that was blended with wine not subject to the invoice?
    - S 143 issue: No property in "unascertained goods" passes until the goods are ascertained
    - Because the wine was blended no property passed because at all times the wine was unascertained goods.

MJN NcNaughton Ltd v Thode

Facts

- NcNaughton supplied timber joinery to Nikau building company, manufactured to specific design.
- Delivered joinery but timber hadn't been used by Nikau.
- Nikau went into liquidation.
- McNaughton hadn't been paid for it, and argued to be paid because the sale was complete.
- What arrangement was put in place to give manufacturer protection?
    - Retention of title clause.
    - Take security over the joinery
        - Both would be registrable security interests under the PPSA, so M could claim joinery if it was not paid for.
    - But they may not be able to resell it easily because it is a specific type of joinery.
    - So instead by require payment in advance.
    - Or a personal guarantee by the buyer. - This is what Nikau did, got a personal guarantee from the director of Nikau. Only worth it if director has money.

Issue

- To enforce the personal guarantee, it matters whether the joinery had passed to Nikau? If it hadn't passed, Nikau did not have to pay the purchase price and director would not be liable for the guarantee.

Held

- What type of goods was the kitchen joinery?
    - They were specific future goods because this was specific joinery that hadn't come into existence, that was to be created for a particular purpose. MJN could not substitute it for something different.
    - If it was just a kitchen sink this would be ascertained because kitchen sinks would be held in bulk, buyers would have to select a particular kitchen sink.
- MJN wasn't in possession at time of K.
- Section 144: Property passes when K intended it to pass
    - MJN was given security interest over joinery.
        - While Retention of title = intention goods not passed until payment, a security interest does not evidence this intention. Property can still pass, even if you have security over it.
    - Until joinery was paid for in full, Nikay had a limited ability to sell.
        - But this was still not showing the parties did not intend property to pass.
    - No intention evidenced that property didn't intend to pass.
    - But intention was evidenced that property did pass because MJN was providing credit, lending purchase price and taking back with security.
- Section 146: Rules
    - Rule 5: Applies here.
        - 1. It was a sale of future goods.
        - 2. The goods were of that description in K, specific joinery,
        - 3. Goods were unconditionally appropriated to the contract - ??
        - 4. Goods in a deliverable state. - Yes, as soon as they were made they were ready to be delivered because it is specific joinery.
        - 5. Buyer or seller assented. - ?

- Were the goods unconditionally appropriated to the contract?
    - *Carlos Federspeil* - interpreted unconditional appropriation = intention to attach K irrevocably to those goods so that those goods and no others are subject to the sale.
    - Here, this requirement was satisfied because you can't use the goods anywhere else e.g. attach to another K, or change their mind. THe goods were custom-made to Nikau's sepcifictaions so clearly the seller unconditionally appropriated the goods as soon as manufactured.
- Was there assent by the buyer for the seller to unconditionally appropriate the goods to the K ?
    - Assent implied because they ordered particular joinery, so of course they assented to specific joinery.
- Provisions MJN put into the K did not amount to provisions reserving the right to disposal.

- Property had passed to Nikau, so the director was liable.

Sales without title

New Zealand Securities and Finance Ltd v Wright Cars

Facts

- A bought a car from a car dealer, wright cars. They gave a cheque and said "don't present cheque until I get finance from finance company - NZ Securities". Wright car gave him possession of the car and notice of change of car? K between wright and third party said property will not pass until funds have been received.
- Finance company would grant loan and take security over the car. A gave notice of change of car to finance company. They tried to get confirmation of the sale before lending by asking Wright cars. Wright cars said they had sold it. But wright cars never passed ownership because they never got paid.
- A never pays wrightcars, and finance company is out of pocket because A stops making repayments on the loan.
- NZ securities and wright cars both claimed title to the car.

Issue

- Who had title to the car?

Held

- Finance company argue under s 149(2), that Wrightcar is precluded from denying A authority to on sell car to them because they had represented to the finance company that the A had authority to sell the car to them when they said that A had bought the car.

Today

- PPSA: Who registered security interest first? Wright cars or NZ Securities?

Sigglekow v Gibbs

Facts

- Gifford sold car to Gibbs. Gibbs pays off entire price.
- But gifford retained vehicle's ownership papers and possession of the car, Gibbs wanted Gifford to store itl.
- Gifford sold the same car again to Sigglekow. Sigglekow obtained ownership papers and possession of the vehicle. She purchased the car in good faith.
- Sigglekow borrowed money from a finance company to do this, and she repaid it.
- Gibbs complained Gifford had stolen the car. He was prosecuted for theft.

Issue

- Who has best title to the car?
- Sigglekow argued that s 153(2) applied because she was an innocent purchaser who received the goods in good faith and without notice of the previous sale to B. This would allow her purchase to have the same effect as if it was expressly authorised by the owner of the goods.
- Gibbs argued that s 152 (1) which says that stolen goods revests in the owner of the goods after conviction. Seems to contradict s 153(2).

Held

- S 153 applied here. S ended up with ownership of the car.
- Facts of the case came within both sections.
- Purpose of s 153 = to protect the innocent purchaser because if you don't protect them you won't have a willing purchaser of the goods.
- S 149 - better reflects *nemo dat.* The court noted the importance of this principle. But recognised there are exceptions to the rule.
    - If sold with ostensible authority then they are precluded them from denying authority to sell.
    - If they are still in possession of the goods, and buyer purchases in good faith.
- We particularly want to protect Sigglekow because she showed all the trappings of ownership. She had possession of the paper, and the papers, she had made repairs on it. May be different facts which mean the court would give possession back to the true owner.

Elwin v O'Regan and Maxwell

Facts

- Elwin innocently buys a car and it gets taken off them by the Australian finance company because N owed them money.
- Elwin bought it from Maxwell, who had bought it from finance C, who had bought it from N, who brought it from Australian finance company.

Issue

- Did N ever have title to the car, because otherwise he could not pass title to Elwin (*nemo dat)?*

Held

- Registration of change of ownership isn't a certificate → it doesn't evidence ownership.
- But s 154 could apply= exception nemo dat rule. This would mean Elwin could have title to the car, even if N never had title.
    - To come under this provision, N would have had to buy or agree to buy the goods?
    - N was subject to a true hire purchase agreement, meaning he could cancel the agreement at any time and give the goods back. Therefore, he had not entered into an agreement to buy the goods.
    - Couldn't argue that Maxwell agreed to buy the goods because the chain of sale was tainted by transaction between N and Australia.
- Also s 297 could apply. N could have acted as an agent for the goods??

Law around terms of the K

Taylor v Combined Buyers (NZ)

Facts

- Taylor bought a car new from combined buyers.
- After 3 months there was a problem with the car.
- They brought an action to rescind the K, and alternatively damages.
- Issues of breach of terms relating to quality of goods, ss 138, 139.

Issue

- Was the car as good quality as he thought when he bought it?
- Were 136, 138 and s 139 breached?

Held

- Ss 138 and 139 were breached, but taylor lost the right to rescind.
- S 138: Fitness for purpose
    - It applies to both unascertained goods and specific goods.
    - Exclusion "particular purpose" is not limited to a special purpose the buyer communicated to the seller. It includes a general purpose for which goods of that type are commonly used, as seller is taken to know goods are required for their ordinary or usual purpose.
    - Seller is liable for latent defects that make goods not fit for purpose, even if undiscoverable.
    - Goods must be sold in circumstances that showed the buyer relied on the seller's skill and judgment.
        - On facts, impliedly made known to seller the purpose = driving new car that will last. Buyer relied on the seller's skill and judgement because they were a car dealer, and the goods were in the course of the seller's business.
- Seller argued s 138(3) e.g. sold under a patent or other trade name.
    - Court adopted a limited interpretation.
    - Seller will not be liable for defects that normally pertain to that class of goods.
        - It is different if defect was due to it being wet, or passed used by date. Not known defects of the brand.
    - Car sold under a trade name, but buyer is not excluded.
    - It protects vendors who sell branded articles from defects from those brands - purchaser is taken to rely on their own skill and judgement when buying a brand as an ordinary person would have knowledge of the brands defects.
        - On the facts, the car departed from normal standards of that brand of car, it would not normally break down that fast.
- S 139: Merchantable Quality
    - Was it a sale by description? (This could also apply for s136)
        - Calthorpe car was a specific item identified, not bought by description.
        - It is not a sale by description when it is a sale of unascertained goods, or maybe if it is a specific item
        - But usually a sale of a specific item is described or named in some way (Low threshold: Brief is enough e.g. horse).
    - Salmond J's view - in a sale of unascertained goods, everything the seller says about the goods is part of the description. But in the case of a sale of specific goods, the description means a statement of the kind, class or species to which the article belongs. A statement that goes to the essential or specific nature of the goods. Not a statement relating to quality or attributes.
        - Unascertained = description defines contractual obligation. "Horse of particularly good quality" → goes further than merely stating what goods are.
        - Specific = description has a limited function. It is only a description if it is a statement of the kind, class or species that is essential nature of the goods. It is not a statement of quality or attributes.
    - What is "merchantability?
        - Just because goods conform with the description does not mean they are merchantable.
        - If goods are not fit for a particular purpose that does not mean they are unmerchantable.
        - **Test:** Goods will be "merchantable" when they are of such quality as to be saleable under that description to a buyer who has full and accurate knowledge of that quality, and who is buying for the ordinary and normal purposes for which goods are bought under that description in the market.
    - There was a breach of s 139 on the facts because the new car was part of the description, it was essential, goes to the kind or class of goods. Car was required to be of such quality as to be saleable.
        - Knowledge: knowledge of problems with motor.

        - Was using the car for the ordinary purposes.
            - Would not be saleable to persons fully aware of the state of the car.
- But buyer lost the right to rescind (S 133, S 170)
    - He waited 3 months before doing anything about rescinding the K.
    - He also did acts that were inconsistent with seller still being owner e.g. he drove a long way during this time.
        - In this way,, so only entitled to damages.
    - This means he has accepted the goods, cannot reject the goods.
    - Remedy only available if it was a warranty.
- Buyer only entitled to claim damages

Henry Kendall v William Lillico (UK)

Facts

- Turkeys died by poisoning because of feed.
- Ground nuts in it was toxic to Turkeys, because of the mold on the nuts.
- 1960 - no reason to think groundnut might be toxic to turkeys.
- Only turkeys were affected by it, cattle were fine.
- Nut was imported to Kendall, then sold on to another party, and then to SAPPA.
- S 14 of UK SOGA is equivalent to s 138 and s 139.

Held

- How did Lord Reid approach the issue of *merchantable quality?*
    - Merchantable quality can only mean commercially saleable under that description.
    - "Who has full and accurate knowledge of that quality" Do you judge it by reference known at the time or later knowledge?
        - Later knowledge must be relevant. Latent defects make something unmerchantable.
        - Goods were described as ground nuts. Goods were merchantable because one of the purposes of ground nuts is to feed cattle. Some buyers would be prepared to pay the asking price for them.
- What was the test adopted by Lord Reid to establish if goods are of merchantable quality?
    - Commented on test that is similar to test from *Taylor v Combined Buyers,* and he approved the test. So maybe shows the test aren't too different, although there are subtle differences.
    - Cammell Laird - goods were used for any purpose for which goods would normally used.,
        - Lord Reid focuses on the description of the goods in the contract.
    - Goods will be unmerchantable if, in the form in which they were tendered to the buyer, they were of no use for any purpose (judged objectively) for which goods which complied with the description under which those goods were sold, would normally be used. In other words, they are not saleable under that description. So if goods of that description are normally used for several purposes, the goods will be merchantable if fit for any of those purposes.
        - If description was so specific that the goods would normally only be used for one purpose - they must be fit for that purpose.
        - But if the description is broad, so that goods of that description are normally used for several purposes, the goods will be merchantable if fit for any of those purposes.
- What was Lord Reid's reasoning on the issue of whether the goods were fit for purpose s 138?
    - Buyer must have required goods for a purpose made known to the seller and the seller knew buyer would be relying on their skill and judgement.
        - Would a reasonable person in the shoes of the seller have realised their skill and judgement was being relied on?
        - In this case there was reliance.
    - The buyer did not need to state his purpose.
    - Seller knew the groundnuts were sold for feed, not fit for purpose because they were toxic.
    - This provision could arise in a range of broader circumstances.
- Were either of these terms found to be breached?
    - Breach of FFP but not merchantable quality.
- What does the judgement of Lord Wilberforce add?
    - No reasonable seller could have known but this doesn't deny liability.

Ashington Piggeries Ltd v Christopher Hill (UK)

Facts

- Mink farmer had devised a formula for mink feed.
- He approached CH and asked them to make the formula, because he needed their help to source the ingredients and put the feed together. The ingredients were to be the best quality available.
- The minks died, CH stopped getting paid, so they sued the Mink farmer.
- CH had put norweign something in it which made it poisonous to the Mink.
- AP counter claimed for breach of s 136, 138 and 139.

Issue

Held

- 136: Sale by description - The description was hearing meale. Nothing had been added that changed this, it was still hearing meal, complaint was as to quality so no breach.
    - It is no ones fault that it is toxic. Changes to toxicity will not change their nature.
    - Hearing meale did not cease to be that just because of manufacturing.
    - One judge argued it was more than different in quality because it was poisonous, so it was different in kind.
        - Most judges thought it was different in quality though, because the preservation affecting the hearing meale just changed the quality.
    - 4 out of 5 Judges held that there was no breach of 136, it was still hearing meal if toxic, it just affects the quality.
- 138: Fitness for purpose - Buyer relied on seller as to the quality of the ingredients. CH knew purpose for goods. Animal feed was in the course of business to supply and AP relied on CH's skill. Just because it was not poisonous to other animals doesn't matter.
    - There was a breach.
    - Reliance is key: Purpose must be communicated in a way that means seller reasonably understands he/she is being relied on (but reliance can be implied e.g. if buyer selects a seller who deals in those particular goods).
    - Partial reliance on the seller's judgement will be enough.
        - Purpose was made known in a way (that it would be used for mink) in a way that relied on skill and judgement. Reliance related to the quality of the goods received. Buyer had relied on it's own judgement that hearing meal was suitable for mink and as to the proportions of the ingredients.
        - That other animals were not so sensitive, didn't matter. Buyer didn't have to show that it was poisonous to other animals, only that it was toxic to mink.
    - All agreed breach of this.
- 139: Merchantable quality
    - CH had never sold product so not seller dealing in goods of this description? This split the court.
    - Lord Diplock:
        - It was no one's fault that the hearing meale turned out to be toxic. Difficult to say where risk should have fallen.
        - Emphasised freedom of K. Aim of the law is to give effect to the common intention of the parties. Look at transaction in light of common sense and good faith in business.
        - Hearing meale did not cease to be hearing meale bc it became toxic.
        - Goods are merchantable if fit for any purpose for which goods which correspond with the description by which they were sold would normally be used.
            - Here it would be which it would be e.g. for cows.
        - Key issue: does the buyer have the onus of proving that the defect was due to a characteristic that was within seller's expertise to detect, or was the onus on the seller to prove that the defect was due to a characteristic which lay within the sphere of the buyer?
            - Tussle between principles of caveat emptor (buyer beware) and caveat venditor (seller beware). He preferred the former but was prepared to agree with the other judges that onus is on the seller.
        - If this is the first time the seller is dealing in goods of the contract description that doesn't mean seller is not a dealer in goods of that description.
- There was a breach of MQ, but a 3 to 2 split.

Harlingdon and Lenister Enterprises v Christopher Hull Fine Art Ltd (UK)

Facts

- Sale of a painting by one art dealer to another.
- The painting was a forgery.
- Seller had been asked to sell the painting describe in the catalogue. Seller had no expertise in german expressionism. He was told to approach a person with an interest in expressionist art. Painted by Munter.
- Potential purchasers employee comes and looks. He makes it clear to employees that he isn't an expert.
- Employee views it and agree to buy for $6,000.
- Customer ultimately finds out it is a fake, and wants money back.

Issue

- Breach of s 136 or 139?

Held

- Nourse LJ:
- Section 136:
    - Purchaser is relying on description, it is an essential term of sale.
    - Sale of unascertained future goods and sale of specific goods.
    - It may not be a sale by description if
        - no description supplied or
        - Description made is not essential to the identity or
        - description is supplied but it is not relied on (objectively would parties expect description to be relied on)
    - Was it part of description that the artwork was painted by Munter?

        - No, neither contemplated reliance because seller made clear that they were not an expert.
- Section 139(2):
    - If buyer examined goods, no implied condition as to defects of examination.
    - Was it of merchantable quality?
        - UK SOGA 1979 definition: Goods are of merchantable quality if they are fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.
        - It is of MQ because it can be resold for a lower price. Just because it is not painted by the artist doesn't mean it is not saleable.
        - Art dealers are aware of foregeries of art works. There has been expert evidence that it is customary for one art dealer to rely on another art dealer.
- Slade J: Reached same conclusion
    - Must be a sale by description meaning that the court can impute parties intention to make description part of the K.
    - Circumstances have to show they intended the thing to correspond to the description. Absence of reliance suggests they did not intend description to be a term of the K.
        - Because seller made clear they didn't know about artist, no breach of s 136.
    - No breach of s 139.
- Stuart-Smith LJ: Dissenting
    - Breach of 136?
        - Both parties believed that the painting was by Munter.
        - Condition that it was by Munter was not excluded by the seller.
        - The majority's decision leads to an unfair result.
    - Breach of 139?
        - Merchantability means more than just merchantable qualities. There was description of painting my Munter, the price, that it had been purchased by re sale.
- Ultimately judging are deciding what is a reasonable result in all circumstances? Who should bear the loss? It will depend on the facts in each case.

Feast Contractors (NZ)

Facts

- Buyer was looking for a second-hand specific engine (680) for an earth moving machine.
- Buyer sends an employee to look at an engine at second hand shop.
- Employee inspects the 680 engine and is not happy with it. They see another engine (600 not 680) he did not inspect.
- He asks if it could be held for him in case he couldn't find another 680 engine.
- Buyer decides to purchase 600. He asks seller's employees to dismantle the engine and inspect it, and if it is good order, to send it to the buyer.
- Seller says there was no instruction to dismantle the engine.
- Buyer buys it for 4 days, then it breaks down.

Issue

- Buyer refused to pay for it because there was a breach of s 138 and s 139.

Held

- Section 138
    - Disclosure of buyers purpose to seller alone is not enough for s 138, you have to show reliance on seller's skill and judgement for purchasing goods for that purpose.
    - Reliance can be by inference.
    - If buyer and seller are equally knowledgeable of goods, it is less likely there will be an inference of reliance.
    - No liability under s 138 because the buyer did not convey he was to use the goods in a way that required the seller's skill and judgement.
- Section 139
    - Mahon J said UK cases test for merchantability dominate the field e.g. Lord Reid. Goods are not of merchantable quality if they are of no use for any purpose the goods might be normally used for, not commercially saleable. No longer adequate to rely on *Taylor v Combined Buyers.*
    - But then he says Salmond J's formulation is goods, and stood the test of time.
    - He says there is little difference between the two definitions, and he ended up applying Salmond J's formulation.
    - APPROVED BOTH DEFINITIONS.
    - There was no breach of condition. They were saleable as a second hand engine with a limited operating life.
    - With second-hand goods buyer should be taken to know that they could break down more easily.

Hamilton v Papakura District Council (NZ)

Facts

- Problem with water bought from council that was used on tomato farm.

- Water was contaminated with herbicide.
- Water came from catchment area where herbicide was prayed on gorse.

Issue

- Buyer of water claimed breach of s 138.

Held

- 3 to 2 split in the court. Majority held there was no breach.
- HC and COA had said there was no liability because buyers purpose had not been communicated to seller in a way that showed reliance.
    - Buyer makes known the particular purpose the goods are required.
    - Shows the buyer relied on seller's skill and judgement
        - It does not matter if seller does not possess the necessary skill and judgement or that they could not have detected the defects or the goods.
        - Buyers water fully treated and on sell it. They are not experts in water. And they do nothing to it other than test it, but they don't test it for herbicide. Statutory standard = fit for human consumption. No breach of this.
    - Goods are in course of seller's business to supply - council was in business of supplying water
    - Have to consider all the circumstances.
- Council wouldn't have realised they needed to supply water fit for tomatoes.
- They would have thought drinking water was acceptable for tomatoes.

    Dissent

- Implied communication of buyers particular purpose to seller.
    - It doesn't matter that they didn't know it was for tomatoes. Growing tomatoes was within normal purpose of use of water, so council should have considered this.
- Would a reasonable person in the shoes of the seller have realised their skill and judgement was being relied on to ensure goods are fit for that purpose? (*Henry Kendall)*
    - Is there evidence to show the buyer was not relying on the seller? Partial evidence is enough.
    - Used water for 3 years without a problem.
        - Inferences to be drawn over the pattern of trading indicated reliance on seller's judgement.
        - It didn't matter that the defect was latent and the seller itself couldn't have detected it.
    - What law is determining is loss distribution. Essential function of the implied term is to allocate loss.
        - If the buyer impliedly made known to the seller that they needed water for this type of cultivation to show that they are relying on the seller's expertise to supply water suitable for that purpose.
        - Then under s 138 the parties have contracted on the basis that water supplied will be reasonably fit for that purpose. It is up to the seller to negate that in the K.
    - Council knew of this potential use and could have guarded itself by saying it does not guarantee safe water for plants.
- Very different view on where liability lies.

Trelise Cooper Ltd v Cooper Watkinson Textiles Ltd (NZ)

Facts

- CW supplied TC with a fabric, but they refused to pay.
- CW served a statutory demand for the amount owing.
- TC counter claimed S 138 the statutory demand should be set aside because the material was not suitable for the purpose (women's garments) because it was scratchy on the skin.
    - The knew the purpose was for women's garments.
    - She relied on their skill and judgement.
- TC also argues second material disintegrated into the seams, so was not suitable for purpose of clothing, breach s 138.
- Seller argues no reliance on seller's skill and judgement.
    - Also argued this was sale by sample so s 142 applied.
- If it is a statutory demand situation the debtors task is to demonstrate that it has an arguable basis for the claim that it is not liable.

Held

- The basic rule regarding the goods at common law is caveat emptor, and this is reflected in 137 - there is no implied warranty or condition as to the fitness or quality of goods supplied except in 138-141 (Limited no. of statutory sections)
- Section 138
    - Condition 1: buyer makes known the purpose goods are required
        - Seller new that making of clothes was the purpose of the goods required but did not know the exact use or design for the garments which were jackets and lined trousers.
    - Condition 2: purpose communicated to show reliance
        - Is the purpose for goods communicated in a way that a reasonable person in the shoes of the seller would have realised their skill and judgement was being relied on to ensure goods are fit for that purpose? (*Henry Kendall)*
        - No evidence of reliance. TC was making its own judgement. Experienced fashion designers will not rely on suppliers for quality of fabric.

        - Distinguish from *Henry Kendall* - defect was not hidden e.g. toxic, the buyer can look and see if it is not suitable for purposes.
        - It was suitable for making fashion garments of some kind, just not the particular purpose that TC was going to use them for.
- S 142
    - Sale by sample = if the K allows the buyer to see a sample of the goods. If K doesn't set this out clearly it is difficult to know.
        - 3 implied conditions.
        - If the K doesn't clearly set out that it is a sale by sample, it can be difficult to work.
        - Just because a sample of the goods is produced doesn't necessarily make it a sale by sample.
    - Test Adopted Drummond - a contract will be a sale by sample if object of producing sample is to present to the eye the real meaning and intention of parties in regard to the subject matter of the K which owing to the imperfections of language, it may be impossible to express in words?
        - Why is the sample being shown the the buyer?
    - On facts, It was SBS because they showed TC the fabric. You can't describe the fabric, or explain it. They needed to show the fabric.
    - S 142 (1)(C) "goods are free of any defect that makes them unmerchantable". What does merchantability mean?
        - Applied Lord Reid's test from *Henry Kendall* and also referred to test from *Finch Motors*
        - The fabric will only be unmerchantable if it is no use for any of the purposes the fabric would not normally be used. It could still be used to make other garments.

Herbert Construction v Carter Holt Harvey (NZ)

Facts

- Sale of a building product, roofing material = Unascertained goods.
- Claim for payment and counterclaim.
- H for construction building, entered K to buy ampelite roofing, arranged CHH to get ampelite to purchase off them.
- Roofing was non-compliant to what K required.
- Company that manufactured ampelite said it was of the standard.
- HC did not want to pay CHH, CHH said the ampelite was of standard.
- CHH owed $400,000 to Herbet.

Issue

- K between H and CHH as buyer and seller.
- Potential breaches s 136, 138 and 139

Held

- Section 136
    - Sale by description only if it goes to the identity of the goods, not quality (cites *Ashington Piggeries,* ignores *Taylor* - since they are unascertained goods everything would be part of the description*)*.
    - This was to the quality of the goods, it was still material that could be used for roofing, just wasn't at standard of quality expected.
- Section 138
    - No breach because there was no proof they relied on the CHH judgement or skill.
        - H never claimed this.
        - But it doesn't require reliance in fact, reasonableness test.
    - Maybe an exception under s 138(3) - sale of article under trade name?
        - Buyer takes risk that trade name does not meet purpose if defects are known to trade.
        - But the defects did not normally pertain to the goods, so seller is not exempt.
- Section 139
    - It did sell roofing material in general, so s 139 potentially applies.
    - Adopts Lord Reid's Test for merchantability - if the goods are of use for any purpose for which they are normally used.
    - Ampelite sold under trade name, and under that name it only has one use - roofing of corrosive acquirements. Expectation they would meet a certain standard to achieve this.
- The goods do correspond with description, and are fit for purpose, but they are not of merchantable quality.
- CHH ended up carrying the risk.
- CHH would have to claim against the manufacturer to recover the loss.

Finch Motors v Quin (NZ)

Facts

- Purchase of a car suitable for towing a boat.

Issue

- Breach of s 136?
    - Did this form part of the description of the goods?
- Breach of s 138?

Held

- Breach 136?
    - That the car was suitable for towing a boat was not part of the description of the car.
- Breach of s 138?
    - There was a breach here because the purpose had been conveyed to the seller.
- Breach of s 139?
    - Test: Hardie Boys J = various definitions that have appeared in the cases are "elaborations, for the purpose of the particular contract under consideration of the basic concept that 'merchantable quality' means commercially saleable under the description by which the goods are sold".
    - Went on to adopt the lengthy test of Lord Reid in Henry Kendall.
    - No breach, they were commercially saleable.
- Buyer did not lose the right to rescind the K by keeping the car for 3 days, they did no more than was necessary for a reasonable inspection of the goods. S 133/S 170.

Consumer Guarantees Act

"Consumer"

Nesbit v Porter

Facts

- Purchased car as a family, five months later defects appeared from motor vehicle dealer.
    - The car said it had done 789,000 km. People knew this was likely to be inaccurate.
    - It was leaking windscreen and had rust.
    - Steering box failed on WOF
    - $3,200 in repairs.
- Asked for dealer to pay for repairs or take it back.
- Dealer refused to take car back but offered to pay part of the bill, so applied to the commerce commision under the CGA.
- The model of car was primarily used for business so issues at to whether it was ordinarily used for personal business.

Issue

- Whether they are consumers?
- Was the vehicle of acceptable quality?
- Whether right of rejection was lost?

Held

- Dispute tribunal
    - They can cancel K and return the vehicle to the dealer.
    - Acted outside jurisdiction.
- District Court
    - Was the vehicle ordinarily acquired for personal use, so that the Nesbit's would be consumers?
        - Only 20% of that type of vehicle was used for personal use.
        - It is ordinarily acquired for commercial use, not personal use.
- High court agree with the DC.
- COA
    - "Ordinary" does not mean what most people use it for.
    - "Ordinary" = means as a matter of regular practice or occurrence that goods are acquired for personal use.
    - That 20% of buyers use the car for personal use shows that there is a regular practice of vehicles being acquired for personal use, even if this dealer had never sold it for personal use. If not unusual to be personal, it can come under CGA.
    - This wouldn't disadvantage dealers if in fact they buy goods for commercial use, para (b) will most likely take that person out of the CGA (hold goods for the purpose of..)
    - And if it doesn't take the business out of the CGA, the seller can contract out of the CGA under s 43(2) as both parties are in trade.
- However, the parties cannot get the money back because a reasonable period had expired before they rejected the goods - section 20.
    - 5 months after buying the car the car started to rust. Shortly after they became aware of more major problems.

- A month later if failed it's WOF.
- Vehicle was returned in April (9 months after purchase) to indicate rejection of the goods.
- The older the goods are when they are sold the shorter the reasonable period is going to be to reject the goods.
- If goods are used less frequently it may be a longer period.
- Need to balance the interests of the consumer and the seller.
- Found Defects were apparent by January 1996, since they waited till april they lost their right to reject the goods.
    - Nature of the vehicle as a second hand vehicle with uncertain history overseas.
    - Use - they may have been driving in rough conditions.
    - Length of time it was reasonable to be used - probably quite long as a car
    - The amount of time you would expect for defects to be apparent - expect defects to be apparent quickly given nature of period.

"Acceptable quality"

Contact Energy Ltd v Jones

Facts

- Disrupted use of electricity.
- At the time, electricity was regarded as a good. They had complained to commerce commision, and they had found it was a breach of acceptable qualities.
- [Electricity and gas supplies are specifically decided under a separate provision now - power outages, and power surges]

Issue

- Had a guarantee of acceptable quality been breached in relation to supply of electricity?

Held

- Acceptability is to be determined objectively by the fictitious creation of a reasonable consumer. They are taken to know about state, condition and defects of goods. "Would they think the goods were acceptably fit/durable/safe for all the purposes they will be used for?"
- Consumers must be taken to know that risk are involved in distribution network and outages might happen. Judge takes a balanced approach.
- Commissioner was incorrect.

Fair Trading Act

Misleading conduct or representations

Taco Company of Australia Inc v Taco Bell

Facts

- Dispute under s 52(1) of the Australian Trade Practices Act 1974
    - A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.

Held

- **Four principles to determine misleading and deceptive conduct.**

1. Must identify the relevant section of the public
    a. Look at who the question of whether the conduct is misleading falls to be determined
        i. All members of the public who know both Taco places in the US and AUS.
2. Would all persons in that group be misled?
    a. Including all types of people from astute to gullible.
3. The test is objective, but evidence that one person in the group was subjectively misled is relevant.
4. Why has the misconception arisen?

Result

- Court found the companies actions were misleadings as they were likely to convey an association between restaurants.

AMP Finance NZ Ltd v Heaven

Held

- **Has there been a breach of s 9?**

1. Was the conduct capable of being misleading?
2. Was D in fact misled by the conduct?
3. In circumstances was it reasonable for D to have been misled?
    a. Apply *Taco Bell* questions.
    b. But modify *Taco Bell's* approach to assessing capacity to mislead all persons within the group. NZ consumers are expected to have a reasonable degree of common sense.

Red Eagle Corporation v Ellis

Facts

- Loan of $250,000 made on the security of a personal guarantee of Ms Black, who said she had real estate in Sydney of net worth $2 million. (This was fraudulent).
- Mr Ellis made certain representations to the lender (Red eagle, whose agent was Mr F, an experienced businessman) in relation to Ms Black's net worth. These were honestly made
- Lender claimed they had been misled by Mr Ellis, sued under s 9 of the FTA.
- High court held Mr. Ellis' statement was misleading but Mr F had also been equally careless so was partly responsible for the loss. 50/50.
- Ellis appealed to COA - Mr Ellis won.
- Then Red Eagle appealed to SC.

Issue

- Was there a breach of s 9?
- If so, was there causation for damages?

Held

- Test of AMP was not intended to apply to all situations; the correct approach is circumstantial.

1. **TEST = Whether a reasonable person in the plaintiff's situation, with characteristics known to the defendant, or of which the defendant ought to have been aware, would likely have been misled or deceived.**
    a. No need to prove anyone was actually misled.
    b. [Note: this was an easy case. No argument as to what was said/meant or whether there was loss because that was very clear. In different circumstances of the plaintiff's situation the test could come out differently e.g. the characteristics of a person might indicate conduct was not misleading, or if it is a sophisticated business, conduct is considered to be less misleading].

2. Causation for damages - s 43 FTA

a. Plaintiff must have suffered loss or damage "by" the conduct of the defendant.

b. Have to apply a common sense conception of causation to show sufficient nexus.

i. Was the plaintiff actually misled by the defendant's conduct? AND

ii. Was the defendant's conduct an operating cause of the plaintiff's loss? AND

iii. Was the defendant's breach the effective cause or an effective cause of the plaintiff's loss?

1. Doesn't need to be the sole cause of the loss. There could be more than one contributing factor to the loss including from the plaintiff themselves (e.g. if they were careless).
2. Plaintiff's own actions could affect the amount of compensation the court awards. However, the plaintiff's conduct will only automatically preclude claims for damages if it was the sole cause of the loss.

Result

- The high court was correct.
- Was there a breach of s 9?
    - The representations made by Mr Ellis had the capacity to mislead even an experienced businessman.
- Was there causation for damages?
    - Mr F was in fact misled.
    - Were the representations an effective cause of the loss? Yes because Mr. F trusted Mr E's integrity.
- The blame should be apportioned 50% each because Mr F had been careless.

Hieber v Barfoot & Thompson

Facts

- REA advertised property for sale with amazing views, but REA knew the view would be obstructed by building going up.

Held

- Was there a reasonable expectation that this particular matter would be disclosed?
- Significance of silence to be considered in the context that it occurs.

Unfair Contract Terms

Jetstar Airways Pty Ltd v Free (Australian case)

Facts

- Customer booked return tickets to Hawaii, online which included the classic checkbox for terms and conditions to continue.
- The terms and conditions said changed were permitted but you had to pay the difference + $75 change fee.
- The sister became unable to go, so the customer wanted to take her niece. She had to change the name on the tickets, but they said it would cost $900 to change the name.
- They took JetStar to court arguing it was an unfair K term.
- Appealed.

Held

- It was a fair K term.
- In practice, it is very hard to work out whether a particular clause will be considered unfair or not.

PPSA

S 17 - Security interest under the Act.

JS Brooksbank and Co Ltd v EXFTX Ltd

Facts

- B supplied wool to EXFTX.
- ANZ has a GSA over EXFTX in all their present and after-acquired property, that was registered on the PPS register in 2002.
- EXFTX enters into a security arrangement with B.
    - EXFTX is not allowed wool until each instalment is paid for.
    - Once paid, title passed, even if delivery had not occurred.
- B's staff member mistakenly authorised an instalment of the wool to EXFTX without realising it had not been paid for.

- EXFTX went insolvent and receivers were appointed over the company.
- Receivers refused to return the wool to B.

Issue

- Was it a 'security interest'?
- Did B have an unregistered security interest in the wool?
    - If it did it would lose out to prior registered security interests.

Held

- The supply agreement was not a security agreement because it was not intended in substance to secure payment of an obligation. It was clear that possession of the wool was not to pass before payment was made. They were trying to prevent a situation arising where they would have to secure payment.
- Mistaken possession did not change the agreement into one that in substance secured the performance of an obligation.
- ANZ's security interest had not attached to it because B did not have rights to the wool which the banks security agreement could attach.

Waller v NZ Bloodstock Ltd

Facts

- 1999: Glenmorgan granted a debenture (SI) over all of it's present and future assets in favour of Locke.
- This was before the PPSA, so it was registered under the Companies Act 1993.
- In 2001 - G entered into an agreement with NZB to acquire a horse. "Lease to purchase" agreement. Title to the horse was to remain at all times with NZB until the end of the lease period (2004), at which time NZB would sell the horse to G at a residual price.
- 2002 the PPSA came into force and L registered a financing statement. NZB registered nothing.
- The horse was then subleased by G to a sub-lessee.
- 6 July 2004 NZB terminated the lease because G defaulted, and they took the horse.
- 23 July 2004 Locke appointed a receiver of G's assets.

Issue

- Who is entitled to the horse?
- Who was entitled to the stud fees?

Held

- Did NZB have a security interest?
    - Yes because s 17 includes a lease for a term of more than one year (deeming provision).
    - Further, s 24 said title being in the secured party [being in the hands of the lessor G] rather than the debtor DOES NOT AFFECT the application of the Act.
    - Title is subordinated to the operation of the PPSA, meaning a party with title can lose out to a prior registered security interest. Possessory title of a lease is enough of a right to allow them to grant a security interest.
- Did L's security agreement satisfy PPSA requirements?
    - Did they come under s 40?
        - L's security interest attached to the horse when value was given by L.
        - Debtor had rights in the collateral when they took possession of the horse under the lease. S 40(3)
        - The security agreement complied with s 36.
    - Did it satisfy s 41?
        - L's security interest was perfected by registration of a financing statement.
    - Therefore, L had a security interest with priority (notwithstanding that title belonged to NZB or that NZB had a personal right if G defaulted they could take the horse back).
        - The PPSA gave L a statutory right to the goods, even if it is not a proprietary right in the usual sense.
- Does Nemo dat apply?
    - NZB tried to argue that G cannot give more than they have, as they are just a lessee.
    - But the statute overrides the contractual language of the lease.
    - NZB's interest was deemed by statute to be a security interest capable of being overridden by another prior registered security interest.
    - What is the rationale for this approach?
        - The substance of the transaction (with NZB) was to secure payment or performance of an obligation (so it should be subject to the act and it's priority rules, whether or not they have title) Or
        - The overriding concern is to protect innocent third parties who may be deceived by the appearance that the lessee has good title. (therefore, the bank should be able to take security over the horse because G had the appearance of having good title to the horse, unfair for them to miss out).
- Did it matter that the debenture did not describe the horse?
    - No because section 36 requires a security agreement that contains an 'adequate' description of the collateral.
    - A statement that a security interest is taken in all of the debtors present and after acquired property is an adequate description.
    - It doesn't matter that the charging clause in the debenture was worded a bit differently to this, it still does the same thing.
    - G's rights in the horse were created by s 40(3) and were covered by the charging clause.

This case shows the statutory altering of the proprietary rights of a lessor where a lease is for more than one year, and the crucial importance of registration of a security interest.

Attachment

Dunphy v Sleepyhead Manufacturing Co Ltd

Facts

- Sleepyhead provided goods to a company called KR. S retained title until price paid.
- S had a security interest in goods for the purposes of PPSA.
- Buyer KR never signed the contract, so never assented to the terms of the K in writing. But S registered a financing statement on the register.
- KR went insolvent, and went into liquidation. The liquidator took all the goods and refused to give them to S.

Issue

1. Was S's agreement enforceable against the liquidator?
2. Could Sleepyhead get leftover money after bank satisfied it's debt because they are the next secured creditor?

Held

- Issue 1:
    - For a security interest to be enforceable against third parties, there must be attachment as well as perfection. Attachment that is enforceable against third parties can only occur if the requirements of s 36 are satisfied.
    - S 36: Needs to be written, signed etc. or have possession.
    - Since the contract was never signed, the security interest was enforceable against sleepyhead only.
    - Bank had a better security interest, so S loses out.
- Issue 2:
    - The agreement was still enforceable between KR and sleepyhead.
    - Liquidator tries to argue that they are a third party, so S would lose out again.
    - Court holds that even though the liquidator is technically a third party they were acting as an agent for the company in this situation e.g. liquidator = K. Therefore, the arrangement was just between KR and S, not a third party, so S's agreement was enforceable as s 40(1)(a) and (b) had been complied with.

Sales in the OCB

StockCo v Gibson

Facts

- Debtor was group of farms (Crafer Farms). In debt to bank. They buy land, convert it into dairy farms. Bank provided money and took security (a GSD - General Security Deed) over all the livestock and property of the farms.
- The group wanted to sell cows to have cash to buy some more lands, and drought meant it was hard to feed all the cows they had.
- StockCo said they would buy 4,000 cows and lease them back to help the group generate funds to buy a new farm. The bank had to give its consent to release the cows, because bank would lose security over cows but get security over the new farm.
- The bank started asking questions and said they would only lend a certain amount more to fund the purchase of the new farm. But Crafer had already made commitments to purchase additional farmland. If they didn't, they would lose a large deposit.
- So Crafer worked out a way to get around needing to get the bank to release their security on the cows.
    - N, a related farm, would buy the farm instead. However, they needed funds.
    - N farms was not subject to the bank's security interest because they were not part of the Crafer group.
    - So, the Crafer gifts 750 cows to N. N would sell the cows to StockCo and StockCo would lease the cows back to N, so the group would have cash to buy the land.
    - When the group sells to N, no money changes hands because N buys it and the Group gives loan to N.
    - The cows were never moved at all.
- 4,000 other cows were then sold by the Crafer farms to Stockco to generate more cash. Crafer farms decided this was a sale in the OCB so they didn't need the banks consent.
- The animals were then leased back to N by StockCo.
- StockCo then registered a PMSI over that transaction. Because it was not a sale and lease back to the same party a PMSI was possible.
- The 4,000 cows in question were never actually moved, it was just to generate funds to allow N to purchase the new farmland. It was done in a way that gave StockCo a first ranking security interest over the cows, and did not require the consent of the bank.

Issue

- Was sale of the 4,000 cows in the ordinary course of business, meaning that they took the cows free of any security interest?

Held

- PPSA must be interpreted in light of it's purpose.

- Imposing on the bank the risk that the debtor will sell goods in OCB in contravention of the security agreement, to protect the purchaser, unless the purchaser was actually aware that it was in contravention of the security agreement.
    - No suggestion that StockCo new it was acting in breach of the security agreement.
- But bank is protected in sal s that are outside of the OCB, particularly when debtor teeters on brink of insolvency to divest cash.
- Can't take too broad of a definition of OCB to balance these interests/two commercial objectives of lenders and purchasers.

- Two stage test for OCB - need to apply an objective factual assessment based on all the circumstances of the case.
- [The test was a refinement of *Orix NZ Ltd v Milne* test: what was the business of the debtor and was the sale made in the OCB? The new test is a subtle refinement so that it is not about what the business of the seller is, but what is the ordinary course of business for that seller]
    - **What was the ordinary course of the debtor's business?**
        - Debtor's business was to run a farm and sell stock, so sale makes sense under that.
    - **Was this particular sale in the ordinary course of that business? Para [77]**
        - *Where was the sale agreement made? E.g. ordinary business premises = OCB*
            - Normally stock sale would be on the sale yards. This sale involves a degree of formality and external advisers e.g. lawyers. It was made in legal offices.
        - *Who was the purchaser/who were the parties to the sale? E.g. Consumer = OCB*
            - Normally it was a consumer, buyer was a provider of finance.
        - *What was the quantity of goods sold? E.g. smaller amount = OCB.*
            - 4,000 cows = 15% of their herd. This is a lot, unusual.
        - *What was the price? E.g. Discounted price = Not OCB*
            - Discounted price suggests OCB.
            - Not clear here, so neutral factor.
        - *Was it conducted by manager or senior staff? E.g. Done by higher ups = OCB*
            - Here the sale required a directors resolution and lawyers were involved, so not OCB.
        - *What was the reason for the transaction? E.g. Suspicious circumstances or in response to financial difficulties = not OCB.*
            - The group was in desperate circumstances to pay off the new farm.
        - *What was the frequency of the transaction? E.g. Was it a routine sale = OCB*
            - This was a one-off.
        - *Are the parties at arms length or related? E.g. Arms length = OCB.*
            - StockCo was at arms length, so probably neutral on facts.
    - Overall, this sale was not in the ordinary course of business because of the unusual features of this particular transaction.
        - They raised funds in a unique manner
        - The way the transaction was implemented and negotiated was odd.
        - The money went through a lawyer's trust account.
        - The advancing of proceeds of sale to En was not in the economic interest of the group.
        - Lease back of cows gave no benefit to farm group, only N profited.
- What about the 750 animals that were gifted to N?
    - There was an oral gift of 750 cows where the donor owned a large number of cows and never identified which were the subject of the gift.
    - There was no deed of gift, no declaration of trust (show clear intention to gift), and no delivery of the trust. (Requirements for a gift)
    - There was no gift here. All that was achieved is that N had the right to call for delivery of the cows but this wasn't enough to have a security interest over it, and could not entered into a sale and lease back with StockCo.
- Were the 750 animals (that were subject of the gift) adequately described in the sale and leaseback for the purposes of **s 36**?
    - Section 36 requires that the debtor has signed a security agreement that contains an adequate description of the collateral that enables the collateral to be identified.
    - Because the cows were not identified being still co-mingled with the other cows, it would affect enforceability against third parties, as it would fail to comply with s 36.
- Why couldn't we apply s 45 rule to StockCo so that their security interest would attach to the proceeds of the sale?
    - Stock Co paid the money to Crafer farms, but it wasn't actually on paper. Money went in and went straight out as a loan to N, so N could use the money to buy the farm.
    - Crafter farms only had an obligation from N to pay an unsecured debt, so if N gets into trouble and other parties get first claim to their assets, Crafter farms would get nothing.
    - So while C farms actually got 3.6 million from the sale, that didn't give the bank comfort bc the money went off in an unsecured loan to N.
    - All that Crafer farms had was an obligation to pay an unsecured debt. If N gets into trouble, Crafer farms would have nothing, and so the bank would have nothing.

Carey v Smith

Facts

- Sale of peet (harvested from peet fields). NZ Peet was involved in harvesting and selling Peat.
- They had a surplus of Peat but didn't have enough money to harvest it bc it was trading at a loss.
- NZ Peat decided to sell it's surplus to a third party who was a shareholder.
- NZ Peat arranged they could buy Peat back at a set price. Only had to repurchase it when needed.
- Earlier it had granted a GSA to ANZ bank, including all of the peat. Under the GSA, NZ Peat was permitted to sell inventory if the sale was in the ordinary course of business but not otherwise.
- Agreement with B = 2008. Peat that was sold was removed into a separate pile and money was paid.
- No amount was ever paid back to party B for the Peat even though NZ Peat took Peat from the pile, and party B had asked them to pay for it. 70% of the peat was taken from the pile. NZ Peat went into liquidation.

Issue

- Who had the right to the remaining peat upon liquidation?
    - They had sold it to B, so B had title.
    - Bank was claiming it under GSA.
- Was the sale a sale in the OCB?
    - So that B had received good title of the goods free of the bank's security interest.

Held

- OCB appeared in the contract.
- [73] case law that has developed under s 53 as to what OCB means was applicable to determine the meaning of the words in the parties own K.
    - Applied 2 stage test from StockCo.
        - What is the ordinary course of the sellers business?
        - Was the sale made in the ordinary course of that business?
- **Para [77] - balance sheet approach. Facts pointing to extraordinariness are to be given more weight than those that raise no concern.**
- Ordinary course of business?
    - Harvester of peat, processor of peat, seller of processed peat. Not in the business of selling unprocessed peat.
- Was in OCB?
    - Not a sale to ordinary customers, it was in a pile, they kept possession, buy back arrangement that prevented buyers from accessing the peat, no evidence the sale was at market value, and purpose of sale was to finance peat at a time that they needed a large amount of cash. Senior staff put the sale deal together. There had been no advertising of it. Intent of transaction was to give B security in effect for an advance it was making and to put Peat into funds to finance it's operations.
- So it fell well outside of OCB.

BNZ v Waewaepa Station

Facts

- Farm called Te Rimu station that granted bank a GSA over all present and after-acquired property in 2008, which was registered in the same year.
- Loan was due to be repaid in december 2012.
- In November 2012, a director of the company that was operating TRS arranged for 2,500 to be transported to another farm (over $200,000). Farm bought the sheep and they said this was sale in OCB so it was free from security agreement.
- Waewae farm never actually paid for sheep it just setting off money that was owing to TRS. WW station had been making advances to fund TRS operations because bank had reduced overdraft.
    - WW applied market value for sheep in reduction of the value of the debt owed to them from TRS.
    - All the farms in drought conditions at the time so sheep were in poor condition. There was no enough feed for them on TRS, so reason for moving them to WW for welfare of animals.
- Agreement allowed TRS to sell stock/inventory in OCB as long as proceeds were deposited into the farms bank account. It was not otherwise permitted to move livestock on the land where it was kept.
- Bank wanted payment for loan due, no payment made, so receivers appointed and then a liquidator appointed.

Issue

- Who had right to the sheep?
    - WW said they had title to the sheep because of s 53.

Held

- There was a breach of the agreement because it did not go into the farms bank account.
    - WW farm could not rely on that authorisation in the agreement to say sale is authorised so therefore security does not follow the goods.
- But maybe the sale was OCB under s 53? Referred to StockCo and adopted the two stage approach.
    - What was the ordinary course of business of TRS?

        - As a sheep and beef farm. Included breeding, buying, rearing and selling livestock. Sales might be affected through station agents or farms, unseasonal weather might require departure from the usual way of doing things.
    - Was this particular sale in the OCB?
        - Who decided on sale, quantity of sheep sold, value at which they were sold. Suggested it was sale in OCB. Sheep needed feed, welfare of animals.
        - But TRS was in financial difficulty, it was a sale to a related party, the director of TRS was also a director of WW and knew the bank would be deprived of the sale proceeds because it would go to pay off the debt. And he knew WW would be getting more under this arrangement than under liquidation. Director had acted on both sides. Deal was not properly documented.
    - Overall, this was not a sale in OCB.
- [Note: S 53 ONLY applies if the buyer does not know the sale constitutes a breach of the agreement. Inference could be drawn that the buyer knew it was in breach because the director acted on both sides of the sale. He was the same person who signed the GSA with the bank and involved in negotiations so was actually aware of breach. So even if it was a sale in OCB, it would still fail under s 53.]

<u>*Tubbs v Ruby*</u>

[This was decided before *StockCo* - Found that a sale where person was financially stressed could amount to sale in OCB]

Facts

- Waimate timber processing was a forestry company that cut and sold timber, operating a saw mill in Waimate, that sold timber offshore. Its returns were influenced by value of NZ dollar. It was under financial pressure when NZ dollar went up because it would make timber more expensive to offshore buyers.
- Bank had GSA over assets present and after acquired property, and they had registered it.
- The company had always had cash flow problems. In 2005, the directors decided to establish Ruby to assist with the cash flow problems.
    - Ruby purchased timber from W at full price to achieve sales for W. Then this timber would be seperated off and treated as Ruby's timber in W's shed and W couldn't use that timber unless they had a customer who wanted to use that.
    - If they sold it, they would account for proceeds to Ruby or swap stock of W to Ruby.
    - The arrangement between the two related companies and the sales were primarily to finance the business operations of the seller.
- The general manager started to change things. Started to take the timber from Ruby's pile and sell it as W stock without paying anything back to Ruby for it or replacing the timber. This generated a debt from W to Ruby.
- By 2009, Ruby's stock of timber was all gone. This was in breach of the agreement. Ruby's director didn't know this was happening.
- W went insolvent, liquidator was appointed later.
- In the middle of 2009, W replenished the timber it had taken from Ruby's pile and then Ruby sold it's pile of timber to offshore clients.
- Paperwork showed sale of W selling timber to Ruby in 2009 - but because general manager had created invoices of R selling timber to W, the new sale reversed this transaction.
- If sale of the timber to Ruby was not in the OCB, the ANZ security agreement attached to timber that had been sold to Ruby and the proceeds of the sale.

Issue

- Was the sale to Ruby in 2009, a sale in the OCB?

Held (HC)

- It was in sale of OCB, 2005-2008 they all were in OCB.
- In 2009 was just simply performance of the 2005-2008 sale contract. This was not withstanding that in substance it was a financing agreement, Ruby was financing W's businesses.

Held (COA)

- What was the business of the seller?
    - To sell timber. It sold timber to Ruby. There were a number of sales from 2005-2008, at full market value. Inventory was replaced with cash. That the arrangement was entered into the relieve financial pressure for W wasn't enough to take it out of OCB.
    - 2009 - the arrangements change. W had purported to sell timber to Ruby, no cash was paid.
    - Sales would be entered into to satisfy the claim that Ruby would otherwise have had for conversion of the timber or to set off W debt to Ruby for all the timber taken.
        - This arguably outside the OCB.
    - COA allowed appeal by receivers, granted injunction, required Ruby to pay all proceeds from offshore timber sales into a separate bank.

Sent back to HC, to deduce what Ruby knew about the general managers action.

- Sale of timber to ruby was in the OCB, so Ruby had the better claim to the timber (or proceeds of the timber).

Linda Widdup

- Criticised this decision. Goes against the policy to balance security for financiers.
- In substance, Ruby was a secondary financier. It is not what you would typically consider to be a sale in the OCB.
- She argues StockCo provides better guidance on how to balance the competing interests.

Swindle v Matakana Estate

Facts

- Matakana is making the wine, goldridge is buying the wine and onselling it.
- Business needed funding, so brought in third party funder, Aorangi.
- Aorangi advanced funds to VA and VB (which were set up and owned by the same people who owned G and M), and they were going to sell the wine to Goldridge which assumed they had ownership at some point of the wine.
- Goldbridge would pay VA and VB, who would then pay Aorangi. The two V's make no profit.
- No formal agreement between VA/VB and Matakana, but it was actually Matakana who was growing and making the wine, and was holding all the wine at all times. Matakana purchased grape juice off grape growers, and on sold grape juice to VA and VB.
- When did title pass? Matakana did all the bottling and invoiced VA/VB for the wine. VA/VB had granted a security interest over all of their assets to Aorangi. All the money that was advanced was on lent to matakana and goldridge as unsecured advances.
- Matakana went insolvent. It was in possession of lots of wine stock. They had granted a GSA over all of it's assets to the bank.

Issue

- Did s 53 apply to the sale of wine as between matakana and VA/VB so that the wine was taken out of the bank's security interest?

Held

- YES Para [108].
- VA/VB had been selling wine to Matakana since 2001.
- The growers sold the grape juice to matakana who on-sold the wine to VA/VB. It was at market value.
- The fact that they were related was neutral consideration in his view. The case of *Tubbs v Ruby* is analogous. Despite the fact that they were also set up as financing companies. The arrangements did last for 9 years.
- Sale - recognition in the multiple ways commerce is transacted.

Lewis and Templeton v LG Electronics Aust. Ltd

Facts

- Business that sold white (fridges) and brown goods (tvs).
- Goods were purchased under suppliers where credit was acquired and title was retained, to create a security in goods.
- Shop was permitted to on-sell the goods in the ordinary course of business.
- Some goods were regularly on sold to a related company who on-sold them to customers.
- AUS PPSA - contains provision s 46 equivalent to our s 53.

Issue

- Were the sales to the related company in the ordinary course of business?

Held

- StockCo approach was adopted.
- *Tubbs v Ruby* - sale to another company can be in the OCB.
- Para [89- 97] - discussed StockCo - important to consider the purpose of this section. Allow commerce to proceed expeditiously without buyers having to check, while ensuring financiers security is not unfairly deprived to discourage lending.
- The business of the shop?
    - To sell these goods. It was part of OCB to sell to the related company.
    - No factors that pointed to unusual features of sale.
    - Sale at low market value was not determinative.

Bloodstock

a. Did stud feeds fall within first limb of s 45? Yes.
b. Second limb issue, in which debtor acquires an interest?
    i. Becuase those stud fees were not payable to the debtor but to a related company, the debtor had no proprietary interest in them so they were not proceeds that the SI attached.